

As A 401(k) Sponsor, How You Deal With Plan Provider Cold Calls

By Ary Rosenbaum, Esq.

As a 401(k) plan sponsor, the details of your plan are for public consumption because your annual Form 5500 is available to be publicly viewed. There is a whole cottage industry within the retirement plan industry where details of your plan are sold to plan providers that want information for plan prospecting and they want your business. So expect the phone calls, emails, and even this day, mail from plan providers that want your business. This article is all about how to deal with plan providers that are contacting you for your business.

You're not being disloyal

When a plan provider contacts you about your plan, you need to understand that there is a sales pitch attached to it. You should never act as if speaking to a plan provider is some type of disloyalty to your incumbent provider. The only loyalty as a plan sponsor is to plan participants because as a fiduciary, you only have a duty of loyalty to them. Your current plan providers aren't a spouse, so talking to another plan provider is perfectly acceptable and quite honestly, needs to happen.

As part of doing your job, you need to talk to other providers

As a plan sponsor, you are a plan fiduciary. Part of the process of being a plan fiduciary is exercising your duty of care at the highest level because being a fiduciary

requires the highest of duty of care in equity and law. As part of that fiduciary duty, you need to make sure that your incumbent plan providers are doing the job that they are contracted to do. Too often plan errors committed by your providers are only discovered on an Internal Revenue Service or Department of Labor audit or when there is a change of provider. Perhaps, it might be a good idea for another plan provider



to check on your plan. Keep in mind that any potential plan provider has the bias of wanting to get you as a client, so understand that. Also, fee disclosure regulations require your plan providers to disclose the direct and indirect forms of compensation that they receive for the services they provided to your plan. As a plan sponsor and fiduciary, you have the fiduciary duty to determine whether the fees being charged to the plan are reasonable for the service provided. You can't just take the word of your

plan providers that they are charging a reasonable fee, you need to benchmark their fees against what other providers charge. You need to remember that you require to pay only reasonable plan expenses, not the cheapest plan expenses. Gauging plan providers solely on cost is a recipe for disaster, you have to factor in the level of service to gauge whether the fees are reasonable or not. Speaking to a plan provider that

contacts you in one form or another can be an excellent gauge to determine whether the fees being charged by the incumbent provider is reasonable or not. How many times was I taken in by a home contractor, just because I didn't bother to check out there among other contractors and whether the fees I was charged were reasonable or not. If you want to pay extra for business expenses, that's on you. So talking to another provider who contacts you can be used as a way to exercise your duties prudently.

Vet any provider you talk to

Years ago, I needed a waterproofing company for my downstairs as the water was coming up from the ground in my basement. I used Google to find a waterproofer. The problem is that I didn't bother to vet them. After hiring them and finding them unresponsive after the shoddy work they did, a short Google search would have discovered that this waterproofing com-

pany had numerous complaints. I would also discover that the perceived owner of the company was a former podiatrist who lost his medical license for Medicare fraud (so his wife was President of the company in name only). When a plan provider contacts you out of the blue without a referral, you only know about them what they tell you. If you don't check up on the plan providers that contact you and engage with you, you may have no idea of their qualifications. While a financial advisor needs some registration to operate and an auditor needs to



be a Certified Public Accountant, there are no licensing requirements for a third-party administrator (TPA) or ERISA §3(16) fiduciary. So anyone including my 14-year-old son can claim they are a TPA or §3(16) administrator. There was a TPA/ §3(16) administrator who was arrested for stealing \$13 million from his 401(k) clients. While he was a TPA for many years, a Google search would have shown that he was sanctioned by the Securities and Exchange Commission a decade earlier for millions in penalties and banned from the securities industry for 3 years. That was certainly a clue that this TPA/fiduciary was someone that shouldn't be trusted with millions of 401(k) assets. As a plan fiduciary, you have a duty of prudence and hiring a plan provider just based on a phone call or email message may come back to haunt you if the provider just isn't up to the task of assisting you. Negligent hiring of a plan provider is a breach of your fiduciary duty of prudence. So even if you talk to the provider who contacts you and it goes nowhere, you still should vet them to make sure they are who they say there are. I know of a couple of plan providers serving time in prison for theft and the common thread among these providers is they lied about their background and their experience. There are plenty of ways to check up the providers who contact you and you can do it for free. You can't afford as a plan fiduciary to assume every plan provider is on the up and up.

Don't be defensive, understand their perspective

Remember that any communication from a plan provider is a sales pitch. That's not to suggest that they're untrustworthy or that they will say anything to get hired, it means that you should understand where they are coming from. They're not going to say how wonderful your plan is if they hope to get hired by you. If they hope to be your plan provider, there is certainly going to be some criticism about your incumbent provider. They may say your incumbent provider is too expensive or causing administrative errors. Whatever it is, there will be some complaints. If this plan provider is way too negative about your incumbent provider and offers no reason why they should be hired, that is also you should note. I made one mistake in life by leaving one job for another just to leave that job. Don't hire a provider just because of the negativity flung about the current provider, only hire plan providers that offer something that could help your plan. When talking to plan providers who contact you, don't be defensive about your plan providers. What this cold calling plan provider says may be accurate or it may be just a sales pitch. So don't take personal offense to anything you hear and on the flip side, don't take what they say as gospel.

The best source is always a referral, usually

People on my community's Facebook groups always make referrals for businesses when people ask for them and stealing a line from Back to School, maybe the people giving referrals are maniacs. The best way to meet a plan provider is through

a referral from a trusted source. Referrals aren't perfect because mistakes can be made especially when the referrer doesn't have first-hand knowledge of the plan provider's work. Speaking for someone who makes referrals, I have seen where referrals have gone wrong. However, a trusted source making referrals to a specific plan provider is more valuable than just relying on a cold call from a provider you have never heard of. If you get the cold call or mail from a potential plan provider and you are interested in meeting them, ask for a list of their current clients so you can

contact them as a way of getting some idea of the competence of this plan provider.

You can always so no thanks

Picking up the phone from a plan provider or opening up communication for them doesn't mean you have to talk to them. I am a plan fiduciary for a \$100 million 401(k) plan and I was taken back by some of the phone calls and messages I have received from plan providers. There are plan providers who aren't very good at communicating with potential clients and there is no legal requirement that you have to talk to specific plan providers. Just remember you have a fiduciary duty to review your plan providers and benchmark their fees.

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**The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557**

<http://www.therosenbaumlawfirm.com>
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