

# Request for Proposals: Retirement Plan Sponsor Fiduciary Considerations

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**PRACTICES** ERISA and Other Benefits Litigation, Employee Benefits and Executive Compensation

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As part of a plan sponsor's fiduciary responsibility under ERISA to administer the plan in the best interest of plan participants and beneficiaries, plan sponsors have a duty to monitor third-party service providers to the plan with respect to both the services being provided and the fees charged for such services. A Request for Proposal ("**RFP**") provides the plan sponsor with the opportunity to solicit and review possible plan service provider candidates and compare such providers' services and fees. It may also serve as an opportunity to re-negotiate fees being charged by the plan's current service providers.

The DOL generally recommends that retirement plan sponsors conduct RFPs once every three to five years. Further, the DOL has indicated that, at reasonable intervals, the performance of service providers should be reviewed in such manner as may be reasonably expected to ensure their performance has been in compliance with the terms of the plan and ERISA, and also satisfies the needs of the plan. In addition, plan administrators should annually request an independent benchmarking of service providers' fees.

There are certain key provisions, as further described below, which should be included in every RFP. Involving plan counsel in the RFP process can help ensure the RFP contains these key provisions. It may also give the plan sponsor a leg up in negotiating the service agreements resulting from the RFP, since counsel can request that the RFP responses address certain items, such as indemnification and termination provisions, that will later be included in the service agreements.

- **Description of services and fees:** The RFP should ask specific questions regarding the scope and cost of the provider's services. Plan sponsors have a fiduciary duty to determine that the services are necessary and provided at no more than reasonable compensation. As part of this requirement, service providers must provide plan sponsors with a service provider fee disclosure notice reasonably in advance of entering into a service arrangement for the plan sponsor to review.
- **Review of the service provider's background:** A review of the service provider's experience is necessary to determine whether it has the appropriate expertise and background to provide the requested services to the plan. This would also include questions regarding any prior violations, audits, potential conflicts of interest, and references.
- **Communications:** The RFP should clarify how often the service provider will communicate with the plan sponsor and whether the service provider will, on behalf of the plan sponsor, distribute any required initial and annual participant plan-related notices.
- **Specimen service agreement:** The RFP should require the service provider to provide a copy of its specimen service agreement to confirm that the services outlined within the RFP are consistent with the agreement and that the agreement's limitation of liability,

indemnification, statute of limitations, and termination provisions are acceptable and comply with applicable law and other guidance issued by the DOL, including the DOL's best practices guidance regarding cybersecurity language that should be included in service agreements.

As noted above, it is important for a retirement plan sponsor to engage in an RFP process as part of its fiduciary duty to review the plan's services and fees. By including the provisions provided above in the RFP, a plan sponsor can clearly identify the scope of the services and evaluate whether such services are provided for reasonable compensation prior to finalizing its choice of service provider, which should help minimize any surprises as part of the relationship.