ECKERT SEAMANS

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EMPLOYEE BENEFITS ALERT

FIDUCIARY CONSIDERATIONS FOR PLANS WHEN SELECTING RECORDKEEPERS

A recent ruling by the Seventh Circuit Court of Appeals leaves open the question of whether fiduciaries of 401(k) plans should periodically put the recordkeeping function for their plans out to bid. The idea that a plan sponsor needs to "test the market" every three years has highlighted the potential liability that plan fiduciaries have when selecting 401(k) plan recordkeepers.

The hiring of a 401(k) plan recordkeeper is a fiduciary function under the Employee Retirement Income Security Act of 1974 ("ERISA"). Recent litigation like the Kraft Foods case focuses on whether the direct and indirect fees that recordkeepers charge for their services are reasonable, but cost is only one consideration for plan fiduciaries evaluating a recordkeeper. When evaluating a recordkeeper, plan fiduciaries should engage in an objective process designed to elicit information necessary to assess the qualifications of the recordkeeper, the quality of the work product and the reasonableness of the fees charged in light of the services provided, while taking care to avoid any arrangements with self-dealing, conflicts of interest or other improper influence.

Requesting information from recordkeepers is a good way for plan fiduciaries to obtain this necessary information. When requesting information from prospective recordkeepers, plan fiduciaries should provide each of them with complete and identical information about the plan and the services needed to make a meaningful comparison. According to a publication put out by the U.S. Department of Labor called "Meeting Your Fiduciary Responsibilities," when looking to hire a recordkeeper, plan fiduciaries should consider: (1) information about the firm itself such as the financial condition and experience with retirement plans of similar size and complexity; (2) information about the quality of the firm's services including the identity, experience, and qualifications of professionals who will be handling the plan's account; any recent litigation or enforcement action that has been taken against the firm; and the firm's experience or performance record; and (3) a description of business practices including the proposed fee structure and whether the firm has fiduciary liability insurance.

To demonstrate compliance with ERISA's fiduciary requirements, plan fiduciaries should document this selection (and monitoring) process, including the specific reasons for the selection of a particular provider. If plan fiduciaries end up selecting or retaining a recordkeeper with whom the plan sponsor has other business, for example a firm with whom the plan sponsor has a banking arrangement, plan fiduciaries should be even more careful about the selection process and make sure to document the appropriate reasons (not related to that other business arrangement) that particular firm was selected or retained.

*The Employee Benefits Alert is intended to keep readers current on matters affecting employee benefits and is not intended to be legal advice. If you have any questions about this alert or any other issues relating to employee benefits, please contact **Kathryn English** at 412.566.1226, **Michael Herzog** at 412.566.6130, **Malgorzata (Gosia) Kosturek** at 412.566.6180, **Sandra Mihok** at 412.566.1903, **Brandon Richards** at 412.566.1263, or **Paul Yenerall** at 412.566.1944.*