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Surviving (and Thriving after) a Retirement Plan Recordkeeping Conversion

Leslie E. DesMarteau

The retirement plan recordkeeper Request for Proposal (RFP) and conversion processes can be arduous, but these processes also present opportunities to reduce plan costs, improve plan services, and enhance understanding of plan benefits. Human resource (HR) employees typically look forward to a retirement plan recordkeeper conversion as much as they would look forward to a root canal—and as with a root canal, even if the current situation is painful, the cure will never be a fun process. However, periodic evaluation of recordkeeping fees and vendor options is an essential part of fiduciary due diligence under the Employee Retirement Income Security Act of 1974, as amended (ERISA), and that means fiduciaries must be prepared to make a move when circumstances warrant. A well-thought-out RFP process, careful planning in advance of the conversion, and teamwork during the conversion process can minimize the risk of problems and reduce the administrative stress involved.

Leslie E. DesMarteau is in the Rochester office of Harter Secrest & Emery LLP. She is an employee benefits attorney experienced in dealing with a variety of employee benefits issues for both for-profit and tax-exempt clients.

OVERVIEW OF FIDUCIARY DUTIES

ERISA does not set forth any specific standards about vendor contracts, pricing, or the contracting process. ERISA, however, does require that vendor relationships qualify as prudent and reasonable.

General Prudence

Section 404 of ERISA requires fiduciaries to operate a retirement plan (1) for the exclusive purpose of providing benefits to plan participants and beneficiaries and defraying "reasonable expenses" of plan administration; and (2) prudently (*i.e.*, "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims"). This standard requires fiduciaries to ensure that expenses paid by the plan are "reasonable" and to follow the sort of procurement practices that a prudent and experienced businessperson would follow when engaging a vendor. Under Section 409 of ERISA, failing to meet this standard renders a fiduciary personally liable to make the plan whole for any resulting losses, such as excessive payments to vendors.

Prohibited Transaction Rules

In addition, Section 406 of ERISA prohibits a plan from paying a "party in interest" unless certain conditions are met, and prohibits fiduciaries from exercising their fiduciary authority to benefit themselves. Violation of these "prohibited transaction" rules exposes the responsible fiduciary and the "party in interest" who received payment to liability to reimburse the plan and disgorge any profits. Prohibited transactions with "disqualified persons" also are subject to excise taxes under Section 4975 of the Internal Revenue Code of 1986 (the Code), as amended. As a service provider to the plan, a plan's recordkeeper is a "party in interest" under Section 3(14) of ERISA and a "disqualified person" under Section 4975 of the Code. Accordingly, payments made to a recordkeeper for services rendered and products purchased must meet the statutory conditions for exemption from the prohibited transaction rules. Usually, plans rely on Section 408(b)(2) of ERISA and the parallel provision in Code Section 4975(d)(2) to permit payments to recordkeepers. That exemption allows a fiduciary to enter into "reasonable arrangements" for "reasonable compensation" for "necessary" services.

A service is considered necessary if it is "appropriate and helpful to the plan obtaining the service in carrying out the purposes for which the plan is established or maintained."[1] The determination of whether an arrangement generally and compensation specifically is reasonable depends largely on the individual facts and circumstances, although a vendor's service arrangement must meet certain definitive standards in addition to qualifying as reasonable under the circumstances.[2]

Accordingly, a plan fiduciary must be prepared to demonstrate that its recordkeeping service terms and fees are reasonable. Because every plan is different, and because the retirement plan marketplace is constantly in flux, the plan's fiduciaries should periodically assess the reasonableness of a plan's recordkeeper relationship. The most comprehensive way to do this is by obtaining competitive bids through an RFP.

The plan's fiduciaries must also bear in mind that under Section 2550.408b-2(a) of the Labor Regulations, the Section 408(b)(2) exemption does not permit fiduciaries to engage in self-dealing when selecting or compensating a service provider. Therefore, fiduciaries generally cannot select an affiliated vendor if that vendor will receive any payment other than reimbursement of expenses. All compensation arrangements must be approved by a fiduciary that is independent of the recipient of the compensation, unless another exemption is available.

Litigation

The past 15 or so years have seen numerous lawsuits, and many multimillion-dollar settlements,[3] involving allegations that fiduciaries acted imprudently in selecting, retaining, and/or compensating a plan's recordkeeper.[4] While most of those lawsuits featured attacks on investment options described as charging excessive fees while underperforming, allegedly imprudent recordkeeping arrangements have been frequent targets as well. Plaintiffs have asserted that fees were excessive, that a plan's recordkeeping business was leveraged to obtain cost concessions for the employer on other aspects of its relationship with the recordkeeping firm, that fiduciaries imprudently allowed exploitation of plan data (which they seek to classify as a plan asset), and so forth.[5]

Originally, claims targeted multibillion-dollar private sector 401(k) plans; however, over the past few years, a number of nonprofit colleges and universities have been sued, and smaller plans are also beginning to find themselves in the crosshairs.[6] Defined benefit (DB) plan fiduciaries have less risk in this area, since plaintiffs have less motivation to sue, and are limited in their ability to do so. The Supreme Court case recently decided that participants in a DB plan that experienced significant investment losses did not have standing to sue their fiduciaries, since they would receive their benefits regardless of the outcome of the lawsuit.[7] The Court declined to decide whether the outcome would have been different if the alleged fiduciary misconduct had "substantially increased the risk" that the plan would be unable to pay benefits, but did determine that mere allegations that a plan was underfunded for a time were not enough to create standing. However, even in the wake of this ruling, and even leaving aside situations where a plan's benefit-paying ability is in sufficient jeopardy that participant standing may remain a possibility, the U.S. Department of Labor (DOL) can bring suit and, of course, allowing a DB plan to pay excessive amounts to the recordkeeper increases the employer's potential funding liability. Accordingly, all plan fiduciaries need to take their responsibilities to evaluate recordkeeping arrangements seriously.

IS IT TIME TO CONDUCT AN RFP?

ERISA does not state that vendors must be evaluated on any particular schedule. Nonetheless, in *George v. Kraft Foods Glob., Inc.*,[8] plaintiffs' expert witness asserted that an RFP should be conducted approximately every three years. Although the district court declined to credit this view and granted summary judgment to the defendant fiduciaries, the appellate court reversed and concluded that the expert's view had to be weighed at trial. The case settled before trial, so a final ruling was never made on the question. The general consensus in the retirement industry, however, is that there is no set timeframe for conducting a full RFP that should be considered valid for all plans. Instead, benefits professionals largely agree that fiduciaries should establish recordkeeper evaluation timelines and decide on the necessity for a full RFP based on the particular needs of their plan.[9]

When deciding when and whether to conduct an RFP, a retirement plan fiduciary typically will consider the following:

- Satisfaction with the current recordkeeper and its investment platform;

- Other means of evaluating services and fees, such as benchmarking reports, industry surveys, or a less detailed "request for information" process;[10]

- Time since the last RFP, and the extent to which the plan's circumstances and/or market conditions have changed since then;
    - For example, if the plan has grown significantly, the number of recordkeepers interested in its business and the types and cost of available service packages may well have changed.
    - In the wake of the litigation discussed above, the recordkeeping marketplace has changed a great deal, especially for 401(k) plans, with administrative fees decreasing, lower-cost investment options coming into favor,[11] and service offerings evolving.
- The extent to which services and fees have been successfully renegotiated with the current vendor outside the competitive bidding process;
- Number of other recordkeeping firms likely to be able to meet the plan's needs; and
- Available resources to devote to the RFP and the effect on other plan functions of using resources in this fashion.

