



Oy, Another Conversion? Can It Be Painless?

BY REGINA L. FARMER

The plan conversion (and deconversion) process depends on assembling the right team for the job, devising a course of action, and digging into the details of the plan. Presented in this article are a few helpful guidelines for plan sponsors facing the challenges of executing a successful conversion.

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With the onslaught of litigation over excessive fees, many plan sponsors are changing services providers in an effort to reduce costs, and, more importantly, fulfill their fiduciary obligation to determine the reasonableness of amounts paid by the plan. As a result, plan assets are frequently being moved to a new fundholder. For the new service provider (the one that is receiving the plan assets), the process is commonly referred to as a "conversion." For the old service provider (the one that is sending the plan assets), the process is called a "deconversion."

For both the plan sponsor and the service providers, conversions are, even under ideal circumstances, complex and time consuming. As an attestation to this complexity, many service providers have teams of people dedicated exclusively to processing this movement of plan assets. And, as with a lot of things in life, the devil is in the details.

In spite of the complexities, a conversion can be accomplished smoothly if you remember a few simple guidelines.

Assemble Your Team: Who's on First

In the old baseball joke, "Who's on First," no one really ever figures out who's on first. In a conversion, it is absolutely imperative that all of the players know who's on first, who's on second, who's on third, and so on. This team of players must work well together and perform a vast array of functions to implement the conversion. From the highest level tasks (like deciding to add a new profit sharing contribution) to the smallest details (like determining how hours of service data is communicated to the new fundholder) every job requires people with the right skills to make the decisions and implement the conversion.

For the plan sponsor, the company's human resources department will generally be responsible for the implementation process, coordinating the action between the plan sponsor, the new fundholder, the old fundholder, the third party administrators, the investment advisor, and the attorney. This team will take the lead in the process and handle much of the day to day implementation of any decisions made. For small employers that may lack the manpower or expertise to handle such a complex task in-house, the plan sponsor should consider hiring a consultant, third party administrator, accountant, or attorney to handle these day-to-day tasks, while reserving the major decisions for in-house personnel.

In addition to its human resources team, the plan sponsor must designate who will make plan design

and administrative decisions within the company. Will decision-making be centralized with one individual, a plan committee, or the board of directors? Will decision-making responsibilities depend upon what type of decision is being made? Must plan design changes that increase the company's obligations by a certain dollar figure be approved by the Board of Directors, while other design changes may be approved by the CFO? The plan sponsor should clearly designate which actors will make what decisions.

Someone with appropriate authority must be designated to sign the various documents that are needed to implement the conversion. Through the course of the conversion service provider contracts, plan documents, investment agreements, and other documents will be presented to the company for signature. Frequently, decisions must be made and documents must be signed quickly during this process. Although these functions can be divided however the plan sponsor sees fit, the plan sponsor should carefully consider who will be responsible for reviewing each document, obtaining necessary approvals within the company, and getting the documents properly executed. Will corporate counsel be involved when reviewing the service provider contracts? Will the Board of Directors need to approve any new plan documents? When will the Board meet to consider the adoption of a document? How difficult will it be to obtain the signatures of board members on a unanimous written consent resolution? Has the authority to take action been properly delegated and documented? The plan sponsor will eliminate unnecessary confusion by setting up a proper framework for decision-making and implementation at the beginning of the conversion process?

The plan sponsor also must recruit key payroll and IT personnel who are knowledgeable about the company's payroll systems to implement some of the intricate exchanges of data. Frequently, these individuals will be called upon to identify and resolve technical issues for sharing necessary data among the players involved. If the company utilizes a payroll service provider, a representative from the payroll provider also should be included in the conversion team to streamline and verify the process of providing needed data to others on the team.

If the plan uses or will use the services of a third party administrator, a representative from the third party administrator should be included on the team as well.

The fundholders will have a plethora of people to assist with the process. Generally, the old service provider will have a team leader who coordinates the

process and a technical advisor who coordinates the transfer of necessary records to the new service provider.

The new service provider also will have a team assembled to implement the conversion, which generally includes a team leader, a technical advisor, an employee communications specialist, and (maybe) a document specialist. The team leader will work with the plan sponsor's team to coordinate all of the tasks that must be completed. The technical advisor will implement the transfer of necessary data from the prior service provider and the plan sponsor to bring the plan onto the new recordkeeping system. The employee communications coordinator will work with the plan sponsor and legal counsel to provide mandatory disclosures and other employee communications. The document team may review the existing plan document to ensure compatibility with the fundholder's systems or prepare a replacement (usually a prototype) plan document.

The plan sponsor should also consider the added value of using other advisors in the process. A registered investment advisor is uniquely suited to assist the plan sponsor in selecting funds and mapping investments. ERISA counsel will be helpful when reviewing fiduciary practices, negotiating contracts, comparing plan documents, and drafting mandatory employee notices.

Once the team is assembled, the fun can begin!

