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PLAN FEES AND CHARGES: CURRENT ISSUES IN THE U.S. AND MANAGING TRANSPARENCY RISKS TO AVOID HIDDEN FEE LITIGATION

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U.S. Transparency Requirements

TRANSPARENCY OF PLAN FEES AND EXPENSE DISCLOSURE

- Department of Labor ("DOL") Plan Expense Audit Initiative
  - Failure to disclose retirement plan expenses to plan participants (responsibility of employer plan sponsor)
  - Personal liability of plan fiduciaries for failure to monitor the reasonableness of plan expenses
- DOL Regulations Requiring Disclosure of Service Provider Direct and Indirect Compensation
- DOL Fiduciary Investment Adviser Definition
- Hidden Fee Litigation

U.S. Transparency Requirements

THE BASICS

- ERISA Fiduciary Duties
  - Section 404 – act **prudently** and **solely** in the interests of plan's participants and beneficiaries
    - For the exclusive purpose of providing benefits and **defraying reasonable expenses** in administering the plan
    - Must be applied when selecting and monitoring service providers
  - Section 406 – prohibits the furnishing of goods, services, or facilities between a plan and a party-in-interest
    - A service relationship between a plan and a service provider would be a prohibited transaction
    - 15% Excise Tax on the Amount Involved
    - 100% Excise Tax if not corrected on timely basis

U.S. Transparency Requirements

ERISA Statutory Exemption

- Section 408(b)(2) exempts certain arrangements between plans and service providers if:
  - Contract or arrangement is reasonable
  - Services are necessary for the establishment or operation of the plan
  - No more than reasonable compensation is paid for the services
- DOL regulations provide guidance on what is meant by "reasonable" contract or arrangement

U.S. Transparency Requirements

DOL REGULATIONS REQUIRING DISCLOSURE OF SERVICE PROVIDER DIRECT AND INDIRECT COMPENSATION

- Responsible Plan fiduciary must determine "reasonableness" of service provider direct and indirect compensation to qualify for Section 408(b)(2) exemption from prohibited transaction excise taxes
- Prohibited Transaction Exemption depends upon Plan fiduciary having "Reasonable Belief" that Service Providers Disclosed Required Information
- Discovery of Disclosure Failure requires fiduciary to notify DOL and determine whether to terminate contract or arrangement
- Disclosure Failure Often Results in Discovery of "Revenue Sharing" which can result in DOL or participant claim that fiduciary failed to monitor in violation of ERISA Section 404 prudence requirement

DOL INVESTMENT ADVISER DEFINITION

DOL FIDUCIARY ADVISER DEFINITION

ORIGINAL 1975 FIDUCIARY INVESTMENT ADVISER DEFINITION

1. Renders investment advice
2. Receives compensation, direct or indirect
3. Advice is individualized
4. Provided on regular basis
5. Serves as primary basis for decision-making

This 5-part test narrowed the statutory definition

DOL INVESTMENT ADVISER DEFINITION

DOL FIDUCIARY ADVISER INVESTMENT DEFINITION

NEW FIDUCIARY ADVISER DEFINITION

- Any person receiving compensation for providing **investment advice** based on particular needs of person being advised (employer or trustee plan sponsor, plan participant or IRA owner)
- Does not have to be "provided on regular basis" or serve as "primary basis" for decision-making

DOL INVESTMENT ADVISER DEFINITION

DOL FIDUCIARY ADVISER INVESTMENT DEFINITION

WHAT IS INVESTMENT ADVICE?

- Two types of **recommendations** are **investment advice:**
  - Recommendation as to advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property or how to invest after a rollover, transfer or distribution
  - Recommendation as to management of securities or other investment property including recommendations on investment policies and strategies, portfolio compensation, selection of other investment advisers or managers, account arrangements (broker/adviser) and plan or IRA rollovers, transfers, or distributions
- Advice involves a call to action specific to the recipient; giving rise to fiduciary accountability

DOL INVESTMENT ADVISER DEFINITION

DOL FIDUCIARY ADVISER DEFINITION

FIDUCIARY INVESTMENT ADVISER

- Paid person who provides, directly or indirectly, **investment advice** that:
  - Represents/acknowledges acting as fiduciary; or
  - Is pursuant to written or verbal agreement, arrangement, or understanding that advice is based on particular investment needs of advice recipient
  - Directs advice to specific advice recipient or recipients on advisability of particular investment or management decisions regarding plan or IRA investment property

DOL INVESTMENT ADVISER DEFINITION

DOL FIDUCIARY ADVISER DEFINITION

IMPORTANT CONCEPTS

- DOL threshold concept is whether "recommendation" has occurred
  - Defined as communication that would reasonably be viewed as **suggestion to take or refrain from** particular course of action
  - Makes no difference whether communication by person or computer software program
  - Tailored communication to specific group viewed as recommendation

DOL INVESTMENT ADVISER DEFINITION

NON-FIDUCIARY INVESTMENT ADVICE COMMUNICATIONS

PLATFORM PROVIDERS

- Recordkeepers and TPAs that make available platforms of investment vehicles without regard to individualized needs of plan or its participants
- Person who markets or makes available investment platform must be independent of plan fiduciary
- Must state in writing to plan fiduciary that not providing investment advice in fiduciary capacity

DOL INVESTMENT ADVISER DEFINITION

NON-FIDUCIARY INVESTMENT ADVICE COMMUNICATIONS

INVESTMENT EDUCATION

- Involves providing specific types of information
  - Description of investments or plan alternatives without specific recommendations
  - General financial, investment, or retirement information
  - Asset allocation models
  - Interactive investment materials
- May come from plan sponsor, fiduciary or investment adviser

DOL INVESTMENT ADVISER DEFINITION

NON-FIDUCIARY INVESTMENT ADVICE COMMUNICATIONS

INVESTMENT EDUCATION

- Specific investment alternatives may be included as examples in providing hypothetical asset allocation models or interactive investment materials so long as they are designated investment alternatives selected and monitored by independent plan fiduciary
- This education provision not applicable to IRA's (no independent plan fiduciary)

DOL INVESTMENT ADVISER DEFINITION

NON-FIDUCIARY INVESTMENT ADVICE COMMUNICATIONS

TRANSACTIONS WITH INDEPENDENT PLAN FIDUCIARIES WITH FINANCIAL EXPERTISE

- ERISA fiduciary obligations not imposed on advisers when communicating with independent plan fiduciaries with financial expertise (bank, insurance company, federal or state registered investment adviser, broker-dealer, or other person with at least $50 million under management)
- This carve-out only available for counterparty transactions
  - Adviser may not receive fee or other compensation directly from plan or plan fiduciary for investment advice in connection with transaction
  - DOL believes that if plan pays fee for advice the "essence of the relationship" is advisory and subject to ERISA
  - According to DOL, a person may not charge plan a direct fee to act as an adviser and then disclaim responsibility as fiduciary adviser by asserting that he is merely an arm's length counterparty

DOL INVESTMENT ADVISER DEFINITION

NON-FIDUCIARY INVESTMENT ADVICE COMMUNICATIONS

SWAP AND SECURITY-BASED SWAP TRANSACTIONS

- Communications by advisers to ERISA-covered plans in swaps and security-based swap transactions do not result in advisers becoming investment advice fiduciaries to plan if certain conditions met
- Rule coordinated with SEC and CFTC