Conducting an RFP can be a time-consuming and expensive process in itself, especially for large plans. Devoting plan resources to an RFP means fewer resources for other plan projects, such as participant education. To the extent the employer opts to fund some or all of the cost of the RFP rather than having the plan bear the expense, the employer may reduce its plan contributions or cut spending on other plan-related projects.[12] Furthermore, responding to an RFP requires the expenditure of time and money by the vendors under consideration, so vendors will only participate if they believe they have a realistic chance of winning the business. Accordingly, while an RFP is often an effective way to obtain lower pricing, a plan fiduciary should be thoughtful about how often to undertake one.

PLANNING THE RFP

Once a fiduciary has decided to proceed with an RFP, the fiduciary has a number of decisions to make.

Staffing the RFP

First, the fiduciary should determine whether it has the time and expertise to conduct the RFP in-house, or whether it would benefit from retaining a consultant to coordinate the project and assist with the evaluation of the bids. Many investment advisers offer RFP consulting services to their clients and, in some cases, will include an initial or periodic RFP as part of their baseline fee. Alternatively, a plan may instead choose to select a separate consultant specifically for the RFP.

A consultant can provide the benefit of familiarity with possible candidates and the experience to evaluate candidates and their proposals in relation to market norms. A consultant also may be able to make the process significantly more efficient for the employer's staff, by leveraging templates and past experience to draft the RFP questionnaire, coordinating responses to candidates' inquiries and candidate interviews, summarizing key bid terms, and generally managing the logistics. However, unless the consultant has extensive experience with the particular plan's terms and operations, the employer's staff will need to be closely involved in designing the RFP questionnaire. Staff will also need to remain involved throughout the selection process to be sure that the selected candidate can and will provide all desired services in a fashion that suits the employer's systems and culture. Accordingly, each plan's fiduciaries will need to decide for themselves whether the use of a consultant is likely to be cost-effective.

Timetable

Once the personnel responsible for the RFP have been identified, they will need to decide on a timetable for creating and issuing the questionnaire, receiving responses, holding interviews, and selecting the winning vendor. When setting dates, the RFP coordinator should consider the extent to which it is necessary or advisable to implement a vendor change at the beginning of a plan year or, conversely, whether the many demands on recordkeepers and HR staff alike at year-end along with anticipated vacations and closures (if the plan year aligns with the calendar year or ends at the height of summer vacation season, for example) mean that it would be preferable to select a different conversion date. The RFP coordinator for a safe harbor 401(k) or 403(b) plan will need to be especially conscious of whether the change will coincide with a new plan year. A recordkeeper conversion often requires at least some changes to plan features, and a number of safe harbor plan provisions require advance notice for a midyear change, or cannot be changed at all except at the start of a plan year.[13]

Whichever date is preferred, the desired conversion date will drive the timeframe for the earlier steps in the RFP process.

Identifying Candidates

Once the timetable is settled, the RFP coordinator will need to decide how many vendors to solicit. Three to five is common but, again, the plan's circumstances will ultimately dictate the choices. The coordinator should consider the number of plausible candidates, the likelihood of significantly differing bids, and the time required to assess all the different bids. Having considered those factors, the coordinator then can decide how many candidates will give the fiduciaries an appropriate range of choices without devouring undue amounts of time.

If more than one plan is involved, the RFP coordinator will need to determine whether the plans should conduct a joint RFP or proceed separately (and if the latter, whether it is preferable to have one plan go first or to run multiple RFPs concurrently). The decision of whether to conduct a combined RFP largely depends on the anticipated ability (or lack thereof) to select a single vendor for each plan. For example, an employer with a DB plan and a DC plan might request bids from vendors capable of operating both plans, or might conclude that the vendors able to offer the desired services for the DB plan are too expensive or otherwise undesirable for its DC plan (if they offer DC services at all), and opt to separate the recordkeeping selection process for the two plans.

Use of a common recordkeeper typically offers a number of advantages. A common recordkeeper can coordinate service and employment status records, track plan contribution and benefits limits on a combined basis, and simplify nondiscrimination testing and other processes that require shared data. If the plans cover the same participants, the participants will have one point of contact for all their benefits. A recordkeeper might also offer discounted pricing for multiple plans versus the cost to record-keep each plan separately.

However, when deciding whether a combined RFP makes sense, the fiduciaries will need to bear in mind that the RFP process and the final decision regarding which candidate to select (as well as any associated negotiations on the details of the successful candidate's fees and terms of service) cannot disadvantage one plan for the sake for another.[14] For example, a fiduciary cannot agree to a higher fee for a DB plan in order to obtain a lower fee for a DC plan, or agree to a higher fee for a large 401(k) plan in order to include a small 401(k) plan on the same recordkeeping platform. That does not mean, of course, that a chosen vendor has to be the least expensive recordkeeper for each plan. A fiduciary may conclude that a recordkeeper's package of services and reputation for quality merits a higher fee than a lower bidder.[15] The fiduciary can also legitimately consider administrative advantages to a plan of combined recordkeeping (such as reduced risk of error in tracking limits, service and employment status, and reduced costs for nondiscrimination testing that would otherwise require coordination of data from multiple recordkeepers). The decision for each plan, however, must be the decision that is best for that plan.

DRAFTING THE RFP QUESTIONNAIRE

An RFP typically consists of a questionnaire seeking information about the candidate's organization, capabilities, and pricing, along with a request for various supporting documents.

Contents of the Questionnaire

A questionnaire should provide an overview of the plan sponsor and the plan(s) involved, and typically will then ask the candidates to respond to questions about the following, along with any other topics of interest to the plan's fiduciaries:

- The candidate's business, including its ownership, affiliated entities, and the types of services it provides, and potential conflicts of interest presented;

- The candidate's reputation, including litigation and regulatory enforcement actions;

- The candidate's client base, including the size and types of plans it works with, its client retention record, and references from clients and former clients;

- The candidate's experience in the plan sponsor's industry and with plans of the relevant type(s), as well as past exposure to any other unusual aspects of the employer's business or plans that may assist it with understanding the plan's unique needs;

- Additional available services of interest to the fiduciaries, such as investment advice for the fiduciaries and/or participants, trust/custody services, actuarial services, and/or plan design consulting;

- Insurance and bonding coverage;[16]

- The vendor's privacy and cybersecurity protocols in connection with participant data, as well as its willingness to respect confidentiality for both employer and employee information;

- The vendor's disaster recovery capabilities;

- Client contact practices, including:

    - Extent to which the client will be assigned a designated relationship manager and other designated account personnel, or alternatively (as is often the case for very small plans), the extent to which the client will be limited to general call-center or online support without a particular person as the point of contact;

    - Availability and willingness to attend fiduciary committee meetings;

    - Availability and willingness for regular telephone and/or in-person meetings with staff; and

    - Scope of telephone and online support resources for the plan sponsor and fiduciaries.

