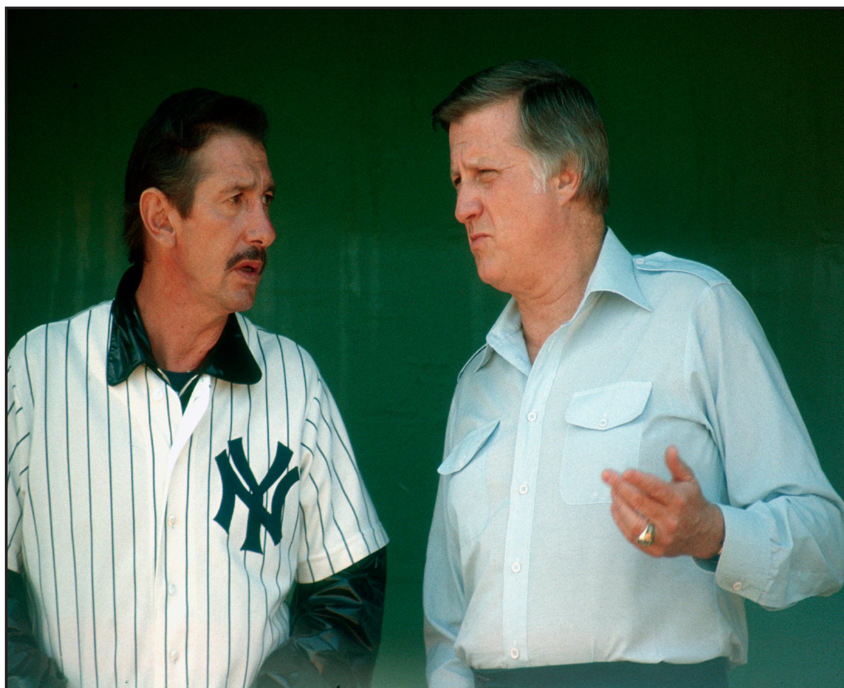
When You May Have To Fire Your 401(k) TPA

By Ary Rosenbaum, Esq.

Saying goodbye is never easy, but there are certain times when you need to do it. Personally, I've had to say goodbye to certain places of employment, friends, and organizations because it was the end of the line, and keeping the relationship continuing would have caused greater harm. There are many times where you do need to say goodbye. As a 401(k) plan sponsor, that goodbye is when you have to fire a plan provider. When it comes to firing a third-party administrator (TPA), there are many reasons why you have to fire a TPA and there are reasons when you have no choice. This article is about when you may have to fire your TPA.

Their fees are unreasonable

As a plan sponsor, you're also a plan fiduciary. As a fiduciary, you have the highest duty of care in law and eq¬uity. One of your fiduciary duties is that you have to pay reasonable expenses to plan providers for the services they provide. That means you don't have to pick the cheapest provider; you just have to make sure that the fees are reasonable for the services provided. That means that you can always pay more as long as the services warrant. So you can pay white-glove prices for white glove treatment. The problem with fees is that you really don't know if they're reasonable if you aren't shopping for prices. Many years ago, my wife and I used a contractor that we didn't know was expensive until we shopped after one project bid by him came in way too high. If I pay too much for a contractor, that's my problem. As a plan fiduciary, the problem is a lot bigger because you're responsible for the plan assets of your employees. So as a plan sponsor to fulfill your fiduciary duty in a prudent manner, you need to benchmark the fees that the plan is being charged. Whether it's actually shopping the plan out to other TPAs or using a benchmarking service, you do need to make sure that the fees being charged are reasonable for the services provided. If you determine the fees being charged are unreasonable, you need to negotiate with the TPA to lower it to a level that is consistent with what the marketplace charges for a similar level of service. If the TPA is unwilling to



negotiate, you have to fire the TPA. As a plan sponsor, you're violating your fiduciary duty if you're paying for services that are unreasonable for that level of work. So you have no choice, but to fire them because the repercussions can be costly. According to the fee disclosure regulations, you can run the risk that your contractual relationship with the TPA can be considered a prohibited transaction. A prohibited transaction can risk to excise taxes, as well as subject you to possible litigation by the government and/or an aggrieved plan participant. No TPA is worth the headache if they're charging you too much in fees.