DOL INVESTMENT ADVISER DEFINITION

NON-FIDUCIARY INVESTMENT ADVICE COMMUNICATIONS

PROHIBITED TRANSACTION EXEMPTIONS

- Under ERISA and Code, individuals providing fiduciary investment advice to plan sponsors, participants and IRA owners not permitted to receive payment without prohibited transaction exemption (PTE)
- Best interest contract exemption (BICE) permits firms to continue many current compensation and fee practices provided certain conditions are met to mitigate conflicts of interest and advice is in best interests of their customers

DOL INVESTMENT ADVISER DEFINITION

NON-FIDUCIARY INVESTMENT ADVICE COMMUNICATIONS

BICE REQUIREMENTS

- Acknowledge fiduciary status
- Adhere to impartial conduct standards
  - Prudent investment advice that is in customer's best interest
  - Charge only reasonable compensation
  - Avoid misleading statements
  - Contract for IRAs and non-ERISA plans
- Establish policies and procedures reasonably and prudently designed to prevent violations and mitigate harmful impact of conflicts of interest
- Refrain from sales incentives

DOL INVESTMENT ADVISER DEFINITION

NON-FIDUCIARY INVESTMENT ADVICE COMMUNICATIONS

BICE REQUIREMENTS

- Must disclose information about conflicts of interest, fees paid by retirement investor and compensation received from third parties
- Website about financial institution's business model, disclosure of compensation and incentive arrangements with advisers and policies and procedures that mitigate conflicts of interest

DOL INVESTMENT ADVISER DEFINITION

NON-FIDUCIARY INVESTMENT ADVICE COMMUNICATIONS

BICE LIMITATIONS

- Proprietary products subject to "finding"
  - Firm makes written finding that products are prudent based on the investment objectives, risk tolerance, financial circumstances and needs of retirement investors (Advisers Best Interest Obligation for Proprietary Products that generate Third Party Payments)
  - Subject to impartial conduct standards
  - Disclose conflicts
  - Product compensation is reasonable
- Not available to advisors with discretion

DOL INVESTMENT ADVISER DEFINITION

NON-FIDUCIARY INVESTMENT ADVICE COMMUNICATIONS

BICE ENFORCEMENT

- According to DOL, if advisers and financial institutions do not adhere to BICE standards, retirement investors will hold them accountable through ERISA action (for ERISA plans) or breach of contract (for IRAs and other non-ERISA plans)
- DOL believes that "consistent with long-existing ERISA jurisprudence, advisers can usually prove they have acted in their clients' best interest by documenting their use of a reasonable process and adherence to professional standards in deciding to make the recommendation and determining it was in the customer's best interest, and by documenting their compliance with the financial institution's policies and procedures required by the Best Interest Contract Exemption."

U.S. Hidden Fee Litigation

MAJOR CLASS ACTION LAWSUITS

- Accusing employers and members of board and senior officers of violating ERISA
- "Allowing" employees to be overcharged by their vendors for administration services and investment management
- U.S. Supreme Court in May 2015 unanimously ruled that plan fiduciaries have a continuing duty under ERISA to monitor and remove plan investments if and when they become imprudent

U.S. Hidden Fee Law Suits

NAMED IN THE SUITS:

- The plan sponsor (the employer)
- The Named Fiduciary (sometimes a committee, sometimes the employer)
- The Named Administrator (also sometimes a committee, sometimes the employer)
- Any plan committee or plan investment committee
- The Board of Directors
- The CEO
- The trustee that holds the assets of the plan

U.S. Hidden Fee Law Suits

HIDDEN FEE LAWSUITS

- Over 50 cases are currently pending
- Claimed fiduciary breaches for failure to
  - Investigate service/investment arrangements
  - Negotiate reasonable total compensation
  - Monitor service/investment arrangements
  - Disclose fees and conflicts of interest

Hidden Fee Litigation

HIDDEN FEE LAWSUITS

- ABB
- Anthem, Inc.
- Bechtel
- Boeing
- Caterpillar
- Deere
- Exelon
- Fidelity Investments
- General Dynamics
- General Motors
- International Paper
- Insperity, Inc.
- Kraft Foods Global
- Lockheed Martin Corp.
- Northrop Grumman
- Novant Health, Inc.
- RadioShack
- Southern California Edison
- Transamerica Life Ins.
- United Technologies

Hidden Fee Litigation

HIDDEN FEE LAWSUITS

Larger Settlements

• General Dynamics	$15.1M	(08/06/10)
• Caterpillar	$16.5M	(08/12/10)
• Bechtel	$18.5M	(10/14/10)
• Kraft Foods	$9.5M	(07/03/12)
• Cigna Corp.	$35M	(07/09/13)
• International Paper	$30M	(10/01/13)
• Lockheed Martin Corp.	$62M	(2/20/15)
• Boeing	$57M	(11/05/15)
• Novant Health Inc.	$32M	(11/09/15)

Hidden Fee Litigation

EMPLOYER LIABLE FOR $35.2 MILLION FOR FAILURE TO MONITOR FEES (*TUSSEY V. ABB, INC.*, W.D. MO., 3/31/12 2012 U.S. DIST. LEXIS 45240, AFF'D BY 8TH CIR. MO. 2014, 746 F. 3D 327)

- First 401(k) fee class action to be tried and decided on the merits
- Missouri federal district court ruled that employer plan sponsor breached its ERISA fiduciary duties and must pay $35.2 million for
  - Failing to demonstrate the thoroughness and scope of the consultant's review
  - failing to monitor recordkeeping fees and revenue sharing payments made to Fidelity
  - failing to negotiate rebates to offset or reduce the cost of providing administrative services to plan participants
  - replacing a Vanguard actively balanced mutual fund with a Fidelity target date fund that generated more in revenue sharing for Fidelity

Hidden Fee Litigation

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- Court emphasized that if fiduciary selects revenue sharing, "it also must have gone through a deliberative process for determining why such a choice is in the Plan's and participants' best interest"
- This analysis was particularly critical since Plan's Investment Policy Statement ("IPS") required that revenue sharing "be used to offset or reduce the cost of providing administrative services to plan participants"
- Court held that IPS is governing plan document and that employer violated its ERISA Section 404(a)(1)(D) statutory fiduciary duty to comply with its terms

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- Employer monitoring reasonableness of overall expense ratio insufficient because it does not show
  - how much revenue is flowing
  - competitive market for comparable funds
  - fails to take into account the size of the plan
- Court found that revenue sharing generated by the Plan's assets far exceeded the market value for recordkeeping and other administrative services provided by Fidelity

Hidden Fee Litigation

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- Court, based on expert testimony, found that reasonable per-participant charge should have been half of per-participant charges paid by Plan for 2001-2007 period
- Court also found that employer deleted Vanguard actively balanced mutual fund, not because of performance concerns, but because Fidelity target date fund that replaced it generated greater revenue sharing

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- **Monetary Relief**
  - Court assessed $21.8 million in damages for losses caused by the "improper" transfer of assets that generated greater revenue sharing
  - Court also found that Plan suffered losses of $13.4 million as a result of ABB's failure to monitor recordkeeping costs and to negotiate for rebates
  - All defendants (ABB, its Pension Review Committee, Pension and Thrift Management Group, the Director of that Group and its Employee Benefits Committee) held jointly and severally liable for these amounts

Hidden Fee Litigation

EMPLOYER CAN'T "HIDE BEHIND" INVESTMENT CONSULTANT'S ADVICE [*TIBBLE V. EDISON INT'L*, (C.D. CAL.) 2010 WL 2757153, 9TH CIRCUIT CAL. 2013, 711 F. 3RD 1081, U.S. SUPREME COURT 575 U.S. (2015)]

- ERISA fiduciaries are required to understand fees and services. ERISA fiduciary rules require that fees charged to a plan be "reasonable" (potential fiduciary liability)
- Arrangements with service providers may be considered ERISA prohibited transactions if the "reasonable and necessary" exemption is not satisfied (potential tax penalty liability).
- Employer plan sponsors normally hire investment consultants to advise them on the reasonableness and identification of plan investment and administrative fees and expenses.