- Participant experience, including:

    - Call center and online resources;

    - The extent to which customer service personnel are located outside the United States, and any special quality control concerns that need to be addressed with respect to offshore facilities;

    - Cost and willingness to provide participant education programs, online or in person;

    - Availability and cost of participant advice services and/or managed accounts, if desired; and

    - Use of data for cross-selling of products.

- Timing, cost, and scope of available documentation and reporting for the plan fiduciaries, such as trust reports, testing reports, and an SOC 1 report;

- Timing, process, and personnel for a conversion, if the candidate is not the incumbent recordkeeper;

- Available recordkeeping services of interest to the fiduciaries, which may include:

    - Access to an IRS-pre-approved plan document and associated ancillary documentation (such as a summary plan description and loan policy), or, conversely, the candidate's willingness to work with an individually designed document or one obtained through a separate vendor;

    - Form 5500 preparation and, if applicable, audit support;

    - Participant communication support, including drafting and dissemination of communications,[17] and willingness to customize communications;

    - Participant eligibility tracking and enrollment support, including the ability to support automatic enrollment if relevant to the plan;

    - Vesting service tracking and vesting administration;

    - Contribution calculation support;

    - Distribution services, including distributions to terminated employees, hardship and other in-service withdrawals (if applicable), administration of the cash-out process on an automated basis (and with automatic rollovers, if desired), required minimum distribution enforcement, administration of spousal consent requirements if applicable to the plan, and tax withholding/reporting;

    - Investment platform, particularly for participant-directed DC plans (and even more so for plans offering company stock and/or white-label funds), and the extent to which existing plan investments could be retained on the vendor's platform, as well as the ability to assist with investment disclosures (such as prospectus requirements for company stock and fact sheets for white-label funds) and the ability to enforce investment restrictions;

- Account record maintenance, particularly for daily-valued participant-directed plans;

- Record retention, including ability to take custody of existing plan records, duration of record retention, destruction policies, and willingness to return or transfer records in the event the relationship ends or the record would otherwise be destroyed;

- Beneficiary designation and death benefit administration, including enforcement of spousal consent requirements, and the extent to which existing beneficiary designations can or cannot be carried over from the current recordkeeper or the employer's files;

- Nondiscrimination testing and tracking of plan limits;

- Mergers and acquisitions support;

- Administration of plan loans, if the plan allows for them, including the ability to administer loans converted from the current recordkeeper and, if desired, to accept ongoing loan repayments after a participant's termination of employment;

- Handling of incoming and outgoing rollovers and in-plan Roth conversions, if relevant to the plan;

- Support for missing participant search and outreach, death searches, and handling of uncashed checks;

- Administration of employee stock ownership plan (ESOP) dividend pass-through payment provisions, if applicable;

- Qualified domestic relations order (QDRO) review and administration;

- Handling of participant power-of-attorney, guardianship, and estate paperwork as needed;

  - Correction support in the event of errors by either the recordkeeper or the employer; and
  - Support in the event of a government audit or lawsuit involving the plan.
- Any design restrictions necessary for the plan to be administered by the candidate, such as restrictions on eligibility or vesting requirements, necessity to offer or not offer certain types of distributions, and so forth:
  - The candidates should review the existing plan document, and identify any provisions that would need to be changed.
  - If the plan uses an IRS-preapproved document but may need customizations to that document (for example, to accommodate a particular contribution design or fiduciary governance structure), the RFP should inquire as to the candidate's willingness to customize its document, and the employer's counsel should be consulted as to the impact of the desired modification on the plan document's pre-approved status.
- Proposed compensation arrangements, including:
  - Direct fees, and in the case of DC plans, the methods available for allocating those fees among participants;
  - Anticipated indirect compensation such as "revenue-sharing" and float, and the extent to which that revenue would be rebated to the plan;
  - Conversion fees, including the extent to which fees are waived upfront but subject to recoupment in the event of early termination;
  - Duration of any fee guarantee period, as well as exceptions to the guarantee if the plan's circumstances change;
  - Any asset-size or participant-number breakpoints that will result in an automatic increase or decrease in fees; and

    - Any requirements necessary to obtain specified fees, such as the use of one or more of the candidate's proprietary investment vehicles.

- Service quality guarantees and associated fees at risk if those guarantees are not met;

- Deconversion or plan termination support and costs; and

- Any requirement that the plan work with an affiliated or other approved investment adviser, consultant, or other third party.

In preparing the questionnaire, the RFP coordinator should consider any unusual aspects of the plan that may require specialized support, and ask the candidates to confirm their ability to provide the necessary services. Likewise, if there are plan provisions that have caused administrative problems in the past and which cannot be eliminated, the RFP coordinator should call candidates' attention to those provisions and request information about how the candidate will address the challenges they pose.

As noted above, the RFP should ask candidates to review the current plan document themselves and inform the coordinator of any obstacles to its successful administration, and to include a proposal for resolving those obstacles. The candidates, however, will not have the same familiarity with the plan and its operational history as the employer's staff, and not all operational quirks are necessarily apparent from the plan document. Accordingly, the RFP coordinator should be proactive about flagging potential issues to avoid unpleasant surprises later in the process.

Even in the absence of unusual plan features, the RFP coordinator needs to work closely with the employer's HR staff to make sure that the RFP expressly addresses all expected services. The HR employees responsible for the plan should review the existing contract's list of services to be sure all current contracted services are incorporated into the questionnaire. They also should think about anything else that they do (or that the current recordkeeper does that the current contract omits), and decide whether that function should be included in the questionnaire and future contract.

Sample Documents

In addition to asking the candidates to complete the questionnaire, the fiduciaries should request copies of documents that will be important to the relationship and/or post-conversion operations. Typical requests include:

- Recordkeeping agreement (or confirmation of the recordkeeper's willingness to use the client's form of agreement);
- Service agreements for any additional services of interest, such as investment advisory agreements and trust or custodial services agreements;
- Participant statements;
- Plan document and summary plan description, if the plan will be using the vendor's documentation;
- Audit support package and other reports of interest;
- Payroll fee specifications;
- Information technology protocols and specifications (such as disaster recovery plans and cybersecurity standards); and
- Other sample participant communications, such as highlights guides, enrollment forms, distribution forms, education campaign materials, and legal notices.

Fiduciaries also may benefit from viewing a demo of the vendor's plan-sponsor and participant Web sites and mobile applications.

SELECTING A RECORDKEEPER

Once the candidates have submitted their bids, the RFP coordinator will need to evaluate the materials and identify any topics requiring additional information from one or more of the candidates. The coordinator may also conduct some preliminary negotiation at this stage. For example, if a promising candidate has too high a price, the coordinator may request a lower bid if the candidate wishes to remain in consideration. The RFP coordinator may also need to consult with specialists on certain aspects of the vendor's proposal, such as risk management and information technology. The relevant specialists should identify any issues that need to be addressed before a candidate can be considered viable or which otherwise require further follow-up, and ensure the coordinator is aware of any aspect of a given vendor's proposal that will need to be weighed as part of the decisionmaking process. The RFP coordinator will then synthesize the information into a format that will allow efficient comparison of the candidates by the fiduciary decisionmaker. Most plans are operated by a fiduciary committee, and the members of that committee typically make the final decision.

