HELPING PLAN SPONSORS NAVIGATE STABLE VALUE IN A BUNDLED ENVIRONMENT

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Fiduciaries under the Employee Retirement Income Security Act ("ERISA") are responsible for the prudent selection and monitoring of service providers and the prudent selection and monitoring of investments. These two duties are independent of one another (as further described below), and they should remain independent from each other even when pricing is bundled for investments and recordkeeping services.

A quick reminder that plan fiduciaries have five core obligations:[1]

1. Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
2. Carrying out their duties prudently;
3. Following the plan documents (unless inconsistent with ERISA);
4. Diversifying plan investments; and
5. Paying only reasonable plan expenses.

> *"The best practice for plan fiduciaries is to separately evaluate the recordkeeper and the investment options to ensure the prudent process is followed and independently documented."*

Plan fiduciaries must use caution when a recordkeeper requires a plan to select the proprietary investments on its platform. One of the more common examples of this is when a recordkeeper requires plans to invest into its proprietary guaranteed or stable value option. When considering recordkeeping fees that are deeply discounted or zero, especially if they are bundled with proprietary funds, plan fiduciaries may want to stop and consider that:

- The duty to select and monitor service providers is a distinct, prudent process from the duty to prudently select and monitor investments.
- These processes should be well documented for each asset class.
- Plan fiduciaries should evaluate the plan's investment options on their own, independent of any discounts on certain plan services.

[1] See DOL, Meeting Your Fiduciary Responsibilities, available here: www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf

As plan fiduciaries face the complexities of their fiduciary obligations, plan fiduciaries may wish to consider these potential traps, opportunities, and best practices:

Disentangle Service Provider and Investment Fees: As you can see, recordkeepers may present pricing that includes lower recordkeeping fees alongside the requirement to use the recordkeeper's proprietary investment options, such as a target date fund, stable value or guaranteed fund, and/or other proprietary products and services. While it is not an explicit violation of ERISA to accept this arrangement, it remains the prudent fiduciary's duty to select and monitor the investments independent of the recordkeeping services. The best practice for plan fiduciaries is to separately evaluate the recordkeeper and the investment options to ensure the prudent process is followed and independently documented. Plan fiduciaries may consider requesting that recordkeeping pricing be provided independent of investment options so that objective decisions may be made on investments and recordkeeping. For example, many recordkeepers provide multiple versions of pricing, including both an option that includes proprietary investments and one without proprietary investments.

While you may be wondering about the potential harm in running the two processes together given that you may get substantially lower recordkeeping fees, doing so may result in "short term gain, for long term pain." For example, with stable value funds, when a clear due diligence process is not separately undertaken when evaluating recordkeepers and investments, then there might be several consequences. Participants may be faced with a lower stable value crediting rate just to get lower recordkeeping fees in the short term. Likewise, there may be portability constraints that in the short-term are inconsequential but could have long-term impacts to the plan and its participants. These consequences could be complex, and a plan fiduciary should understand them in advance of selecting a recordkeeper's proprietary stable value product.

Consider these potential traps, opportunities and best practices:

- ***Disentangle Service Provider and Investment Fees***
- ***Investment Policy Statement and Breach of Fiduciary Duty***
- ***Review Recordkeeper Contractual Provisions***
- ***Identify all Sources of Service Provider Payments***

Investment Policy Statement and Breach of Fiduciary Duty: ERISA does not require plan fiduciaries to have an investment policy statement (IPS); however, many well-run retirement plans utilize an IPS or other documented investment objectives. Once a plan implements an IPS, then the plan must follow it, as the IPS is considered part of the plan's documents. Failure to follow the IPS may be considered a breach of fiduciary obligation.

In the context of our example from above, if the plan has a process for selecting and monitoring designated investment alternatives (DIAs or investments in the line-up) and one of the DIAs in the investment menu is a stable value fund, then the plan must follow the process to select, monitor, and, if warranted, replace the stable value fund. When presented with "packaged pricing" for lower-cost recordkeeping, coupled with a proprietary stable value option, it could be a breach of fiduciary duty to not follow the process for selecting and monitoring each DIA of the plan. In the end, the plan fiduciaries may arrive at the same result by selecting the proprietary investment option, but at a minimum, the process and documentation of the process should demonstrate an objective decision.

Review Recordkeeper Contractual Provisions: Recordkeepers may contractually set a fee in their agreement that is tied to proprietary investments. If those investments are ever changed, then the recordkeeping fee may change. Plan fiduciaries are encouraged to determine if they can negotiate the agreement with the recordkeeper, where possible, such that recordkeeping fees are not tied to investment options; alternatively, plan fiduciaries should understand these provisions and be prepared to continue to make investment decisions independently, based on the plan's IPS or other stated investment objectives and process.

Identify all Sources of Service Provider Payments: Service providers have multiple business lines. If recordkeeping fees appear to be "free," then there may be another source or sources of payment to the recordkeeper that may not be clear on its face. Therefore, plan fiduciaries should identify all sources of revenue to the service providers.