Hidden Fee Litigation

EMPLOYER CAN'T "HIDE BEHIND" INVESTMENT CONSULTANT'S ADVICE [*TIBBLE V. EDISON INT'L*, (C.D. CAL.) 2010 WL 2757153, 9TH CIRCUIT CAL. 2013, 711 F. 3RD 1081, U.S. SUPREME COURT 575 U.S. (2015)]

- California Federal District Court ruled that Fiduciaries of Southern California Edison's (SCE) Section 401(k) plan breached their duty of prudence under ERISA when they selected more costly retail class mutual funds instead of institutional class mutual funds
- Court emphasized that while securing independent advice from an investment consultant is "some evidence" of a thorough investigation, it is not a complete defense to a charge of imprudence
  - Plan fiduciaries must "make certain that reliance on the expert's advice is reasonably justified"

Hidden Fee Litigation

EMPLOYER CAN'T "HIDE BEHIND" INVESTMENT CONSULTANT'S ADVICE [*TIBBLE V. EDISON INT'L*, (C.D. CAL.) 2010 WL 2757153, 9TH CIRCUIT CAL. 2013, 711 F. 3RD 1081, U.S. SUPREME COURT 575 U.S. (2015)]

- Need evidence demonstrating the thoroughness and scope of the consultant's review
- Employer plan sponsor cannot "hide behind" a consultant but must be able to produce evidence of a robust and thorough investigation through prudent process standards and fee forensic audit and benchmarking

Hidden Fee Litigation

EMPLOYER CAN'T "HIDE BEHIND" INVESTMENT CONSULTANT'S ADVICE [*TIBBLE V. EDISON INT'L*, (C.D. CAL.) 2010 WL 2757153, 9TH CIRCUIT CAL. 2013, 711 F. 3RD 1081, U.S. SUPREME COURT 575 U.S. (2015)]

- Fiduciaries found jointly and severally liable were the employer plan sponsor, members of the Plan Investment and Benefits Committees, Vice-President of Human Resources and Manager of the employer's Human Resources Service Center
  - No evidence that fiduciaries investigated differences between retail and institutional class funds
  - Fiduciaries were improperly motivated by desire to capture more revenue sharing for SCE even though doing so increased the fees charged to Plan participants

Hidden Fee Litigation

EMPLOYER CAN'T "HIDE BEHIND" INVESTMENT CONSULTANT'S ADVICE [*TIBBLE V. EDISON INT'L*, (C.D. CAL.) 2010 WL 2757153, 9TH CIRCUIT CAL. 2013, 711 F. 3RD 1081, U.S. SUPREME COURT 575 U.S. (2015)]

- On appeal, Ninth Circuit upheld District Court and ruled that
  - SCE Plan fiduciaries breached their duty of prudence in selection investment options
  - Unreasonably relied on consultant's advice
- Ninth Circuit emphasized that fiduciaries must make certain that reliance on consultants advice is reasonably justified and cannot "reflexivly and uncritically adapt a consultant's recommendations
- ERISA's duty to investigate requires fiduciary to review, assess and where necessary, supplement the data that consultant gathers

Hidden Fee Litigation

EMPLOYER CAN'T "HIDE BEHIND" INVESTMENT CONSULTANT'S ADVICE [*TIBBLE V. EDISON INT'L*, (C.D. CAL.) 2010 WL 2757153, 9TH CIRCUIT CAL. 2013, 711 F. 3RD 1081, U.S. SUPREME COURT 575 U.S. (2015)]

- Ninth Circuit rejected DOL's amicus brief continuing violation theory and held that act of designating an investment for inclusion in plan's menu starts six-year statute of limitations period
- Unanimous U.S. Supreme Court held that fiduciaries who select investment options for 401(k) plans have continuing duty under ERISA to monitor their selections and remove imprudent investment options
- Supreme Court emphasized that under the law of trusts, from which ERISA's duty of prudence is derived, "a trustee has a continuing duty to monitor trust investments and remove imprudent ones"

Hidden Fee Litigation

EMPLOYER CAN'T "HIDE BEHIND" INVESTMENT CONSULTANT'S ADVICE [*TIBBLE V. EDISON INT'L*, (C.D. CAL.) 2010 WL 2757153, 9TH CIRCUIT CAL. 2013, 711 F. 3RD 1081, U.S. SUPREME COURT 575 U.S. (2015)]

- Supreme Court instructed Ninth Circuit to consider "continuing duty" issue on remand
- Ninth Circuit affirmed district court's judgment based on determination that Tibble failed to raise continuing duty to monitor argument at district court or appellate court levels

Hidden Fee Litigation

BUNDLED VENDOR MAY BE ERISA FIDUCIARY WITH RESPONSIBILITY TO MONITOR OWN COMPENSATION [SANTOMENNO V. TRANSAMERICA LIFE INS. CO., (C.D. CAL.) NO. 12-02762, 2/19/13]

- Plan participant class action lawsuit against Transamerica Life Ins. Co. ("TLIC") seeking to represent over 15,000 retirement plans serviced by TLIC
- TLIC sells 401(k) plans "bundled" administrative services and investments through Group Annuity Contracts ("GAC")
- TLIC admitted that it has "limited fiduciary responsibilities" for monitoring the GAC investment performance, but argued that it did not have fiduciary duty with respect to its fees

Hidden Fee Litigation

BUNDLED VENDOR MAY BE ERISA FIDUCIARY WITH RESPONSIBILITY TO MONITOR OWN COMPENSATION [SANTOMENNO V. TRANSAMERICA LIFE INS. CO., (C.D. CAL.) NO. 12-02762, 2/19/13]

- California federal district court found that TLIC may be a fiduciary with responsibility to monitor its own compensation
- Ability to change fee schedule is fiduciary "discretionary" activity
- Ability to add or delete investment options is fiduciary "discretionary" activity
- Having OR exercising discretion are both fiduciary functions
  - "A fiduciary duty attaches not because a party takes a discretionary action but when that party acquires the power to take a discretionary action"

Hidden Fee Litigation

LOCKHEED AGREES TO PAY $62 MILLION TO SETTLE $1.3 BILLION ERISA CLASS ACTION [ABBOTT V. LOCKHEED MARTIN CORP., S.D. ILL., PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT (4/30/15) NO. 06-701-MJR-DGW]