Depending on the number of candidates and the content of the bids, the plan fiduciaries may decide to interview all the candidates, or may winnow the list to two or three finalists before conducting interviews. Large plans also frequently include a site visit to the recordkeeper's facility as part of the selection process.[18] The interview and, if applicable, the site visit give the fiduciaries and HR staff a chance to evaluate the ease of communication with the recordkeeper's personnel, the compatibility of organizational cultures, and other intangibles. While the reasonableness of the recordkeeper's fees are a major consideration and it is essential that the recordkeeper be capable of operating the plan, the "vibe" that the employer's staff receives when meeting with the recordkeeper personnel is also extremely important. A good working relationship is a key to smooth plan operations. For this reason, the RFP coordinator should request that the fiduciaries and other involved staff members have the opportunity to meet the recordkeeper staff members who will be their main points of contact, rather than meeting only the salesperson assigned to the RFP.

NEGOTIATING THE CONTRACT

In most cases, a plan will use the recordkeeper's form contract, although some large plans may instead require that a recordkeeper work with the employer's form of agreement. If the plan is using the recordkeeper's form contract, the RFP coordinator should review the contract during the RFP process and before a final decision is made, and confirm the candidate's willingness to resolve any issues identified. If the plan will be using the employer's agreement, the candidates should be required to submit any proposed revisions to the employer's form as part of their bids. Those revisions should be reviewed by the employer's personnel and any concerns addressed with the candidate in advance of deciding to select that vendor.

Contract review should include the plan's attorney, the employer's procurement staff (if applicable), and any other specialists whose input is needed. For example, the employer's risk management personnel should confirm the adequacy of insurance provisions if they have not already done so. Perhaps most important, in this day and age, the employer's information technology/cybersecurity personnel must confirm that the vendor's privacy, data security, and disaster recovery standards are satisfactory, both in operation and as documented in the contract. As noted above, the RFP coordinator typically should involve relevant specialists during the candidate review stage, to be sure any obstacles to selection of a particular candidate are identified and addressed before the candidate is selected. These specialists, however, should also review the final contract terms.

Even if the RFP has resulted in a decision to retain the existing recordkeeper, the RFP coordinator should not neglect to update the contract. Naturally, any changes to the services or fees will require conforming amendments. If gaps in the documentation for the services provided to the plan or other key contract terms were identified as part of the RFP preparatory process, the updated contract should address those issues as well. In addition, legal counsel and the relevant specialists should review the contract to ensure that it meets the employer's current procurement standards and is in line with current best practices. Once again, the privacy and cybersecurity provisions will be particularly important. In recent years, high-profile data breaches, along with new state privacy and cybersecurity laws, have encouraged evolution in best practices in this area.

Contracting Parties and Fiduciary Status

Typically, the recordkeeper and the employer will be the parties. For most plans, especially smaller plans, the employer is both the plan sponsor and the plan fiduciary, so this arrangement is appropriate. However, if the employer is not also the plan's administrator and named fiduciary with the requisite authority over all fiduciary terms of the contract, the relevant fiduciary entity also needs to be a party, or at least enabled to provide direction to the recordkeeper on aspects of plan operations within its authority and to terminate the recordkeeping contract.

If the employer is not the responsible fiduciary, it typically will still need to be a party to the agreement's indemnity clause and with respect to plan sponsor functions (such as the making of contributions and the maintenance of compliant plan documents).[19] Conversely, since fiduciary status depends on a party's actions and authority, not on whether the person is formally designated as a plan fiduciary, the agreement also should be clear that the employer in this circumstance is *not* a plan fiduciary and avoid giving the employer the power to make decisions about plan administration or investments.

In terms of the recordkeeper's side of the contract, most recordkeepers do not act as fiduciaries. They limit their services to the type designated by the DOL as "ministerial" services,[20] and refer any issues requiring a discretionary decision to the employer's HR staff or fiduciary committee. In these circumstances, the recordkeeper normally disclaims fiduciary status expressly. However, some recordkeepers will agree to take on certain fiduciary functions, or will even agree to act as the legal "plan administrator."[21] Section 2550.408b-2(c)(1)(iv)(B) of the Labor Regulations requires that any person acting as a fiduciary must acknowledge its status as such in writing. Accordingly, the agreement must be clear about the recordkeeper's role,[22] and the plan documents should be amended as necessary to be consistent with the intended arrangement.

If a recordkeeper (or its affiliates) also offers nonrecordkeeping fiduciary services (such as trustee services or investment advice/management), there will normally be a separate contract addressing those aspects of the relationship. The vendor will acknowledge its fiduciary status with respect to those services in that separate contract instead of in the recordkeeping agreement.

Contracted Services and Fees

The RFP coordinator must make sure that the final contract reflects the terms and conditions of the bid, and work with the HR staff to address all key points. For example, if the candidate indicated that it will administer required minimum distributions, the agreement should include that in the list of services. In some cases, however, recordkeepers rely on an administration manual or other separate document to detail the services to be provided, and prepare that document after the contract is completed, during the conversion process. In that case, the contract should commit the recordkeeper to provide all services promised in its RFP response. The contract also should specify any desired restrictions on subcontracting, particularly to offshore locations.

In addition, the contract needs to reflect the compensation agreed upon during the RFP process. If the recordkeeper guaranteed the fees against increase for a period of time (with or without a specified cost-of-living adjustment), the agreement must include that guarantee. Regardless of whether a guarantee applies, the RFP coordinator should make sure that the recordkeeper cannot increase its fees without the consent of the plan fiduciary, unless the plan can terminate the agreement before a fee increase takes effect. A service provider that can set its own fees has converted itself into an ERISA fiduciary with discretionary authority over its own compensation, in violation of Section 406(b) of ERISA,[23] so the recordkeeper must be barred from having *de facto* power to implement a unilateral fee increase. Likewise, the contract should specify that the recordkeeper will not undertake services involving additional fees without disclosing the fees and obtaining authorization from the plan fiduciary.

On a related note, the RFP coordinator should require the recordkeeper to represent that it has fully disclosed all compensation. If the plan is a DC plan with participant-directed investments, if the recordkeeper will be providing fiduciary services, and/or if the recordkeeper will receive "indirect" compensation, the recordkeeper also should represent that its compensation disclosure satisfies Section 2550.408b-2(c)(1) of the Labor Regulations.[24] Finally, the vendor should confirm that it will provide any information needed for Form 5500 Schedule C and participant disclosures under Section 2550.404a-5 of the Labor Regulations, if applicable to the plan.

The RFP coordinator should confirm that invoicing processes and timelines are acceptable. In that regard, if any expenses (such as travel costs for participant education programs) will be paid by the plan or plan sponsor, the contract should identify any expense reimbursement policies to which the recordkeeper must adhere.

Duration of the Agreement

In order to comply with Section 2550.408b-2(c)(3) of the Labor Regulations, a plan service agreement must be terminable on reasonably short notice without penalty (other than compensation for losses associated with early termination).

It is common for recordkeeping agreements not to have a set expiration date, or to renew automatically absent notice to the contrary, but nonetheless to be terminable on reasonable notice by either party. Since the need for recordkeeping services is indefinite and the timing for reevaluating a relationship typically is highly dependent on a plan's circumstances, an evergreen or automatic-renewal arrangement with flexible termination provisions normally is the most efficient. If a plan does have a contract with an expiration date, the fiduciaries need to be sure that someone is tracking that date, so that action to renew or replace the contract can be taken in a timely fashion.

