The difference between 404(a) 5 and 408(b) 2 disclosures

408 (b) 2
Service provider disclosures to plan fiduciaries
Due: July

404 (a) 5
Plan sponsor disclosures to retirement plan participants
Due: August (quarterly)

408(b) 2

What are 408(b) 2 disclosures?

ERISA Section 408(b) 2 defines a reasonable contract between a service provider and the plan. After 2012, to be reasonable a contract must be preceded or accompanied by a service provider's disclosure statement.

What liability is associated with 408(b) 2 disclosures?

No disclosure or incomplete disclosure makes the underlying contract *unreasonable.* Payment made under an *unreasonable* contract or arrangement is a *prohibited transaction*. Violating ERISA's prohibited transaction rule exposes the service providers that receive compensation and the fiduciaries that authorize such compensation to fines and or penalties.

How does a "covered service provider" comply with 408(b) 2 disclosure rules?

1. Creates a written Disclosure Statement.
2. Submits the statement to the "responsible plan fiduciary" on time.
3. Answers any questions about the statement from the responsible plan fiduciary.

Who is a "covered service provider"?

A provider of services covered by the regulations to a retirement plan covered by the regulations

Who is a "responsible plan fiduciary"?

The fiduciary that hires the service provider

How does a fiduciary comply with 408(b) 2 disclosure rules?

1. Evaluate whether full disclosure is made.
   a. Request in writing any missing or unclear information.
2. Evaluate the information for reasonableness of the compensation and costs disclosed.

This implies knowing whether a retirement plan is covered, who is a covered service provider and what disclosures must be made.

404 (a) 5 disclosures to participants

Who handles it?

A retirement plan's service providers provide quarterly statements showing the impact of costs for each individual participant and beneficiary.

Who has the liability for 404(a) 5 disclosures to participants?

Plan fiduciaries are liable for the accuracy of the investment disclosures, even though they don't write them.

The regulations remove fiduciary liability to participants for the disclosures' content if the plan sponsor/ fiduciary has a good faith reason to trust the data.

What else should be included in the 404(a) 5 disclosures to participants?

It has been suggested that plan sponsors write the new 404(a) 5 disclosures to assist participants in understanding the plan, etc. That is an enormously bad idea. If a plan sponsor **adds** to the Disclosures from the Service Providers it is

- Declaring it has the expertise---BAD idea
- Qualified to provide the information--BAD idea
- Taking responsibility for mistakes--BAD idea

Do not mess with content you receive.

Fiduciary safety can be created only by:

accepting 404(a) 5 information as received from the service provider
providing such information to the participants without alteration additions or deletions
adding a memo to the file explaining why, the fiduciary, believes the disclosures are accurate and reliable.