- Lockheed Martin Corp. ("LMC") agreed to pay $62 million and implement extensive affirmative relief to settle $1.3 billion lawsuit over claims that LMC as Plan Sponsor and Named Fiduciary of LMC Salaried and Hourly Savings Plans breached its fiduciary duties to 120,000 Plan participants by failing to identify excessive fees
- District Court certified as ERISA Class Action and Seventh Circuit Court of Appeals found certification appropriate
- U.S. Supreme Court refused to hear appeal from Seventh Circuit
- District Court granted class certification and case settled just prior to trial

Hidden Fee Litigation

LOCKHEED AGREES TO PAY $62 MILLION TO SETTLE $1.3 BILLION ERISA CLASS ACTION [ABBOTT V. LOCKHEED MARTIN CORP., S.D. ILL., PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT (4/30/15) NO. 06-701-MJR-DGW]

- On April 30, 2015, District Court granted preliminary approval of Class Action Settlement Agreement pending a fairness hearing
- Under the Settlement Agreement, LMC agreed to pay $62 million and implement extensive affirmative relief
- $62 million Gross Settlement Amount will be contributed to a Qualified Settlement Fund
- $21 million of attorneys' fees awarded to Class Counsel along with $1,850,000 litigation costs and expenses

Hidden Fee Litigation

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- Affirmative relief agreed to is as follows:
  - Publicly file with the Court annual DOL filing that discloses fees paid by the Plans as well as information about assets in the Stable Value Fund and Company Stock Funds
  - Confirm current limitations on amount of cash equivalents held in Company Stock Funds and amount of money market equivalent assets held in Stable Value Fund, and to file notice with the Court if those limitations are changed
  - Initiate competitive bidding process for the Plans' recordkeeping services and to publicly file with the Court a notice identifying the entities that submitted bids and the selected recordkeeper

Hidden Fee Litigation

LOCKHEED AGREES TO PAY $62 MILLION TO SETTLE $1.3 BILLION ERISA CLASS ACTION [ABBOTT V. LOCKHEED MARTIN CORP., S.D. ILL., PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT (4/30/15) NO. 06-701-MJR-DGW]

- Offer participants the share class of investments that has the lowest expense ratio, provided that the share class is available and consistent with the needs and obligations of the Plans
- Terms of the Settlement must be reviewed by an independent Fiduciary

- $62 million is the single largest settlement of an excessive fee case against one employer to date. $21 million in attorneys' fees awarded to Class Counsel assures that litigation will continue for subsequent years

Hidden Fee Litigation

BOEING SETTLES EXCESSIVE-FEE SUIT FOR $57 MILLION [SPANO V. THE BOEING COMPANY, S.D. ILL., CASE 3:06-CV-00743-NJR-DGW, CLASS ACTION SETTLEMENT AGREEMENT FILED 11/05/15]

- Boeing Company agreed to pay $57 million as part of class action settlement agreement reached with plaintiffs in a nearly decade-long 401(k) suit
- Litigation alleged that the Boeing 401(k) Plan fiduciaries breached their duties under ERISA by allowing the Plan to pay excessive fees including an imprudently risky Technology Sector Fund, and imprudently managing the Plan's Company Stock Fund
- Under the Settlement Agreement, Boeing will deposit $57,000,000 (the "Gross Settlement Amount") in an interest-bearing settlement account (the "Gross Settlement Fund")

Hidden Fee Litigation

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- Attorneys' fees will be paid out of the Gross Settlement Fund in an amount not more than one-third of the Gross Settlement Amount, or $19,000,000, as well as reimbursement of costs incurred of $1,845,000

- Significant theory for recovery was based on Boeings' failure to effectively and competitively bid recordkeeping services for the Plan and limit revenue sharing payments from the Plan's mutual funds to CitiStreet who allegedly charged excessive and unreasonable recordkeeper fees to Plan participants

Hidden Fee Litigation

NOVANT REACHES $32M SETTLEMENT IN PLAN FEES CASE [KRUGER v. NOVANT HEALTH, INC., M.D.N.C. NO. 14-CV-00208, SETTLEMENT FILED 11/9/15]

- Novant Health Inc. agreed to $32 million settlement with its employees who alleged that company's retirement plan committee breached its ERISA fiduciary duties by overpaying millions of dollars in fees
- Novant's retirement program consists of 25,000 participants with total assets of $1.2 billion
- Employees filed class action suit in North Carolina federal district court claiming that Novant and its plan fiduciaries breached their ERISA fiduciary duties by offering unreasonably priced investment options that were used to provide excessive compensation to two of the plans' service providers, Great-West Life & Annuity Insurance Co. and D.L. Davis & Co

Hidden Fee Litigation

NOVANT REACHES $32M SETTLEMENT IN PLAN FEES CASE [KRUGER v. NOVANT HEALTH, INC., M.D.N.C. NO. 14-CV-00208, SETTLEMENT FILED 11/9/15]

- Specifically, employees alleged that Great-West, an administrative and record-keeping service provider for the plan, received excessive compensation of approximately $8.6 million between 2009 and 2012 and that D.L. Davis, a brokerage company that provides the plan with limited marketing and enrollment services, was paid excessive fees of up to $9.6 million between 2009 and 2012 in the form of "commissions" by the plan

- Employees also alleged that in addition to these fees both companies received additional funds as “kick-backs” from the plan

Hidden Fee Litigation

NOVANT REACHES $32M SETTLEMENT IN PLAN FEES CASE [KRUGER v. NOVANT HEALTH, INC., M.D.N.C. NO. 14-CV-00208, SETTLEMENT FILED 11/9/15]

- Under the Settlement Agreement, Novant will deposit $32,000,000 (the "Gross Settlement Amount") in an interest bearing settlement account (the "Gross Settlement Fund") which will be used to pay Class Counsel's Attorneys' Fees of $10.67 million and Costs of $95,000

- In addition Boeing agreed during the *four-year* Settlement Period, to:

  1) conclude a comprehensive request for proposal ("RFP") competitive bidding process for recordkeeping, investment consulting and participant education services;

  2) engage an Independent Consultant to assess the adequacy of the RFP process and selection of service providers;

Hidden Fee Litigation

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3) ensure that the Plans' administrative service providers are not reimbursed for their services based on a percentage-of-plan-assets basis;

(4) review and revise all current investment options in the plans, as needed, ensuring that those options selected or retained are for the exclusive best interests of the plans' participants;

(5) have the Independent Consultant review the investment option selection process and provide recommendations, if necessary;

(6) have the Independent Consultant conduct an annual review, for four years, of Novant's management of the Plans;

Hidden Fee Litigation

NOVANT REACHES $32M SETTLEMENT IN PLAN FEES CASE [KRUGER v. NOVANT HEALTH, INC., M.D.N.C. NO. 14-CV-00208, SETTLEMENT FILED 11/9/15]

(7) remove Davis, and related entities, from any involvement with the Plans;

(8) not offer any Mass Mutual investments in the Plans or any other investment that provides compensation to Davis and related entities;

(9) provide accurate communications to participants in the plans;

(10) not offer any brokerage services to the plans; and,

(11) adopt a new investment policy statement to ensure that the plans are operated for the exclusive best interests of the plans' participants.