Any notice period for termination by the plan must be sufficiently short to give the plan the desired degree of flexibility and meet the regulatory standard. However, since changing recordkeepers requires extensive planning under the best of circumstances, the RFP coordinator need not prioritize negotiating an extremely short notice period. Conversely, the coordinator must ensure that any timeframe for notice of termination by the recordkeeper is adequate for the plan's fiduciaries to make arrangements for an orderly transition to another provider, at least in the absence of a breach of contract by the plan or plan sponsor.

In that regard, the agreement also should include provisions addressing ongoing support and associated compensation in the event of termination of the agreement. For example, the plan fiduciaries will want to know what reports will be available and whether there are associated fees if a plan needs to have its records transitioned to a new recordkeeper. The parties should also address any post-termination record retention and record-return expectations. Concededly, the recordkeeper may not be willing to commit to specific services or pricing in advance. At the least, however, it is important for the parties to understand what they can expect and what they will need to negotiate at the time of deconversion or plan termination, and for the contract to provide the plan with any rights the plan's fiduciaries view as essential.

The agreement should include a survival clause, so that provisions still relevant after termination (such as the agreement's indemnity and confidentiality clauses) continue in effect.

Privacy and Data Security

A plan's recordkeeper has access to a great deal of personal information about plan participants. Likewise, the recordkeeper often is privy to important developments in an employer's business, since business developments may affect plan operations. The recordkeeper may also have the use of the employer's logo and other intellectual property. The contract must contain appropriate safeguards for this sensitive information, along with provisions addressing appropriate remediation, reporting, and indemnity provisions in the event of a data breach.

Normally, there is little controversy regarding clauses relating to use of the employer's name, logo, and proprietary business information. Although most recordkeepers will seek permission to use the plan sponsor's name on its client list, they also typically will agree not to do so without specific consent if the employer so requests. Likewise, plan fiduciaries typically do not object to reciprocal clauses protecting the recordkeeper's name, logo, and work product, so long as the plan's right to retain and share the work product is adequate to allow the plan to comply with its own record retention obligations and any audit disclosures needed.

However, provisions regarding the use and protection of participant data often present more complicated issues. Concededly, it may be relatively easy for the parties to reach conceptual agreement on contract terms relating to the handling of data breaches. Although cybersecurity liabilities present special issues, and may require specialized indemnity language, there is generally a common understanding of the expected response to these situations. Likewise, the recordkeeper's ability to satisfy a plan's technological specifications for cybersecurity and disaster recovery may require extensive review and detailed contract terms, at least in the case of a large employer, but the parties often agree conceptually on best practices.[25] In contrast, provisions relating to the *use* of participant data have become an increasingly fraught topic.

As part of the RFP review process, the fiduciaries should ask the candidates to communicate their views about acceptable rules regarding a recordkeeper's use of the plan's data for (1) general client service and research purposes (such as the creation of reports reflecting practices across its client base), which often include the potential for advantage to the plan and rely on anonymized data rather than participant-specific information; and (2) the recordkeeper's own benefit, such as the use of participant contact information and transactional histories to facilitate the marketing of non-plan–related products.

As noted above, recent lawsuits have challenged the use of plan data by recordkeepers in this fashion as an impermissible use of a plan asset, and asserted that access to the data should be factored into the recordkeeper's compensation assessment. One of the cases asserting this type of claim was dismissed, while another settled before a ruling was made on the issue but included a protective clause involving the future use of data in the settlement agreement.[26] A claim of this type against Shell Oil Co. and Fidelity was filed on January 24, 2020, and remains pending.[27] It seems likely that at least some plaintiffs will continue to pursue claims of this type, at least until and unless the question has been more thoroughly resolved by the courts.[28] Recordkeepers, however, are often extremely resistant to any restrictions on marketing activities and may assert that special exceptions to their normal practices are not possible. In those circumstances, the fiduciaries should consider whether the recordkeeper's normal approach is acceptable in light of the plan's circumstances, the recordkeeper's compensation arrangements, and any alternatives available from other recordkeeping candidates.

Beyond the potential for claims relating to data use and the reasonableness of compensation, plan fiduciaries also have legitimate concerns about potential liability if participants believe the products marketed have been endorsed by the plan fiduciaries. State or foreign data protection laws applicable to the plan's population also may affect the fiduciaries' views on permissible data use.[29] Ultimately, fiduciaries should be thoughtful about the extent to which marketing will be allowed, taking into account any limits on their bargaining power. Fiduciaries should also consider defensive strategies, such as indemnity from the recordkeeper for liabilities associated with non-plan products and the use of appropriate disclaimers (such as a statement that the employer and plan have not endorsed any non-plan products) in participant communications.

Indemnity Clause

The plan fiduciaries should seek to have the recordkeeper indemnify the employer and plan in the event of losses arising from its negligent conduct, breach of law, or breach of the agreement. In turn, the recordkeeper typically will expect the employer to indemnify it in the event of losses arising from problematic directions from or conduct by the employer and its staff. In some cases, the recordkeeper may seek a broader indemnity for any losses not arising from its own negligence or misconduct.

Some recordkeepers seek caps on their indemnification obligations, typically expressed as a multiple of annual fees. While these caps are not per se impermissible, they do require careful analysis.[30] Likewise, some recordkeepers seek to apply a "gross negligence" rather than "negligence" standard. Ultimately, the acceptable scope of indemnity, and the extent to which the employer is willing to agree to any caps on the recordkeeper's liability to indemnify the plan and employer (or to insist on caps on its obligation to indemnify the recordkeeper), are a matter of business judgment and will depend on the plan's bargaining power. In the case of a multiemployer plan or any other plan without a non-plan source of funding for indemnity, the fiduciaries will need to be sure that the plan's indemnity obligations are limited to circumstances in which ERISA will permit indemnity. Regardless of the terms of the final provision, all parties should be sure they understand the extent of the indemnity obligations of the employer and the extent of the recordkeeper's financial responsibility for any losses it causes. As noted above, the employer's risk management personnel also should confirm that the recordkeeper has adequate insurance or other resources to meet its indemnification obligations.

In addition, the plan fiduciaries need to be comfortable that other aspects of the indemnity provisions, such as coverage for employees and other affiliates, notice requirements, claim deadlines, and exclusions of consequential and punitive damages, are prudent in the circumstances. In addition, the parties will need to agree on whether to include provisions relating to indemnity claims that cannot be mutually resolved. For example, a contract may include a contractual statute of limitations, requirements for mediation or arbitration, a jury trial waiver clause, provisions for cost-shifting of attorney fees, and/or a forum selection clause.

Amendments

Preferably, any amendment should require affirmative consent by an authorized representative of each party. Recordkeepers for smaller plans, however, may instead use a notice-and-deemed-consent process, whereby a fiduciary is deemed to consent to all announced changes unless it objects within a specified period of time.[31] If a recordkeeper insists on a notice process rather than obtaining affirmative consent for changes, the notice period must be long enough to allow for analysis of the proposed change, as well as for orderly termination if an objection will result in termination. As noted above, in order to avoid a violation of the prohibited transaction rules, particular care is needed to be sure that a recordkeeper cannot unilaterally increase its fees (or reduce its services) in this fashion unless the plan fiduciaries have the opportunity to block the change or terminate the agreement.

