

Monitoring Call Centers

Is it a fiduciary duty to know what they tell participants?

Plan sponsors need to know what their service providers are saying to participants about distributions and rollovers. At the least, this is good risk management. But it may also be a fiduciary duty. Sponsors, which typically act through their plan committees, select the recordkeeper as a service provider and the call center as one of the services. As a result, plan committees have a fiduciary duty to monitor those services. While that duty is not well-defined, at least in its details, it could include overseeing the communications between the recordkeeper and participants.

For example, Jerome Schlichter, a leading plaintiffs' class action attorney, with Schlichter Bogard & Denton, stated that "if the plan sponsor provides access to someone pushing IRA [individual retirement account] products, that raises the question of whether there is a fiduciary breach. ... The plan sponsor should monitor communications to participants with an eye out for ... red flags."

When committees monitor their service providers, the focus is usually on performance, compensation and capabilities, not on ancillary services such as distribution discussions. But, as suggested, these services are now being scrutinized.

Government regulators and policymakers believe participants should receive clear, comprehensive and unbiased information about their distribution options so they can make informed choices. A study by the Government Accountability Office (GAO) found that some recordkeepers provided inadequate information and used sales tactics to move participants into IRA rollovers that were more profitable for the provider, and not necessarily in the participants' best interest.

Our own experience, out of fairness to recordkeepers, is that few of them, if any, engage in high-pressure tactics; most take an information-based approach to participant distributions. Even there, though, some emphasize their own products in a way that resembles sales more than education.

Because it is the service relationship with the plan that gives a recordkeeper access to participants, committees should assure themselves that participants are being given clear, complete and unbiased information. That information should be provided in the context of education about distribution options and the considerations for making decisions among those options. For example, participants usually have only four choices: to leave the money in the plan; transfer the money to the plan of a new employer; take a

distribution as an IRA rollover; or take a taxable distribution.

There are a number of factors that a typical participant must keep in mind when making an informed decision. While a full discussion of those is beyond the scope of this column, four important considerations stand out:

- **Range of investments.** Are the plan's investments suitable for developing a portfolio that is appropriate for the participant, or would a broader range of investments in an IRA be preferable?
- **Expenses.** Are the plan expenses for investments, administration and advice more or less than comparable costs in an IRA?
- **Services.** Does the plan provide needed advice and services, or would an IRA offer more value?
- **Distribution flexibility.** Does the plan permit periodic and special distributions? Are there charges for the distributions? Is the flexibility of an IRA needed for the participant's circumstances?

Committees should monitor their providers' conversations and written communications to ensure participants are receiving educational information and are not being steered into IRA rollovers by sales tactics. If properly run, the call center and website can provide important services to help participants retain their retirement money in tax-favored vehicles, such as plans and IRAs.

What Should Plan Committees Do?

Plan committees should also know what participants are told when they talk to the recordkeeper's call center. The committee should ask the recordkeeper to supply information about its call center policies and procedures, the script used by phone representatives for discussing distribution options, as well as any written materials provided to participants. A member of the plan committee, or someone from human resources (HR) or benefits, might contact the center and discuss taking a distribution. In this way, you can make sure participants are being educated on their four distribution options and the important considerations for choosing among them.

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Fred Reish is a partner at Drinker Biddle & Reath LLP's employee benefits and executive compensation practice group, chair of the financial services ERISA team and chair of the retirement income team. **Bruce Ashton**, a partner at the company, and **Joshua Waldbeser**, an associate, contributed to this article.