Hidden Fee Litigation

ANTHEM SUED OVER VANGUARD 401(k) FEES [Bell v. Anthem, Inc., Pension Comm. of ATH Holding Co LLC, S.D. Ind., No. 1:15-cv-02062, complaint filed 12/29/15]

- Anthem Inc. employees accused the Indiana-based health insurer of paying excessive fees to Vanguard entities that service its 401(k) plan by selecting high-priced share classes of mutual funds over the identical, lower-cost share classes that are "readily available" to plans of this size (more than $5.1 billion)

- Employees brought an action in an Illinois U.S. District Court against Anthem, its Board of Directors and Pension Committee for breach of ERISA fiduciary duties

Hidden Fee Litigation

ANTHEM SUED OVER 401(k) FEES PAID TO VANGUARD [Bell v. Anthem, Inc., Pension Comm. of ATH Holding Co LLC, S.D. Ind., No. 1:15-cv-02062, complaint filed 12/29/15]

- Employees argued that Defendants are personally liable under ERISA §409(a) to make good to the Plan all losses resulting from each breach of fiduciary duty and restore to the Plan any losses

- According to the complaint, had amounts invested in higher-cost share classes been invested in lower-cost mutual fund options, Plan participants would not have lost over $18 million of their retirement savings through unnecessary expenses

- Employees also argued that Anthem failed to monitor the compensation received by the Plan's recordkeeper, Vanguard, which became excessive because of the amount of hard dollar and asset- based revenue sharing amounts allocated to Vanguard rather than a fixed annual recordkeeping fee charged to each participant's account

Hidden Fee Litigation

ANTHEM SUED OVER 401(k) FEES PAID TO VANGUARD [Bell v. Anthem, Inc., Pension Comm. of ATH Holding Co LLC, S.D. Ind., No. 1:15-cv-02062, complaint filed 12/29/15]

- According to the complaint, based on the nature of the administrative services provided by Vanguard, the Plan's participant level (roughly 60,000), and the recordkeeping market, the outside limit of a reasonable recordkeeping fee for the Plan should have been $30 per participant

- However, based on the direct and indirect compensation levels, and, internal revenue share allocated to Vanguard as recordkeeper from the Vanguard investor share class mutual funds, the Plan paid approximately $80 to $94 per participant per year from 2010 to 2013, over 210% higher than a reasonable fee for these services

Hidden Fee Litigation

"Eligible Worksite Employees" Accuse Insperity 401(k) Plan of Excessive Fees [Pledger v. Reliance Trust Co., N.D. Ga, No. 1:15-CV-04444, complaint filed 12/22/15]

- Insperity Inc., a human resources services provider of "eligible worksite employees" to small and medium-sized businesses has been sued by its 401(k) plan participants for selecting high-fee investment funds and paying itself excessive record-keeping fees
- The Insperity 401(k) plan has more than $2 billion in assets and benefits more than 50,000 employees
- In a class action suit filed Dec. 22, 2015, Insperity is accused of using the plan to earn excessive fees for Insperity Retirement Services, L.P. (a wholly-owned subsidiary) and allowing the plan's trustee, Reliance Trust Co., to load the plan with high-fee, poorly performing proprietary funds

Hidden Fee Litigation

"Eligible Worksite Employees" Accuse Insperity 401(k) Plan of Excessive Fees [Pledger v. Reliance Trust Co., N.D. Ga, No. 1:15-CV-04444, complaint filed 12/22/15]

- According to the complaint, Insperity promotes the Plan to client companies, emphasizing the fiduciary role it assumes on behalf of clients when administering and managing the Plan for their employees and promotes the investment services provided by Reliance Trust

- According to the complaint, rather than using an arm's length bidding process to hire a recordkeeper for the Plan, Insperity selected its own subsidiary, Insperity Retirement Services, as the Plan's recordkeeper even though other outside entities would have provided the same services at a far lower cost to the Plan

- According to the complaint, Insperity Retirement Services failed to monitor and control the amount of hard dollar and asset- based revenue sharing amounts allocated to Insperity Retirement Services

Hidden Fee Litigation

"Eligible Worksite Employees" Accuse Insperity 401(k) Plan of Excessive Fees [Pledger v. Reliance Trust Co., N.D. Ga, No. 1:15-CV-04444, complaint filed 12/22/15]

- According to the complaint, based on the nature of the administrative services provided the Plan's participant level (roughly 50,000), and the recordkeeping market, the outside limit of a reasonable recordkeeping fee should have been $30 per participant

- However, the Plan paid approximately $119 to $142 per participant per year from 2009 through 2014, as much as 473% higher than a reasonable fee for these services, resulting in millions of dollars in excessive fees

- According to the complaint, had Insperity conducted a competitive bidding process, Plan participants would not have lost over $30 million through unreasonable recordkeeping expenses

Hidden Fee Litigation

Principal Life Not Liable for 401(k) Fees [McCaffree Financial Corp v. Principal Life Ins. Co., 8th Cir., No. 15-1007, 1/8/16]

- McCaffree Financial Corp. brought a class action lawsuit on behalf of its retirement plan participants against Principal Financial Group, who was contracted to provide the plan's investment options
- The contract provided plan participants with a number of investment options
  - Participants could maintain retirement contributions in a "general investment account" offering guaranteed interest rates

Hidden Fee Litigation

Principal Life Not Liable for 401(k) Fees [McCaffree Financial Corp v. Principal Life Ins. Co., 8th Cir., No. 15-1007, 1/8/16]

- Participants could allocate contributions among various "separate accounts," which Principal created to serve as vehicles for retirement-plan customers to invest in Principal mutual funds
- Principal reserved the right to limit which separate account mutual fund it would make available to plan participants
- The full list of sixty-three accounts included in the plan contract was narrowed down to twenty-nine separate accounts and associated Principal mutual funds made available to Plan participants

Hidden Fee Litigation

Principal Life Not Liable for 401(k) Fees [McCaffree Financial Corp v. Principal Life Ins. Co., 8th Cir., No. 15-1007, 1/8/16]

- The contract provided that participants would pay to Principal management fees as a percentage of assets invested in a separate account which varied for each account according to its associated mutual fund
- In addition, Principal could unilaterally adjust the management fee for any account, subject to a cap (generally 3 percent) specified in the contract
- Class action complaint alleged that Principal charged participants who invested in the separate accounts "grossly excessive investment management and other fees" in violation of Principal's fiduciary duties of loyalty and prudence under ERISA sections 404(a)(1)(A) and (B)

Hidden Fee Litigation

Principal Life Not Liable for 401(k) Fees [McCaffree Financial Corp v. Principal Life Ins. Co., 8th Cir., No. 15-1007, 1/8/16]

- McCaffree claimed that the separate accounts served no purpose other than to invest in shares of various Principal mutual funds and therefore involved minimal additional expense for Principal

- Because each Principal mutual fund charged its own layer of fees, McCaffree alleged that the additional separate account fees were unnecessary and excessive

- McCaffree brought this class action to recover these excessive fees and the additional investment gains that would have accrued in the absence of such fees, on behalf of both: (1) the participants and beneficiaries of the McCaffree Plan and (2) the participants and beneficiaries of all defined-contribution retirement plans subject to ERISA that invested in Separate Accounts offered by Principal and also paid excessive fees to Principal during the relevant time period

Hidden Fee Litigation

Principal Life Not Liable for 401(k) Fees [McCaffree Financial Corp v. Principal Life Ins. Co., 8th Cir., No. 15-1007, 1/8/16]

- According to the complaint, Principal is an ERISA fiduciary with respect to the ERISA plans for which it offers Separate Accounts in at least three respects.

