The Times You Can't Trust Your 401(k) Plan's TPA

By Ary Rosenbaum, Esq.

Trust is one of the most important facets of my life. As you know, trust is the willingness of one party (the trustor) to become vulnerable to another party (the trustee) on the presumption that the trustee will act in ways that benefit the trustor. I always say that if I don't trust you, you serve no purpose to me and that's probably because when I was younger, I was betrayed far too many times (that's my insecurity to bear). As a 401(k) plan sponsor, you need to trust your Third Party Administrator (TPA) and there are some signs when you can't.

Most TPAs you can trust

When I first started my law practice 13 years ago, I was very critical of what some TPAs were doing. It led some people to think I was anti-TPA, I'm not. As an ERISA attorney who served to work for TPAs for 9 years and 16 years not, I do appreciate the work that good TPAs do. So I want to preface that you could probably trust 95% of the TPAs out there.

When you don't get fee disclosures or the full story

As a 401(k) plan sponsor, you have a fiduciary duty to only pay reasonable plan expenses. That was a major problem when most TPAs never truly broke down the fees that they were directly or indirectly receiving for helping administer the plan. Many TPAs, including the ones that I worked for, didn't reveal that they were receiving revenue-sharing payments from certain mutual funds for recordkeeping these funds within a 401(k) account. There were TPAs out there who claimed to their 401(k) plan sponsor client that they were slashing fees but ended up making more money through revenue sharing by changing platforms. That was supposed to change with fee disclosure regulations, but there are TPAs that neglect to furnish fee disclosures or fee disclosures that are so convoluted, that a forensic accountant and/or ERISA attorney need to figure things out. If you can't figure out what your TPA is charging you, you can't trust them.

When the TPA wants you to do too much

One of the knocks that I will always have against the TPAs that are the two top payroll providers in the country (hello ADP and Paychex) is that they expect too much knowledge from the plan sponsors. The rules that qualified plans have to abide by in the Internal Revenue Code and ERISA are highly technical, so these payroll providers expect too much from their clients and don't do enough handholding. Something as simple as a 401(k) plan sponsor filling out a census form might require some help from a TPA because I assure you that most plan sponsors don't know what a controlled group is, or a highly compensated employee is. If a plan sponsor has no idea how to provide information, the information will likely be incorrect. Garbage in, garbage out, and the bad TPA won't figure it out and the testing results will be incorrect. You can't trust a TPA that can't spoon-feed you on what you need to do.

The TPA doesn't provide annual valuation and/or provides incorrect testing

I believe that the most important function for TPAs besides the daily recordkeeping is the annual testing. 401(k) plans need to be tax-qualified and the way to do that is to abide by the terms of the Internal revenue Code. That requires discrimination testing to make sure that the plan doesn't discriminate in favor of highly compensated employees. Those tests include coverage, deferrals, matching contributions, and overall benefits. Those tests must be done annually and are part of an

annual valuation report. You can't trust a TPA that doesn't provide you with annual valuation reports and you certainly can't trust one that does the compliance testing correctly. Incorrect testing is often not discovered until years later by the successor TPA or more costly, by an Internal Revenue Service agent. Bad administration of this plan by your TPA will cost you and you can't afford to have such an important plan provider do such a terrible job.

A TPA that doesn't review your plan

I always say you are hired to be fired. No matter how great a TPA is, it will be gone one way or another, either voluntarily or involuntarily. You can't trust a TPA that does their work, without coming to you every once and a while to review the plan and your standing. When you hired the TPA to handle your plan, it didn't mean your demographics and budget for employer contributions stood pat. Your plan can start failing discrimination testing over time or maybe you can fund contributions to avoid the testing and reward highly compensated employees. A good retirement plan is like a suit, it must be tailored to fit. Sometimes you lose weight or gain weight and that suit must be modified. A retirement plan is no different, it has to be tailored to your need and your needs change over time. You can't trust a TPA who doesn't let you know what you need to know to keep a plan that still fits your needs.

The TPA is silent on the deconversion process

As discussed, you are hired to be fired. Yet, TPAs think this is some marriage between your plan and them and they're awfully silent as to what happens when you want to fire them. Most fee disputes these days between plan sponsors and TPAs revolve around termination costs known as the deconversion process. Most TPAs are silent as to the costs of firing them and the cost of deconverting from them to another TPA. Some TPAs use this deconversion process as spite and charge plan sponsor exorbitant fees for firing them, as well as redundant fees for valuations and Form 5500s belonging to the plan year they were paid, even if they are completed in July or October over the following year. Having made a complaint against a Florida and New Jersey-based TPA almost two years, the Department of Labor is looking at this problem. TPAs don't need to be exact on termination costs, but plan sponsors need to know the ballpark of fees. You can't trust a TPA that is so secretive about the process and cost of firing them.

The TPA doesn't play well with other plan providers

The problem kid in kindergarten is the one you remember that didn't play well with others. As a 401(k) plan sponsor, you can't afford to have a TPA that doesn't play well with others. Not playing well with other plan providers could be not cooperating with the plan's financial advisor or auditor. It also could be the situation where the TPA wants to usurp the financial advisor to benefit an advisor they favor or because they also happen to be in the financial advisory business, themselves. I have worked for "producing" TPAs, which means they had their own affiliated financial advisory firms and that was a potential problem for the advisors that were wary to bring the business up. A TPA can't be everything for everybody, so it's important that they can handle their job without the distraction of trying to be everything. There are some TPAs that just won't cooperate with the financial advisor to the plan and that's a problem because most financial advisors are the most direct provider, serving as ombudsmen for the plan sponsor to deal with other plan providers. You simply can't trust a TPA that can't work well with other providers because they won't cooperate or they want to handle that provider's job in addition to their role as TPA.

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