

FIDELITY “INFRASTRUCTURE FEE” IS THE SUBJECT OF GOVERNMENT EXAMINATIONS AND PARTICIPANT LAWSUITS

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Qualified retirement plan fiduciaries, in fulfillment of their ERISA fiduciary duties, are under increasing pressure to fully understand the investment and other service provider fees that are being paid from plan assets, and to ensure those fees are reasonable – plan fiduciaries are facing lawsuits from dissatisfied plan participants, as well as scrutiny by field examiners for government agencies such as the Employee Benefit Security Administration (EBSA). Recent reports in the mainstream press that Fidelity Investments may be facing multiple government investigations from EBSA and the Massachusetts Secretary of the Commonwealth, as well as a multiple lawsuits for its “infrastructure fee,” serves as a reminder that qualified retirement plan fiduciaries, including 401(k) plan fiduciaries, need to be vigilant in their review and monitoring of plan fees.

The Fidelity “infrastructure fee” that is garnering scrutiny and claims of possible impropriety is a fee that Fidelity charges to third-party mutual funds that wish to make use of the Fidelity Investment platform as a means for investors, including retirement plans, to invest plan assets in those mutual funds. To the extent that the infrastructure fee is passed on by the fund to the ultimate plan investor, those fees presumably reduce a fund’s net returns. From the perspective of EBSA and the DOL, there is a specific concern as to whether the “infrastructure fee” is being adequately disclosed to investors, including plan investors. Fidelity’s public responses to the criticisms of the “infrastructure fee” include statements asserting the fee is needed for Fidelity to maintain the infrastructure that allows the third-party mutual funds to be available to investors using the Fidelity platform, and all necessary disclosures of the fees are being made. No details on the status of the government investigations of the Fidelity fee are currently available.

Multiple lawsuits also have been filed in connection with the Fidelity “infrastructure fee,” including a class action lawsuit filed in Massachusetts by a participant in a 401(k) plan sponsored by T-Mobile USA, Inc. in which the plaintiff alleges, among other things, that the “infrastructure fees” are secret kickback payments that violate ERISA rules (including the prohibited transaction and fiduciary rules), and ultimately result in increased expenses that reduce returns on plan investments.

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