  - It is an "Investment Manager" as defined by ERISA with respect to plan assets managed under the contract and is thus an ERISA fiduciary with respect to the plans and such assets pursuant to ERISA §3(21)(A)(ii)

  - Principal "exercises ... discretionary authority or discretionary control respecting the management" of plans for which it offers Separate Accounts and "exercises ...authority or control respecting management or disposition of its assets" pursuant to ERISA § 3(21)(A)(i)

Hidden Fee Litigation

Principal Life Not Liable for 401(k) Fees [McCaffree Financial Corp v. Principal Life Ins. Co., 8th Cir., No. 15-1007, 1/8/16]

- Principal "has ... discretionary authority or discretionary responsibility in the administration" of plans for which it offers Separate Accounts pursuant to ERISA § 3(21)(A)(iii) because it has authority to decide what Separate Account products are offered and how much will be charged to participants

- Principal argued that it is not a fiduciary with respect to the terms included in its agreement with McCaffree

Hidden Fee Litigation

Principal Life Not Liable for 401(k) Fees [McCaffree Financial Corp v. Principal Life Ins. Co., 8th Cir., No. 15-1007, 1/8/16]

- District Court held that Principal is not a fiduciary since all alleged excessive fees were disclosed in the Separate Investment Account Rider
- DOL argued that the District Court's opinion that Principal did not act in a fiduciary capacity is in error
  - Although the parties contractually agreed to a large menu of possible investment options that might be made available under the plan, and agreed to some corresponding fee maximums, Principal had discretionary authority to choose the final line-up of funds in which the plan participants actually could invest
  - Principal exercised this authority when it selected the 29 funds that it made available from the initial list of 63 possible funds listed in the contract

Hidden Fee Litigation

Principal Life Not Liable for 401(k) Fees [McCaffree Financial Corp v. Principal Life Ins. Co., 8th Cir., No. 15-1007, 1/8/16]

- According to DOL, "Fiduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives"

- Because Principal had and exercised its authority to pick and choose the precise funds to include in the investment line-up, it effectively set its own fees, said DOL

- The amount of both the Management Fees and the underlying mutual fund fees were directly determined by which investment options Principal selected

- Principal further exercised its authority when it determined the share class of each mutual fund in which the separate account would invest

Hidden Fee Litigation

Principal Life Not Liable for 401(k) Fees [McCaffree Financial Corp v. Principal Life Ins. Co., 8th Cir., No. 15-1007, 1/8/16]

- Thus, said DOL, Principal actually "exercise[ed] . . . discretionary authority or discretionary control" over plan management, within the meaning of ERISA's fiduciary definition

- Moreover, because McCaffree had neither notice of, nor any ability to choose or reject share classes in the mutual fund investments of the separate account, and it was Principal that both chose the share class and deducted the associated fees from plan assets for each separate account, Principal also exercised "authority and control" over management or disposition of plan assets under ERISA § 3(21)(A)(i)

Hidden Fee Litigation

Principal Life Not Liable for 401(k) Fees [McCaffree Financial Corp v. Principal Life Ins. Co., 8th Cir., No. 15-1007, 1/8/16]

- Eighth Circuit held that because Principal is not a named fiduciary of the plan, McCaffree needed to plead facts demonstrating that Principal acted as a fiduciary

- McCaffree arguments did not support its claim that Principal breached a fiduciary duty to charge reasonable fees

- Principal owed no duty to plan participants during its arms-length negotiations with McCaffree

- Eighth Circuit rejected the argument that Principal acted as a fiduciary when it selected from the sixty-three accounts included in the contract the twenty-nine it ultimately made available to plan participants

- Eighth Circuit also rejected the argument that Principal's discretion to increase the separate account management fees and to adjust the amounts charged to participants as operating expenses supports its claim that Principal was a fiduciary

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Class Actions Against TIAA for Fiduciary Breach

- Teachers Insurance and Annuity Association ("TIAA") sued in two class actions filed in the U.S. District Court for the Southern District of New York on October 13, 2015 for breach of its ERISA fiduciary duties and engaging in prohibited transactions that caused the payment of millions of dollars in excessive fees by retirement plan participants

Malone v. Teachers Ins. and Annuity Assn. of Am., S.D.N.Y., No. 1:15-cv-08038, complaint filed 10/13/15

- Plan participants argued that TIAA misused its dual position as record keeper and seller of group annuity contracts to take excessive compensation from retirement plan assets

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Class Actions Against TIAA for Fiduciary Breach

Malone v. Teachers Ins. and Annuity Assn. of Am., S.D.N.Y., No. 1:15-cv-08038, complaint filed 10/13/15

- According to the complaint, TIAA's conduct was egregious because its record-keeping agreements had a five-year term, while its annuity contracts were for 10 years, which precluded the plans from changing record keepers for 10 years, which caused excessive payments of fees. Participants claimed that TIAA also engaged in prohibited transactions by receiving service and investment fees in exchange for record-keeping services and annuity contract management.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Class Actions Against TIAA for Fiduciary Breach

Richards-Donald v. Teachers Ins. and Annuity Assn. of Am., S.D.N.Y., No. 1:15-cv-08040, complaint filed 10/13/15.

- Plan participants argued that TIAA and its affiliates earned millions of dollars in excessive administrative fees by investing more than $3 billion in mutual funds, separate accounts and annuity contracts established and managed by TIAA, by selecting itself as record keeper, and by engaging in prohibited transactions. Participants alleged that they paid excessive fees because the defendants favored TIAA-CREF's proprietary funds and favored TIAA as record keeper. Complaint estimated that as of the end of 2013, the combined plans managed by TIAA had approximately 30,000 participants.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

BB&T Faces Class Action for Fiduciary Breach
Smith v. BB&T Corp., M.D.N.C., No. 1:15-cv-00841, complaint filed 10/8/15.

- BB&T Corp. sued in a class action suit by 401(k) plan participants who alleged that the financial services firm breached its fiduciary duties by putting its own high-cost proprietary investment funds in the plan
- Complaint argued that BB&T reaped millions of dollars in revenue by putting its proprietary funds in the plan, hiring itself to be the plan's trustee and record keeper, and selecting high-cost investment options.
  - According to the complaint, the plan has approximately $3 billion in assets and 32,000 participants.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

BB&T Faces Class Action for Fiduciary Breach
Smith v. BB&T Corp., M.D.N.C., No. 1:15-cv-00841, complaint filed 10/8/15.

- Defendants include BB&T Corp., former and current members of the board of directors and its compensation committee, as well as BB&T's subsidiaries Branch Banking and Trust Co. and Sterling Capital Management LLC.

- According to the participants, the defendants used BB&T and a subsidiary as the plan's trustee and record keeper, while charging fees on a revenue-sharing basis, instead of soliciting competitive bids from outside vendors on a flat per-participant basis.

