Executive Summary:

Selecting Plan Investments, Services and Providers: Satisfying ERISA’s Fiduciary Requirements Using Fiduciary Benchmarks Insights, LLC Reports

A White Paper by C. Frederick Reish and Nicholas J. White
Fiduciary Responsibility:
ERISA imposes high standards upon fiduciaries responsible for managing the operations of retirement plans – the courts refer to those duties as “the highest known to law.” Although they may be broken down into a number of subparts, these duties are, in substance: (i) the duty of loyalty to the participants and beneficiaries; (ii) the exclusive purpose requirement; and (iii) the prudent man rule. Based on our understanding of ERISA's fiduciary provisions for participant-directed plans, and our review of the services provided by Fiduciary Benchmarks Insights (“FBi”), we have concluded that those services provide substantial support in the performance of those duties.

Description of Fiduciary Benchmarks Services:
FBi is an independent authority on fees, success measures, support and services for defined contribution plans. The company provides plan sponsors with reports that support fiduciary and best practices assessments, as well as information for use in communications with plan participants. To provide its service, FBi has developed a comprehensive database and system to gather and continuously update plan data, and has developed software to build reports that compare a plan's fees, participant success measures, support and services ("benchmarking reports") to a universe of similar plans (the “Benchmark Group”). Its services are available through advisor/consultants, plan providers, and can be accessed directly.

FBi’s benchmarking reports enable defined contribution plan fiduciaries to obtain data that will permit them to assess how their plan compares in multiple respects to the Benchmark Group. The purpose of this information is to assist fiduciaries in fulfilling their obligation to assess their plan’s investment fees reasonableness, services and costs, and to make changes as necessary in the best interests of the plan, the participants and their beneficiaries.
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<th>ERISA Fiduciary Requirement</th>
<th>Reish Comment: How FBi Reports Assist Fiduciaries in Meeting their ERISA duties</th>
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<td><strong>The Duty to Investigate:</strong> Fiduciaries must conduct a thorough investigation and make decisions based on the information they have gathered. In this regard, ERISA requires fiduciaries to use a prudent process. To meet this requirement, they must thoroughly investigate the issues under consideration to obtain relevant information and then base their decisions on the information obtained.</td>
<td>To provide its service, FBi maintains a large database of information, which is continually updated, and has developed software to build reports that compare a plan's fees, participant success measures, support and services to a universe of similar plans. The use of FBi's service provides material assistance to fiduciaries in fulfilling their legal responsibilities in the information gathering, analysis and monitoring phases of the due diligence process.</td>
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**The Duty to Use Outside Sources:**
Fiduciaries are not expected to be experts. They may reasonably rely on the assistance of others in performing the required investigation and data gathering process. One of the key issues in determining whether reliance on the expert is reasonable is whether the expert is independent and unbiased.

The fiduciaries ultimately must make the decisions about a plan’s investments, services and providers; however, in arriving at that decision, the fiduciaries may rely on third parties to assist them in the process. And, indeed, prudence may require them to do so. FBi is an independent organization that focuses on fees, success measures, support and services for defined contribution plans. The company provides plan sponsors with reports that support fiduciary assessments under ERISA. FBi does not make any decisions for the fiduciary; rather, it supports the process by assisting the fiduciaries in assembling the relevant information, and providing a meaningful basis upon which to evaluate that information under the requirements of ERISA.

**The Duty to Prudently Monitor:**
When hiring a service provider or selecting investment, a fiduciary is responsible for making a prudent evaluation of the provider and reasonableness of the fees being charged for the service to be performed. In addition, the fiduciary is responsible for prudently monitoring the activities and reviewing the performance of the provider. Finally, fiduciaries need to review and evaluate the results produced by the provider’s services.

Once the plan is established, there is an additional ongoing fiduciary obligation to monitor the extent to which the plan’s investment, services and providers actually meet the needs of the participants (i.e., are they “working” from a participant perspective), and whether the associated costs are reasonable in terms of the value that is being provided. This monitoring obligation requires both the gathering of a substantial amount of information, and the assessment of that information in relation to some reasonable measurements, or benchmarks. Critical measurements include how a plan’s investments, services, operations and other features compare to similarly situated plans, as well as how the results being produced by the plan’s operations (e.g., participation and deferral rates compare to those plans. That is, fiduciaries should measure how the plan “benchmarks” against a universe of similar plans. This is precisely the information provided by FBi’s reports.