Miscellaneous Provisions

While often overlooked, "boilerplate" provisions—such as identification of the governing state law, integration clauses stating that all the contract terms are contained in the agreement (and any ancillary document it specifically identifies) and clauses preventing waiver of agreement terms generally as the result of a single waiver—all can be important in enabling the contract to function as intended.

Notice provisions are particularly important. A contract's notice rules need to accommodate more informal types of notice for routine communications, in keeping with normal industry practice. For example, funding approvals or minor updates to administrative processes often are communicated by email. In contrast, notable events such as indemnification claims or fee change notices often require notice in a particular fashion, or that a copy be directed to a more senior member of management or the party's general counsel.

THE CONVERSION PROCESS

Most people have, at some point in their lives, been urged to reconceptualize problems as opportunities. That is often easier said than done, and it is all too likely to feel *much* easier said than done to someone in the throes of a plan recordkeeping conversion. Coordinating a plan conversion involves a vast array of notices, deadlines, plan amendments, systems tests, employee seminars, file reconciliations, and numerous other tasks. In addition, most conversions shake at least a few historical problems out of the woodwork, and that is generally the last thing an already stressed benefits staff wants to face.

Nonetheless, a conversion is a valuable opportunity to refamiliarize staff members with the details of a plan that may have been operating on autopilot to perhaps a greater extent than it should, reevaluate plan provisions as well as administrative processes and procedures, examine new opportunities to automate, refresh participants' awareness of the plan, revisit the plan's investment array, and overall seek out ways to streamline plan operations and improve the participant experience.

Project Plan and Staff

The new recordkeeper typically will assign a conversion project manager, and the employer should likewise identify a point person. Legal counsel, the plan's investment adviser, and any other outside advisers should be involved as early in the process as possible.

The parties will also need to agree on a conversion timeline. Even a small plan typically will require several months from selection of a new recordkeeper to completion of the conversion, particularly since conversion of a DC plan almost always will involve investment lineup changes and administrative fee changes, as well as a "blackout" of plan loans, withdrawals/distributions, and investment transactions. Those events require 30 days' advance notice in most circumstances,[32] and a lot of planning is necessary before the notices can even be drafted. Large plans may require a year or more for conversion, especially if more than one plan is involved in a conversion.

Investments

Most conversions require the plan's fiduciaries to make decisions about the post-conversion investment array. Some of a plan's existing investments may not be available through the new recordkeeper, or the conversion may represent a convenient opportunity to make changes that have been decided upon for other reasons. If the plan allows participants to select their own investments, the fiduciaries will have to decide what will happen to assets held in investments being discontinued. If the new recordkeeper can accommodate advance changes in elections, participants can provide instructions for post-conversion investments. If the recordkeeper cannot accommodate that process, or if there are participants who fail to provide instructions, the fiduciaries will need to decide whether to "map" investments into similar options available post-conversion (and if so, which new investment option best aligns with each old investment option), or whether to redirect assets into the plan's "qualified default investment alternative" (QDIA).

Either approach is legally permissible, so the plan fiduciaries can decide which best fits the plan's particular circumstances. "Mapping," known as a "qualified change in investment options," may be less disruptive to participants, and for this reason fiduciaries often prefer it when a plan's old and new investment arrays will be relatively similar in terms of asset classes and investment philosophies. If there are many old funds without a clear match in the new array, however, use of the QDIA generally makes more sense. If a plan is adding or expanding automatic enrollment at the time of the conversion, making the QDIA the default investment for everyone may simplify communication. In some cases, as well, the fiduciaries may feel that the plan participants, on balance, would benefit more from the QDIA than from their existing choices, and use the power of inertia to encourage participants to move in that direction by making the QDIA the default choice. Finally, in some cases, a recordkeeper will offer reduced pricing if a conversion includes a "reenrollment" into a QDIA (typically one affiliated with the recordkeeper). Naturally, the fiduciaries need to scrutinize the overall financial impact of such a proposal to be sure the recordkeeper's total compensation is reasonable, and must also be confident that the QDIA is a quality investment with reasonable fees before making it available under the plan at all. If these standards are met, however, opting for the QDIA approach rather than mapping in this situation may be a way to save the plan some extra money with no downside to participants.

Plan Documents

The conversion team will need to arrange for preparation and approval of plan amendments necessary to make any desired changes to plan terms. Even if the employer is not making design changes, the conversion may require a change from a prior recordkeeper's IRS-pre-approved plan document or an individually designed document to the new vendor's document. The employer's attorney should review the new document to be sure that all provisions have been accurately carried over to the new document and to identify any changes that could affect administration.[33]

The attorney and recordkeeper should also discuss the plan document with the employer's HR staff to confirm that the plan's features align with existing administration. Recordkeepers typically generate a "plain language" administrative guide, either as part of the plan document set-up process or immediately after completion of the document, and the process of creating this guide is an excellent opportunity to be sure all the parties are on the same page and to identify any issues arising from either historical error or new misunderstandings. Accordingly, the employer (and, ideally, the employer's attorney) should review the guide carefully before approving it for use.

Communications

Once the basic outlines of the conversion and post-conversion operations have been established, the conversion team will need to prepare the blackout notice (due 30 to 60 days before commencement of the blackout) if the plan is a DC plan that will experience a blackout, and any other required legal notices,[34] along with additional materials explaining the timing and process for the transition and outlining any changes to plan terms and investments. The employer's attorney should review the notices to be sure all legally required content is included, all deadlines are properly identified, and all plan descriptions are accurate. The plan's investment consultant should confirm the accuracy of all investment information.

The employer and the new recordkeeper will need to be sure the recordkeeper has updated participant mailing lists for any notices it will be distributing on the plan's behalf, and identify a point of contact at the employer for any participant questions, particularly if the plan will not yet have access to the new recordkeeper's call center when communications are first sent.

Plan Records

The employer's staff will need to coordinate the transfer of records from the prior recordkeeper. Particularly for smaller plans, changing recordkeepers usually means a significant reduction in access to historical plan data. Records of past payments, account balance histories, historical plan documents, and so forth often are not transferred. Larger plans may have more opportunity to arrange for customized record transfer protocols and should take advantage of the opportunity to do so.

Plans that cannot obtain historical record transfers will need to consider the extent to which the prior recordkeeper will maintain the old records and for how long, and what to do about data and documentation that the plan may need but to which it cannot be sure of retaining access. This is particularly important for DB plans, which often rely on historical data to calculate and verify pensions for employees who may have terminated decades in the past, but it is also an issue for DC plans. A former employee may assert that he or she never received payment of his or her account balance, for example,[35] or may need historical information for preparation of a QDRO. Furthermore, the plan fiduciaries must be sure the plan's records will be adequate to comply with legal requirements. Section 209 of ERISA mandates that employers maintain records adequate to calculate benefits for as long as necessary, and Section 107 of ERISA requires records supporting Form 5500 to be maintained for six years after filing.[36]

Administrative Set-up

The employer's staff and the recordkeeper will need to establish the process, timeline, and technological infrastructure for data feeds between the recordkeeper and the employer's payroll and HR information systems so that the recordkeeper receives updated employee information in a timely and accurate fashion. More broadly, the employer's staff will need to coordinate with the new recordkeeper on setting expectations for ongoing plan operations, and confirm that they are aligned regarding ongoing communication processes and timelines. Important deadlines should be put on each party's tracking calendar. For example, if the recordkeeper needs census information by a certain date in order to provide nondiscrimination testing reports in time to allow for correction, the employer's staff will need to plan accordingly.