- BB&T also allegedly used as plan investment options more expensive funds with inferior performance and high expenses relative to other investment options. Participants argued that the defendants concealed breaches of fiduciary duty and prohibited transactions through false and misleading statements and by omitting disclosure of information.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Allianz Accused of Self-Dealing in ERISA Class Action
Urakhchin v. Allianz Asset Management of America, L.P. 401(k) Savings and Retirement Plan, C.D. Cal., No. 8:15-cv-01614, *complaint filed* 10/7/15).

- Participants in an Allianz Asset Management 401(k) plan filed a class action Oct. 7, 2015 in a California District Court, accusing various affiliates of the financial company of breaching their fiduciary duties and engaging in self-dealing to the detriment of plan participants
- Complaint alleged that the Allianz 401(k) Plan is made up of high-cost, proprietary mutual funds that cost participants millions of dollars in excess fees each year
- Participants argued that Allianz didn't investigate whether the plan and its participants would receive a greater benefit from investments managed by unaffiliated companies

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Allianz Accused of Self-Dealing in ERISA Class Action Urakhchin v. Allianz Asset Management of America, L.P. 401(k) Savings and Retirement Plan, C.D. Cal., No. 8:15-cv-01614, *complaint filed* 10/7/15).

- According to the complaint, the plan's fiduciaries breached their duties of loyalty and prudence by managing plan assets for their own benefit-not for the benefit of the plan and its participants as required under ERISA

- Participants also accused certain Allianz affiliates of engaging in improper self-dealing by receiving plan assets as profits at the participants' expense

- Participants complained in particular about "excess fees" resulting from the use of the proprietary mutual funds. Total plan costs in 2013 were almost $6 million, or 0.77 percent of the plan's $772 million in assets which is "outrageously high" for a plan of its size
  - If the total fees had been around the 0.44 percent average for plans of its size, participants would have saved more than $2.5 million in fees in 2013.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Putnam Sued for Alleged ERISA Violations [Brotherston et al. v. Putnam Investments, LLC et al. Case No. 1:15-cv-13825 (D. Mass.)]

- Participants in the Putnam Retirement Plan filed a lawsuit on November 13, 2015, against the Plan's fiduciaries in a Massachusetts District Court
- The lawsuit alleged that the Defendants (Putnam Investments, LLC, the Putnam Benefits Administration Committee and the Putnam Benefits Investments Committee) violated ERISA by promoting their own mutual fund business and maximizing profits at the expense of the Plan and its participants
  - Defendants filled the Plan exclusively with Putnam's own high-cost, poor performing mutual funds without regard to whether Plan participants would be better served by other investments

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Putnam Sued for Alleged ERISA Violations [Brotherston et al. v. Putnam Investments, LLC et al. Case No. 1:15-cv-13825 (D. Mass.)]

- Selection of these proprietary mutual funds cost Plan participants millions of dollars in excess fees.
- Defendants added funds with little to no performance history and failed to remove poor performing funds from the Plan.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Prudential Sued Over Alleged Undisclosed Profits
[Wood v. Prudential Retirement Ins. And Annuity Co., D. Conn., No 3:15-cv-01785, *complaint filed 12/3/15.*]

- Participants in 401(k) plans that purchased group annuity contracts from Prudential filed class action on December 3, 2015 in a Connecticut U.S. District Court alleging that Prudential violated ERISA which requires service providers to disclose their fees and compensation
  - In 2014, Prudential made $300 million that wasn't disclosed to 401(k) plans and participants that invested in the company's group annuity contracts.
  - Prudential sets the crediting rate well below its internal rate of return on the invested capital it holds through the stable value funds which guarantees a substantial profit for Prudential on the spread.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Prudential Sued Over Alleged Undisclosed Profits [Wood v. Prudential Retirement Ins. And Annuity Co., D. Conn., No 3:15-cv-01785, *complaint filed 12/3/15.*]

- According to the complaint by not disclosing the difference between its internal rate of return and the crediting rate. Prudential has collected tens of millions of dollars annually in undisclosed compensation from the plans in violation of ERISA.

- Complaint further argued that Prudential places transfer restrictions on its stable value funds in a way that prevents its retirement plan customers from moving out of the funds.

- According to the complaint, Prudential imposes substantial penalties on plan sponsors that terminate their group annuity contracts.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Prudential Sued Over Alleged Undisclosed Profits [Wood v. Prudential Retirement Ins. And Annuity Co., D. Conn., No 3:15-cv-01785, *complaint filed 12/3/15.*]

- According to the complaint, Prudential has not disclosed the amount of the spread it earns on the stable value funds and this nondisclosure gives it a competitive advantage over service providers that disclose their fees
  - This pricing spread constitutes indirect compensation as defined by ERISA Section 408(b) and should have been disclosed to Prudential's retirement plan clients
  - ERISA provides that if compensation is not disclosed prior to entering a contract for service, that compensation is deemed unreasonable and therefore prohibited.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Prudential Sued Again With Another 401(k) Fee Lawsuit [Rosen v. Prudential Retirement Ins. & Annuity Co., D. Conn., No. 3:15-cv-01839, *complaint filed 12/18/15.]*

- Class action lawsuit filed December 18, 2015 in a Connecticut District Court argued that Prudential received improper kickbacks from the mutual funds it offered to 401(k) Investors
- Complaint accused Prudential of engaging in a "pay-to-play" scheme in which mutual funds provided kickbacks in the form of service fees and revenue-sharing payments to have access to Prudential's customer base of 401(k) investors
  - Prudential "deceptively characterized" these fees as being incident to the company's provision of plan services, when the fees actually bore "absolutely no relationship" to the cost or value of these services.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Prudential Sued Again With Another 401(k) Fee Lawsuit [Rosen v. Prudential Retirement Ins. & Annuity Co., D. Conn., No. 3:15-cv-01839, *complaint filed 12/18/15.*]

- Prudential has "lined its pockets" with tens of millions of dollars in revenue sharing payments by and through self-dealing, other prohibited transactions and breaches of its fiduciary duties.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Fidelity Sued Over 401(k) Fees, Investment Strategy
[Ellis v. Fidelity Management Trust Co., D. Mass., No. 1:15-cv-14128, *complaint filed 12/11/15.*]

- Class action lawsuit filed December 11, 2015 in a Massachusetts District Court accused Fidelity Management Trust Co. of charging excessive fees and utilizing an "unduly conservative" investment strategy in one of the funds it sells to 401(k) plans.
- According to the complaint, Fidelity responded to losses incurred during the 2008 financial crisis by adopting an overly conservative investment strategy meant to appease the company's "wrap-providers" (AIG Financial Products, JP Morgan Chase Bank and State Street Bank) at the expense of workers investing in one of Fidelity's stable value funds.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Fidelity Sued Over 401(k) Fees, Investment Strategy [Ellis v. Fidelity Management Trust Co., D. Mass., No. 1:15-cv-14128, *complaint filed 12/11/15.*]

- Fidelity attempted to conceal these missteps by reporting a misleading benchmark that made the fund look more competitive than it actually was.
- Fidelity also charged excessive fees in connection with the fund and allowed its big-bank wrap providers to more than double their fees.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Deutsche Bank Sued In 401(k) Fee Class Action
[Moreno v. Deutsche Bank Ams. Holding Corp., S.D.N.Y., No. 5:15-cv-09936, *complaint filed 12/21/15.*]

