How to Properly Conduct an RFP

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People’s Reaction to ERISA
Origins of ERISA
Investigations

EBSA Enforcement Statistics

- $1.6B recovered for direct payment to plans, participants, beneficiaries
  - $1.1B Enforcement Actions
  - $443.2M Informal Complaint Resolutions
- Over 1,329 civil cases closed; 64.7% with results
- 111 cases referred for litigation; 56 federal lawsuits filed

DOL Investigation—Interview

Plan Expenses

- Proper services for which payment can be made by a plan?
- Review procedure for monitoring any such expenses.
- Many participants in the plan? When are they eligible to participate in the plans?

Service Providers

- Who are your service providers? What service do they perform? How were they selected?
- Any request for proposals? Who prepared the RFP and under what guidelines?
Lawsuits

- DOL—Solicitor’s Office
- Private Litigation—$Billions
  - Plaintiff Attorney—$20.8M fees/expenses—ABB
ERISA Background

Who is a fiduciary?
• ERISA Section 3(21)
• De facto fiduciaries

Selection of plan service provider = discretionary authority/control

Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.
(Benjamin Cardozo)
ERISA §404 Fiduciary Duties
(“Duty of Care”)

• “Eye single” to Participants and Beneficiaries
• Diversification
• Prudence
• Follow plan documents, unless contrary to ERISA
Prudence

• "All that is required of a trustee to invest is, that he shall conduct himself faithfully and exercise sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." Harvard Coll. v. Amory, 26 Mass. 446, 461 (1830)

• CARE, SKILL, PRUDENCE under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character with like aims.

• What a hypothetical prudent fiduciary would do under comparable circumstances?
Prohibited Transactions
(“Duty of Loyalty”)

• Prohibited Transactions
  – (a) Violations—between a Plan and PII
    • PII: The employer, the union, plan fiduciaries, service providers, and statutorily defined owners, officers, and relatives of parties-in-interest
    • Furnishing of goods, services, or facilities
    • per se PT
  – (b) Violations—Fiduciaries
    • Self-dealing
    • Kickbacks
Exemption

• ERISA 408
  – Contract or arrangement—*reasonable*
  – Services—*necessary* for the establishment or operation of the Plan
  – No more than *reasonable* compensation is paid for services
ERISA 409—Personal Liability
Complaint

• Mr. or Mrs. CEO/Fiduciary—defendant
  – Due to the discretionary authority = fiduciary
  – Engaged in non-exempt PT by contracting with a service provider
  – B/F by failing to go out to bid and determine market for the fees being paid to service provider
  – Accordingly, defendant paid excessive fees
  – Defendant is personally liable to make the plan whole for losses resulting from the breach
ERISA Requirement—RFP?

George v. Kraft Foods, 641 F.3d 786 (7th Cir. 2011)

• Selection: Soliciting bids among SP at the outset is a means by which the fiduciary can obtain the necessary information relevant to the decision-making process.

• Monitoring:
  • Fiduciary's knowledge of a service provider's work product
  • The cost and quality of services
  • Fiduciary’s knowledge of prevailing rates for the services
  • Cost to the plan of conducting a particular selection process.
Conducting the RFP

- Objectively illicit information about the quality of services v. fees charged

- Lowest bidder is not the standard
  - “You get what you pay for”
  - Not required to “scour the market”
Process

• Issue rules
  – Communications must be transparent to all bidders

• Key sections of Proposal
  – Plan and plan sponsor background
  – Scope and Criteria
    - Services to be provided—extremely clear as to required services and wish list services
Qualifications

• About the Firm
• About the individual team members
  – Request individual bios
  – Conduct background check
  – Check references
Define Services

- Investment
- Participant
  - Recordkeeping and administration
  - Communication/education
- Compliance
- Vendor
Fees

- Administrative fees
- Asset-based fees
- Commissions
- Employee communication and educational materials
- On-site meetings
- Revenue sharing
Contractual Provisions

• In RFP decide whether to insert mandatory contract provisions
• Insurance
• Indemnification
Process—Compare proposals

- Create Chart compare apples to apples
  - Materials/responses are not clear—

- Create score card
  - 0—Totally unresponsive, does not meet minimum requirements
  - 1—Well below average, barely meets minimum requirements
  - 2—Slightly below average, meets minimum requirements
  - 3—Average, meets minimum requirements, exceeds minimum requirements in some areas
  - 4—Above average, exceeds minimum requirements in many or all areas
  - 5—Outstanding, far exceeds minimum requirements in most areas
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<th>Weight</th>
<th>Score</th>
<th>Weighted Score</th>
<th>Score</th>
<th>Weighted Score</th>
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<td>4</td>
<td>1.40</td>
<td>5</td>
<td>1.75</td>
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<tr>
<td>Prior Experience—e.g., history, review of clients</td>
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<td>4</td>
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<td>Quality of Service—e.g., provide all the services needed, delivery, ease of</td>
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<td>0.70</td>
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Total: 1.00
Finalists Interviews

• Memo to file—how finalists were selected
• Create interview questions to ask all finalists
• Create interview questions to specific providers based on the proposal
Post-Interview Negotiations

• If it’s close, then see if higher bidder willing to match lower bidder
• Check/compare contractual requirements.
Selection of Vendor

Contract Negotiations = “Reasonable Contract”

• Parties and scope of agreement
• Reps, warrantees, covenants
• Rights reserved to plan sponsor
• Confidentiality
• Termination—penalties? time frames?
• Insurance and Indemnification
  – Gross negligence =
• LOLs and SOLs
• Arbitration
Documentation

Perez v. GreatBanc Trust Co.—Selection of Valuation Advisors—Avoid conflicts of interest

• Plan sponsor will prepare a **written analysis** addressing the following topics:
  - The reason for selecting the particular valuation advisor;
  - A list of all the valuation advisors that the plan sponsor considered;
  - A discussion of the qualifications of the valuation advisors that the plan sponsor considered;
  - A list of references checked and discussion of the references’ views on the valuation advisors;
  - Whether the valuation advisor was the subject of prior criminal or civil proceedings; and
  - A full explanation of the bases for concluding that the plan sponsor’s selection of the valuation advisor was prudent.
Monitoring

• Evaluate any notices from provider about changes to compensation or other changes from original arrangement.
• Review performance.
• Evaluate work product/reports.
• Check actual fees being charged.
• Follow up on participant complaints.
Key Takeaways

• Selection process of a service provider is a fiduciary act.
• Must act prudently and negotiate a reasonable contract for reasonable fees for the necessary services to the plan.
• Must be objective and void of conflicts.
• Must continuously monitor service provider.
• Documentation—*based on the following reasons . . . we believe selecting XYZ provider would be in the best interest of the participants and beneficiaries.*