As noted above, the parties typically will work during the conversion preparation process to prepare a description of plan operations. This document should not simply be shelved after approval by the employer. Instead, the employer's staff should meet with the recordkeeper regularly and after any significant plan changes are approved, to make sure the document stays up to date and in line with best practices. Both parties should remember that a conversion is just the beginning, and that successful plan operations require ongoing engagement by both the employer's staff and the recordkeeper's personnel.

CONCLUSION

Unfortunately, if a conversion is not at least somewhat stressful and extremely time-consuming for the employer's staff, that is probably a warning sign that they have not engaged to the necessary extent to be comfortable that their plan will be set up properly on the new recordkeeper's system. There are simply too many details and too many different areas of concern, from technology to communications to legal documentation, for even a well-run conversion to be easy. However, done properly, a conversion can be a valuable opportunity to revisit and improve plan provisions and administration, and to build a positive and productive relationship with the plan's new vendor.

NOTES

1. 29 C.F.R. 2550.408b-2(b).

2. 29 C.F.R. 408b-2(c)(3) requires that a contract be terminable on reasonably short notice, without penalty other than a charge that reasonably compensates the service

provider for losses associated with early termination. 29 C.F.R. 2550.408c-2 prohibits a person already receiving full-time compensation from the employer or union from receiving payment from the plan (aside from reimbursement of "direct expenses" attributable to the plan). The regulation also notes that compensation that would be considered excessive under 26 C.F.R. 1.162-7 will not qualify as reasonable, though it adds that compensation that is not automatically disqualified as excessive may not necessarily be "reasonable."

3. *See generally* Jacklyn Wille, "ERISA Class Settlements Rebounded to $449 Million in 2019," *Benefits & Executive Compensation* (December 26, 2019) (citing $193 million in class settlements related to fees in 401(k)/403(b) style plans).

4. *See generally* Robert Rachal, Myron D. Rumeld, and Tulio D. Chirinos, "Fee Litigation 2018 Round-Up: Recent Developments and Best Practices to Mitigate Risk," *Benefits Law Journal* Vol. 32, No. 1, pp. 19–53 (Spring 2019); Brian J. Lamb, "Unpacking the Bundle-Prudent Practices for Assessing Bundled Services in This Era of 401(k) Plan Fee Litigation," *Benefits & Executive Compensation* (September 12, 2018); Russell L. Hirschhorn, "View from Proskauer: 401(k) and 403(b) Plan Investment Litigation-Dividing the Plausible Sheep from the Meritless Goats," *Pension & Benefits Reporter* Vol. 44, No. 38, pp. 1177–79 (September 26, 2017).

5. *See, e.g., Tussey v. ABB*, 746 F.3d 327 (8th Circ. 2014) (plaintiffs challenged Fidelity's fees and the impact of the plan's recordkeeping business on pricing for other Fidelity services provided to the employer and its other plans); *Divane v. Northwestern Univ.*, No. 16 C 8157, 2018 U.S. Dist. LEXIS 87645 (N.D. Ill. May 25, 2018); *aff'd* 953 F.3d 980 (7th Cir. 2020) (dismissing challenge to recordkeeping and investment arrangements and rejecting plaintiffs' claims relating to recordkeeper use of participant data).

6. Nevin E. Adams, "ERISA Litigation: the Year in Review," National Association of Plan Advisors (December 30, 2019) (visited February 1, 2020) <*https://www.napa-net.org/news-info/daily-news/erisa-litigation-year-review*>.

7. *Thole v. U. S. Bank N. A.,* No. 17-1712, 2020 U.S. LEXIS 3030 (June 1, 2020).

8. 641 F.3d 786 (7th Cir. 2011).

9. *See* Jamie O. Fleckner and D. Lee Heavner, "Seventh Circuit Creates Uncertainty About 401(k) Provider RFPs," *Pension & Benefits Reporter* Vol. 38, No. 22, 1071–74 (June 7, 2011); DOL Advisory Opinion 2002-08A (August 20, 2002) ("With regard to the selection of service providers under ERISA, the Department has previously indicated that the responsible plan fiduciary must engage in an objective process designed to elicit information necessary to assess the qualifications of the provider, the quality of services offered, and the reasonableness of the fees charged in light of the services provided. In addition, such process should be designed to avoid self-dealing, conflicts of interest or other improper influence. What constitutes an appropriate method of selecting a service provider, however, will depend upon the particular facts and circumstances. Soliciting bids among service providers is a means by which a fiduciary can obtain the necessary information relevant to the decision-making process. . . .") *See also Ramos v. Banner Health*, Civil Action No. 15-cv-2556-WJM-NRN, 2020 U.S. Dist. LEXIS 88639 (D. Colo. May 20, 2020).

10. It is worth noting that the *Kraft* defendants had engaged in periodic benchmarking when extending their recordkeeper's contract. The appellate court did not rule that this process was inadequate *per se*; instead, it indicated that the prudence of the defendants' process needed to be examined at trial. The appellate court also noted certain caveats associated with at least one of the benchmarking reports. *Kraft*, *supra* n. 8, at 798–800.

11. *See The BrightScope/ICI Defined Contribution Plan Profile: A Close Look* at *401(k) Plans*, 2016 (June 2019), (visited February 1, 2020), <*https://www.ici.org/pdf/19_ppr_dcplan_profile_401k.pdf*>; George S. Mellman and Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes And Consequences?* Center for Retirement Research at Boston College No. 18-8 (May 2018) (visited February 1, 2020) <*http://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf*>.

12. Generally speaking, costs associated with a recordkeeper RFP constitute permissible plan expenses, although as always, any expenses paid from the plan must be reasonable and must be prudently incurred, and cannot include employer "overhead" expenses.

13. For example, changes to the safe harbor contributions or definition of compensation are restricted or prohibited, depending on the details, while changes to distribution rules or vesting provisions for non-safe-harbor contributions may require issuance of a new safe harbor notice 30 days in advance. *See* IRS Notice 2016-16. Although new legislation relating to plans using safe harbor nonelective contributions may give these plans more flexibility, the IRS has not yet issued guidance, and those changes would not affect plans using the more common matching contribution safe harbor.

14. *See Tussey*, *supra* n.5, at 336.

15. *See Kraft*, *supra* n.8, at 799 n.11.

16. ERISA § 412 requires all entities that "handle" plan assets to obtain a fidelity bond meeting statutorily specified requirements, unless an exemption applies. Plan fiduciaries should assess the extent to which the recordkeeper and/or its affiliates will be "handling" plan assets, and confirm that appropriate coverage is in place or that an exemption is applicable. A fidelity bond, however, only covers theft from the plan. Therefore, a plan's fiduciaries should also assess whether the recordkeeper has an appropriate level of errors and omissions insurance and other relevant coverage (such as cybersecurity insurance), or otherwise assure themselves that the recordkeeper would have the financial wherewithal to cover potential liabilities.

17. If the plan has an active participant population that does not meet the DOL "wired at work" electronic disclosure safe harbor and cannot or does not want to use the 2020 electronic disclosure rules, the vendor should be asked to confirm its ability and pricing for providing hard copy communications.

