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## FIDELITY FACES LAWSUITS, INVESTIGATIONS OVER 401(K) FEES

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March 21, 2019*

In the last month, Fidelity has been hit with two ERISA class action lawsuits over a fee it charges to some third-party mutual funds for access to its retirement plan investment platform ([Wong v. FMR, LLC](#), No. 19-10335 (D. Mass., filed Feb. 21, 2019), and [Summers v. FMR, LLC](#), No. 19-10501 (D. Mass., filed Mar. 18, 2019)). The plaintiffs in both lawsuits are 401(k) plan participants who claim Fidelity has violated ERISA's fee disclosure, fiduciary duty and prohibited transaction rules. Fidelity has denied any wrongdoing and intends to defend the suits. After media reports on the lawsuits, the Department of Labor (DOL) and Massachusetts' securities regulatory body are reported to be investigating the fee arrangement.

### THE FEES

The controversy stems from what Fidelity calls an "infrastructure fee" the company charges to some third-party mutual funds for inclusion on its FundsNetwork investment platform. The plaintiffs claim the fee is calculated as a percentage of the mutual fund's total assets under management, offset by the amount of revenue sharing the fund pays to Fidelity. However, according to Fidelity, "[t]he fee is a fixed amount that typically equates to less than 0.05% of a product provider's assets in all retail, workplace, and intermediary channels maintained by Fidelity and does not vary based on a plan's offering of an unaffiliated product supported by Fidelity."

The fee is "designed to ensure that each Fund Firm meets a minimum required payment to Fidelity" at a time when investors are choosing low-cost, passive investments like index funds, according to an internal Fidelity document [obtained](#) by the Wall Street Journal (WSJ) (subscription req'd). This has led to declining revenue-sharing payments, which the document reportedly describes as "unsustainable economics" while characterizing the fee as a fix for Fidelity's "broken" business model.

### THE LAWSUITS

Together, the lawsuits allege the following:

- The fee is indirect compensation under ERISA Section 408(b)(2) that Fidelity is required to disclose to its retirement plan clients. (Indirect compensation is compensation received from sources other than directly from a plan or plan sponsor.) Fidelity's characterization of the fee as payment for infrastructure maintenance costs is meant to avoid those disclosure requirements.
- Fidelity actively concealed the fee from its savings plan clients, plan sponsors, participants and beneficiaries by labeling it an infrastructure fee.

- The amount of the fee bears no relation to Fidelity's infrastructure maintenance costs. Rather, the fee is a "pay-to-play" payment for providing access to its retirement plan investors.
- Fidelity, as a plan fiduciary, has a conflict of interest when it charges the fee to increase its own profits, knowing the mutual funds will pass the fee to participants.
- Fidelity is engaging in prohibited self-dealing because the fees are plan assets.

### THE INVESTIGATIONS

In light of the lawsuit, the Securities Division of the Massachusetts Secretary of the Commonwealth has confirmed to media outlets that it has opened an investigation into the fee arrangement. The WSJ has reported that the DOL is also investigating, but neither Fidelity nor the DOL has confirmed that investigation.

### RELATED RESOURCES

- [Complaint in \*Wong v. FMR, LLC\*](#), No. 19-10335 (D. Mass., filed Feb. 21, 2019)
- [Complaint in \*Summers v. FMR, LLC\*](#), No. 19-10501 (D. Mass., filed Mar. 18, 2019)
- [Government Probes Fidelity Over Obscure Mutual-Fund Fees](#) (*Wall Street Journal*, Feb. 27, 2019) (subscription req'd)
- [Fact Sheet: Final Regulation Related to Service Provider Disclosures Under Section 408\(b\)\(2\)](#) (DOL, February 2012)

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