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NEWS ALERT

SECURITIES GROUP

Apples, Oranges, and Fees Oh My – Fidelity Faces 401(k) Lawsuit Regarding "Supermarket Fees"

By Anthony R. Leone, Edward B. Whittemore and Melanie N. Aska | March 6, 2019

If you are a 401(k) plan sponsor, advisor, or other service provider, you may want to check your "grocery bill"—your 401(k) "bill" that is. Recently, a participant in T. Mobile USA, Inc.'s 401(k) plan filed suit against various Fidelity entities over the disclosure of "supermarket fees."

In *Wong v. FMR, LLC et al.*, Docket No. 1:19-cv-10335 (D. Mass), Plaintiff Andre Wong alleges that since 2017, Fidelity has failed to disclose certain 401(k) fees and prohibited third-party mutual fund companies using Fidelity's platform from disclosing the same. Wong alleges that Fidelity structured fees to ensure that Fidelity recouped a minimum level of compensation from mutual fund companies in exchange for shelf-space on Fidelity's 401(k) platform. In particular, Wong alleges that Fidelity imposed an undisclosed fee on mutual funds, calculated as a percentage of assets under management offset by other revenue sharing payments. According to Wong, these fees were ultimately borne by 401(k) plan participants in the form of diminished returns and skewed expense ratios.

Fidelity, for its part, has "emphatically" denied all allegations. According to Fidelity, these "supermarket fees" properly included set up, record keeping, and customer service fees, among others. Fidelity has further suggested that it properly disclosed all fees to plan sponsors.

Nevertheless, regulators have taken notice.

It has been reported by the *Wall Street Journal* that the Department of Labor has initiated an investigation into the fees. To date, information regarding the DOL investigation is limited. However, the investigation is likely to focus on ERISA § 408(b)(2), which requires, among other things, the disclosure to plan participants of all direct and indirect fees, and the reasonableness of the fee disclosure. The Massachusetts Securities Division (the "Division"), perhaps bolstered by their recent victory in federal district court concerning tangled issues of ERISA and state securities law requirements,[1] has likewise followed suit by issuing an inquiry letter to Fidelity concerning Massachusetts retirement plans. It is too early in the process to identify the specific securities law theories that the Division may rely on, but Secretary William Galvin has shown that his office will pursue cases doggedly in furtherance of protecting retail mutual fund investors in the Commonwealth. Given that many of the Defendants are registered as either broker-dealers in Massachusetts or SEC registered investment advisors, the Division has a potential "hook" and panoply of enforcement options available under Mass. Gen. Laws c. 110A.

[1] See Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth v. Scottrade, Inc., 18-10508-NMG, (D. Mass.)

It is clear that all plan sponsors, 401(k) advisors, and other covered service providers should, if not already, review fee provisions in their plan documents and exercise caution with respect to the disclosure of both direct and indirect fees moving forward. The failure to take stock of 401(k) fees may leave open the potential for future regulatory or litigation risk. Finally, in an ecosystem involving many parties, the potential is real that this action just scratches the surface of future litigation, whether in the form of "copycat" complaints and investigations or derivative actions against mutual funds, sponsors, advisors and other service providers.

If you have questions regarding the potential impact of this 401(k) litigation or other securities law or ERISA concerns, please contact:

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