18. This type of access is much less likely to be available to smaller plans, and generally is of less interest. A larger plan, especially one that involves complex administration, is more likely to have the influence to obtain permission for a site visit, and more likely to consider making a site visit to be worth the time and expense. Ultimately, however, there is no hard and fast rule as to when a site visit is helpful or necessary. Each plan's fiduciaries will need to consider how much information they need to make an informed decision about a given candidate.

19. For multiemployer plans and any other plan without a sponsoring employer, the contracting relationship will need to be adapted accordingly.

20. 29 C.F.R. 2509.75-8, Q&A #D-2 ("a person who performs purely ministerial functions…for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting management of the plan, does not exercise any authority or control respecting management or disposition of the assets of the plan, and does not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so.").

21. Recent legislation intended to facilitate multiple-employer plans and coordinated-services arrangements may encourage more recordkeepers to offer fiduciary relationships, at least for these types of clients.

22. A number of vendors will provide "acknowledgments" stating that the vendor is a fiduciary "to the extent it performs fiduciary functions," or words to that effect. The plan fiduciaries should require the vendor to outline specifically the services it believes involve fiduciary functions. The intention of the DOL regulations was to ensure plan fiduciaries knew what services were being provided and what level of responsibility a vendor was assuming, and this type of "might be a fiduciary" disclosure does not accomplish that goal.

23. *See, e.g.*, DOL Advisory Opinion 1997-15A (May 22, 1997); DOL Advisory Opinion 1997-16A (May 22, 1997) (noting that taking actions that would result in compensation increases would violate ERISA § 406(b) unless compensation offsets were applied to prevent the increases or an independent fiduciary was given the opportunity to opt out of the arrangement before the compensation increase); *Teets v. Great-West Life & Annuity Ins. Co.*, No. 18-1019, 2019 U.S. App. LEXIS 25671, at *21ff (10th Cir. Apr. 22, 2019) ("When a service provider acts with authority or control beyond the contract's specific terms, the service provider may be a fiduciary. And when the plan or the plan participants cannot reject the service provider's action or terminate the contract without interference or penalty, the service provider is a functional fiduciary . . . The foregoing analysis applies to determining whether a service provider's control over its own compensation may make it a fiduciary.").

24. 29 C.F.R. 2550.408b-2(c)(1) requires certain "covered service providers" to provide plan fiduciaries with specified information about their services and compensation. A "covered service provider" includes anyone acting as a fiduciary (which a recordkeeper typically does not, with respect to its recordkeeping services) or registered investment adviser, a recordkeeper or broker to a DC plan with participant-directed investments regardless of fiduciary status or type of compensation received, and providers of recordkeeping or certain other services to any type of pension plan in exchange for indirect compensation. Failure to provide the required disclosure is a violation of the prohibited transaction rules of ERISA § 406, since the failure prevents the service provider from relying on the prohibited transaction exemption for the provision of services in exchange for reasonable compensation. Most recordkeepers require the fiduciary to acknowledge receipt of a Section 2550.408b-2 disclosure, but in order to give that acknowledgment, the fiduciary needs assurance in turn that the recordkeeper's disclosure includes complete information.

25. It is worth noting that a contract's data security clause should be coordinated with any "force majeure" clause also present in the contract.

26. *Divane v. Northwestern Univ., supra* n.5; Jacklyn Wille, "Vanderbilt Can Settle Retirement Plan Suit for $14.5 Million," *Benefits & Executive Compensation* (May 31, 2019).

27. *See* Jacklyn Wille, "Shell, Fidelity Sued over 401(k) Fees, Handling of Investor Data," *Benefits & Executive Compensation* (January 27, 2020) ("'Shell Defendants allowed the Fidelity Defendants to use Plan participants' highly confidential data, including social security numbers, financial assets, investment choices, and years of investment history to aggressively market lucrative non-Plan retail financial products and services, which enriched Fidelity Defendants at the expense of participants' retirement security,' the participants said in their Jan. 24 complaint.")

28. *See generally* Lydia Wheeler, "Sharing of Workers' 401(k) Data 'New Frontier' in Litigation," *Benefits & Executive Compensation* (February 13, 2020).

29. For example, for plans with participants and beneficiaries in California, the California Consumer Privacy Act must be taken into account. New York recently enacted legislative protections addressing sensitive personal data like Social Security numbers. And the European Union has a robust data protection regime.

30. *See* DOL Advisory Opinion 2002-08A (August 20, 2002).

31. This process is much less common in the large plan marketplace, and most recordkeepers seeking a large plan's business will agree to an affirmative consent requirement if the plan insists. Plan fiduciaries may agree to a limited notice-and-deemed-consent process in the case of amendments necessary to implement legal changes, or which add services or reduce fees and could not have an adverse effect on the plan.

32. *See* 29 C.F.R. 2550.404c-5(c)(3) (requiring 30 days' advance notice if participants' accounts will be invested into a QDIA); ERISA § 404(c)(4) (requiring 30–60 days' advance notice in the event of a "qualified change in investment options"); 29 C.F.R. 2550.404a-5 (30 days' advance notice of changes to administrative fees and investment options) and 29 CF.R. 2520.101-3(b)(2) (30-60 days' advance notice of DC plan blackouts in most cases).

33. In this regard, it is important to note that it is not simply a matter of confirming that selections in the adoption agreement align. Often, one plan may include a provision in the basic plan document while the other makes the provision a feature for selection, and this is a common source of conversion errors. For example, a recordkeeper may not notice that the old plan document had a provision in the basic plan document allowing for in-service payments to begin at normal retirement date, because its document makes that a choice for selection in the adoption agreement, and fail to check the necessary box to preserve this feature. The two documents may also differ in administrative details (such as contractual statutes of limitations for benefit claims, or the administrator's ability to impose procedural restrictions on elective deferrals).

34. Typically, a conversion for a participant-directed DC plan requires a blackout notice, updated QDIA and fee disclosure notices, and, if applicable, updated automatic enrollment and/or safe harbor notices, all typically due 30 days in advance. (A DB plan is not required to provide a blackout notice, but it is advisable to alert participants if their ability to elect or receive payment will be suspended for a period of time.) Changes associated with the conversion may also require a new summary plan description (SPD) or summary of material modifications (SMM). A new SPD or SMM typically is due within 210 days after the end of the plan year in which the change is approved, but may need to be provided more promptly in some cases (such as if an SPD is also a prospectus for a company stock fund, or will be referred to in the safe harbor notice). Normally, it is advisable to provide the new SPD or SMM as promptly as reasonably possible. If the conversion will be accompanied by a freeze or reduction in plan participation or benefits for a DB plan or money purchase pension plan, the plan will need to provide a 204(h) notice, which in most cases will be due at least 45 days in advance.

35. These situations have become increasingly common as the baby boomer generation ages, particularly since plans often did not update their Schedule SSA listings of terminated vested participants when payment was made, and participants therefore may receive a Social Security Administration notice of possible past plan benefits that were in fact already paid out to them. Minimizing the risk of these situations is a significant advantage of diligently updating Form 8955-SSA filings.

36. *See generally*, Leslie E. DesMarteau, "The Employee Benefits Filing Cabinet," *Benefits Law Journal* Vol. 24, No. 2 (Summer 2011).