They're making too many errors

Being a TPA is hard work. I know that because I served almost 10 years as an attorney for TPAs and I do represent TPA clients on retainer. As a 401(k) plan sponsor, you need a TPA to handle the day-to-day administration of your 401(k) plan because you don't have the time or the knowledge to handle it yourself. The problem is that you're essentially at the mercy of the TPA's competence. What does that mean? That means you're dependent on your TPA doing a competent job in the processing of transactions, in their job of allocating contributions to participants, in their job of completing compliance testing, and their job of preparing Form 5500. If they don't their job, it's your problem. If they fail to properly do the compliance testing and it's caught on a government audit, it's on you to fix it by making corrective contributions, which comes out of your pocketbook. It's that way because as a 401(k) plan sponsor, you're on the hook for liability whether it's your fault or not because you're a plan fiduciary and your TPA isn't (unless they assumed that responsibility or completed a fiduciary act, which isn't likely). So if your TPA fails to complete the 5500 and tell you about it and you get a penalty letter for tens of thousands of dollars, you have to pay for it. Sure you can sue your TPA for negligence, but the Internal Revenue Service (IRS), the Depart-

ment of Labor (DOL), and a plan participant's ERISA litigator don't care. As a plan sponsor, you can't afford to have TPAs that make too many errors and it's your fiduciary duty to only hire competent plan providers. Even the greatest TPAs make errors because it happens. If they can discover their error and fix it, there is nothing wrong with it. No TPA is perfect, but you can't keep a TPA that is making too many mistakes that put you in harm's way.

There is too much turnover at your TPA

I once worked at a place where there was so much turnover that I joked that we should have a revolving door. Turnover at any company is usually a reasonable part of the business. The problem is when that turnover is more than just a reasonable course of business. As a 401(k) plan sponsor, you need to have a level of service from your TPA that is both consistent and competent. Working with a TPA, you usually have one person to contact. If not, you usually have a team to contact. You should have a concern when your one contact or multiple contacts are changed on a consistent and frequent basis. A consistent change where these contacts are leaving the employ of your TPA is a sign that there are issues with your TPA. Constant turnover, in my opinion, is a sign that a business has a problem in maintaining their staff. Constant replacing staff is costly, from the point of hiring new employees and the cost of training them in time and money. From a plan sponsor's viewpoint, it's very disconcerting when the contact(s) to the TPA is consistently changing in a game of musical chairs. If your day-to-day contact is doing such a great job and is being promoted, that's fine, but when there is a consistent turnover, it's a point of concern. A TPA in the time of upheaval is a problem spot and it's a large enough concern that a change of TPAs might be needed.

They are reactive, not pro-active

When I was working for a TPA, the salesman brought me to meet a potential client. The client had a 401(k) plan that has such disastrous testing results, all of the highly compensated employees had to receive a refund of their salary deferrals. For example, the owner of the company received a taxable refund of $10,500 of her salary deferrals. The plan was being administered by a TPA that was in the payroll business and didn't have a great reputation as a TPA. While the 401(k) plan consistently failed its discrimination testing, the payroll provider TPA never bothered to discuss with the client about the possibility that a safe harbor contribution should be implemented that could be used to eliminate the need for discrimination testing by making that required contribution. More importantly, the payroll provider TPA never bothered to highlight that the testing results indicated that the 401(k) plan could fix the failure by only making a $7,500 corrective contribution. So to save the owner's $10,500 contribution, only a $7,500 qualified non-elective contribution would have to be made. Yet the TPA never bothered to discuss that fact either. Good TPAs are pro-active, bad TPAs are reactive. A good TPA would have told this 401(k) plan sponsor that a safe harbor contribution is probably the best method going forward to fix failed discrimination testing, a bad TPA won't. As a plan sponsor, you need a TPA that is on top of their game that can identify problems in your plan and offer a way to fix them. You can't afford a TPA that can't identify the issues that you have in the plan and a way to address them. A TPA that is reactive only fixes things when they break, rather than before they break. A TPA that isn't pro-active by offering solutions that can help you is of no help to you.

They don't communicate with you

I once had a TPA administrator try to explain how he reconciled a daily 401(k) plan on a quarterly basis. I'm sure you can, but not very well. The same can be said of communication from TPAs on a daily valued 401(k) plan, some think they can get away by communicating once a year. Your TPA needs to be in constant contact with you. It could be to tell you of upcoming deadlines or to fulfill notice requirements. Whatever the requirement is, you need a TPA that is in constant communication with you because of the nature of a daily 401(k) plan. You're paying a TPA thousands and thousands of dollars in administrative fees, so there is nothing wrong in expecting the TPA to contact you when they need to. A daily 401(k) has so many moving parts, you always need to know how you fulfill your fiduciary duty. And that is through communication by your TPA. If your TPA seems to be in the witness protection program because you don't hear from them on a consistent basis, it may be time for a change.

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