- According to class action complaint filed December 21, 2015 in a New York District Court on behalf of proposed class of $20,000 workers, Deutsche Bank. invested more than $300 million of its workers' retirement savings in an in-house index fund that carried fees 11 times higher than a comparable fund offered by Vanguard.
- According to the complaint, Deutsche Bank workers paid nearly $2.4 million in unnecessary fees over a three-year period as a result of the company's decision to offer in-house mutual funds instead of lower-fee funds offered by Vanguard.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Deutsche Bank Sued In 401(k) Fee Class Action [Moreno v. Deutsche Bank Ams. Holding Corp., S.D.N.Y., No. 5:15-cv-09936, *complaint filed 12/21/15.*]

- Deutsche Bank's plan investment committee ultimately replaced the proprietary index funds with Vanguard funds, the complaint alleged, but it did not reimburse workers for the excess fees they paid.
- Company failed to use the substantial size of the retirement plan ($1.9 billion in assets) to negotiate lower fees and cheaper share classes for its workers.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Great-West Sued for Alleged ERISA Violations
[Krikorian v. Great-West Life & Annuity Ins. Co., D. Colo., No. 1:16-cv-00094, *complaint filed 1/14/16.*]

- Great-West Life & Annuity Insurance Co. and its retirement plan business, Empower Retirement, sued by 401(k) Plan participant seeking to represent a class of "thousands" of 401(k) investors.
- According to the complaint, Great-West services more than 32,000 retirement plans covering more than 7 million participants, and it administers more than $416 billion in assets.
- According to the complaint, filed January 14, 2016 in a Colorado District Court, Great-West's retirement plan business charges and collects excessive 401(k) fees and receives kickbacks from the mutual funds its offers to 401(k) plans as part of an impressive "pay-to-play scheme" and "deceptively characterized" these kickbacks as service fees and reimbursements.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Oracle Sued Over 401(k) Fees Paid to Fidelity
[Troudt v. Oracle Corp., D. Colo., No.1:16-cv-0075, ***complaint filed 1/22/16.]***

- Class action complaint filed January 22, 2016 in a Colorado District Court accuses Oracle Corp. of breaching its fiduciary duties by paying allegedly excessive fees in recordkeeping and administrative services, failing to monitor fiduciaries and engaging in prohibited transactions

- Oracle failed to negotiate reasonable, fixed-fee recordkeeping and administrative services for its 401(k) plan, resulting in losses to the plan of more than $40 million

  - Oracle failed to act prudently by selecting and retaining investment options for reasons other than the best interest of the plan and its participants

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Oracle Sued Over 401(k) Fees Paid to Fidelity [Troudt v. Oracle Corp., D. Colo., No.1:16-cv-0075, *complaint filed 1/22/16.]*

- Such decisions caused the plan to lose tens of millions of dollars in excessive fees and underperformance relative to prudent investment options available to the plan.
- According to the complaint, plan is one of the largest 401(k) plans in the country, with $12.1 billion in assets and more than 65,700 participants.
- Plan assets tripled from 2009 to 2014, from $3.6 billion to more than $11 billion.
- As a result, Fidelity's revenue skyrocketed because its revenue sharing was asset-based rather than a flat fee participant.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

Oracle Sued Over 401(k) Fees Paid to Fidelity [Troudt v. Oracle Corp., D. Colo., No.1:16-cv-0075, *complaint filed 1/22/16.]*

- According to the complaint, a reasonable fee for the plan would have been approximately $25 per participant. However, the plan paid between $68 to $140 per participant from 2009 through 2013 for recordkeeping services.
- Class argued that setting recordkeeping fees on the basis of a percentage of plan asset values violated ERISA because it resulted in excessive fees as assets increased and recordkeeping compensation increased without any changes in the services provided.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

MassMutual Accused of ERISA Fiduciary Breach in Determining Its Own Compensation
[Bishop-Bristol v. Mass Mut. Life Ins. Co., D. Conn., No. 3:16-cv-00139, *complaint filed 1/29/16.*]

- Class action complaint filed January 29, 2016 in a Connecticut District Court accuses Massachusetts Mutual Life Insurance Co. of breaching its ERISA fiduciary duties by engaging in prohibited transactions when it received allegedly undisclosed and unreasonable compensation
  - Complaint filed alleges that MassMutual collected tens of millions of dollars annually in undisclosed compensation from retirement plans and participants to whom it owed fiduciary duties and disclosure obligations under ERISA.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

MassMutual Accused of ERISA Fiduciary Breach in Determining Its Own Compensation
[Bishop-Bristol v. Mass Mut. Life Ins. Co., D. Conn., No. 3:16-cv-00139, *complaint filed 1/29/16.*]

- According to the complaint, MassMutual offers and sells stable value funds to retirement plans through its group annuity contracts. These are managed through the company's general investment account and guaranteed separate accounts.
  - Investment income crediting rate set by MassMutual for its own benefit and profit well below its internal rate of return on the invested capital it held in the stable value funds.
  - MassMutual did not disclose to its clients and participants the difference in those interest rates.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

MassMutual Accused of ERISA Fiduciary Breach in Determining Its Own Compensation
[Bishop-Bristol v. Mass Mut. Life Ins. Co., D. Conn., No. 3:16-cv-00139, *complaint filed 1/29/16.*]

- Complaint argued that under ERISA, plan fiduciaries cannot set their own compensation
  - MassMutual had complete discretion to determine the crediting rate on each of its stable value funds accounts, and thus, the spread between the amount it earned on invested assets and the earnings that were paid out on the accounts.
  - MassMutual paid itself a "pricing spread" that was intended to cover investment management and administrative expenses.

Hidden Fee Litigation

Offering of Proprietary or Affiliated Products Sponsored by Financial Services Companies

MassMutual Accused of ERISA Fiduciary Breach in Determining Its Own Compensation
[Bishop-Bristol v. Mass Mut. Life Ins. Co., D. Conn., No. 3:16-cv-00139, *complaint filed 1/29/16.*]

- In setting and resetting the crediting rates applicable to the stable funds accounts and setting the amount of and keeping the spread, and in determining its own compensation, MassMutual managed plan assets in and for its own interest, and breached its fiduciary duties to both clients and participants.

The Solution

WHAT TO DO

- Examine whether fees paid to service providers and other expenses of the plan are "reasonable"
  - Avoids potential fiduciary liability and prohibited transaction exposure for failure to examine this issue
  - Protects ERISA section 404(c) safe harbor (which insulates an employer from ERISA fiduciary liability) that may be negated by failure to identify and disclose all plan fees and expenses to plan participants
- Such a review can "recapture" significant assets for the benefit of both the employer and plan participants

The Solution

WHAT TO DO

- **"Reasonableness of fees" not easily ascertained**
  - Traditional investment consulting firms may not be able to perform forensic investigation and provide negotiation necessary to uncover embedded and undisclosed fees
  - Require Investment Consulting Firm to be Designated Fiduciary Responsible for Determining the Reasonableness of Service Provider Direct and Indirect Compensation to Qualify for the ERISA Section 408(b)(2) Exemption From Prohibited Transaction Excise Taxes
  - Independent counsel who specializes in this area can provide analysis on confidential basis
  - Helps to avoid participant and government litigation for excess fees that may come to light as the result of the forensic plan expense review process