Take the Time to Get to Know Each Other: The Key to Any Solid Relationship

It is important for the plan sponsor and the new service provider to understand how the other operates. Of all the information that the new service provider will need, the structure of the plan sponsor's company is one of the most important. Although not a difficult task when only one company is involved, if the corporate structure includes subsidiaries, joint ventures, other shared ownership businesses, or affiliated businesses (even if payroll is centralized), additional issues will need to be explored to ensure a smooth transition. The plan sponsor should additionally share with the new service provider an overview of the corporate climate and plan operations. Does the company frequently purchase other businesses? Has the company historically found it difficult to pass testing? Does the company want to change the plan design during the transition? Open communication about these issues will go a long way to ensure a smooth transition and a well-run plan.

Similarly, the new service provider should discuss with the plan sponsor what services it will provide,

what services it does not provide, what information the service provider will need, how the plan sponsor and service provider will exchange information, and what form that information must take. The design of the plan will dictate what services are needed, so a thorough understanding of the current plan design and any proposed changes is an absolute must.

Review the Contracts: Reading the Fine Print

The first contract that must be reviewed is the contract with the current service provider. The terms of this contract will dictate what must happen to terminate the existing relationship and whether the conversion will have any financial consequences for the company, the plan, or the participants. Frequently, the contract will require the plan sponsor to give the current service provider advance written notice of the intent to terminate the contract. If this notice is given late, it is possible that the current provider will not cooperate to get the changes done within the intended time frame. This is particularly an issue for a December 31 conversion date. Additionally, termination of the contract may trigger redemption fees or other financial consequences, which the fiduciaries must weigh against the benefits that will be received as a result of the conversion. The contract with the current service provider should be reviewed early in the process to determine what action must be taken and what consequences will be triggered by the conversion.

Each of the new service providers and advisors also will require a written contract. The contracts will dictate the responsibilities of each of the team members and the compensation to be paid. When reviewing these contracts, the plan sponsor must quickly decipher what services each player will perform before, during, and after the conversion. More importantly, the plan sponsor must assess what tasks are not being delegated to the service providers and advisors moving forward, as the plan sponsor retains responsibility for performing these tasks. If the employer is not sufficiently familiar with plan rules to identify whether all necessary tasks are handled at each step along the way, the plan sponsor should seek out other team members to help in this assessment.

Plan Documents: Creating the Game Plan

Once the team is assembled and the service contracts are in order, the next task must be a comprehensive review of the existing plan document. The plan sponsor will need to determine what, if any, plan provisions should be modified. Do the current benefit

levels need to be changed? Does the plan contain provisions that are difficult to administer? Must any plan provisions be modified to accommodate the new service providers' procedures? Addressing modifications to the plan document before the conversion will increase the likelihood that the plan will meet the needs of the company and be administered correctly.

Getting a handle on the documents requires proactive communications between the parties. Even in today's technological age, not every option in a document is workable. The team members should beware of design provisions that in theory provide a desired result, but in reality simply do not work with the service providers' systems. One way to avoid these unworkable situations is to have the service provider's compliance department review all design choices to determine if the systems are capable of implementing and administering the plan. Additionally, beware of any provision that requires the service provider to create special systems for implementation. Although flexibility is a wonderful idea in theory, as time passes and service personnel changes, it becomes increasingly difficult to remember why the special system was designed and how it was intended to work. As a result, the maintenance of the special systems often becomes burdensome at best, and impossible at worst.

Even if the plan design is not intended to change, it is common that the document may need to be amended onto the new fundholder's prototype or volume submitter plan, or even a new individually designed document. This change commonly occurs if the prior plan document was supported by one of the service providers whose association with the plan is being terminated. If the plan sponsor is satisfied with the plan design, no redesigns must precede the redocumentation. However, the new team must be very careful to track all existing plan provisions into the new plan document, down to the slightest detail. Small unexpected modifications in the provisions of a plan can cause significant operational failures if the plan sponsor continues to operate the plan as it always has, only to later learn that the new document requires something different.

Example: Corporation ABC's existing 401(k) plan document allocates profit sharing contributions on compensation earned after a participant enters the plan. Unbeknownst to ABC's human resources team, the new plan document modifies this provision to include compensation for the entire plan year. The human resources team continues to calculate and allocate profit sharing

contributions based upon compensation earned after a participant enters the plan. As a result, the plan experiences an operational failure that could result in disqualification of the plan if it is audited.

Similarly, if the plan sponsor wishes to make changes to the plan design, each change should be carefully considered. Changes to coverage, the definition of compensation, allocation conditions, or other provisions could require the plan administrator to perform additional testing or obtain different or additional census data. Furthermore, different or additional data may need to be gathered by the plan sponsor and provided to the administrator. However, many of these unintended consequences can be avoided with a little forethought into how the plan provisions will be transitioned and administered in the future.

Fiduciary Duties: It's All About the Process

As with any other action taken by a fiduciary, a change in service providers carries the same obligation to act exclusively in the best interests of participants and act like a reasonable person knowledgeable about such matters. With the recent volatility in the market, fulfilling these fiduciary obligations when moving plan assets may seem like a challenge. Market timing, asset performance, and other things outside of the team's control can be a significant factor in the minds of participants when they judge the success or failure of the move. A few of the things that fiduciaries should carefully consider are:

1. Whether any redemption fees or other financial consequences will arise as a result of the conversion, and what, if anything, can be done to minimize the impact of such consequences;
2. When the assets should move;
3. Whether the assets should be transferred in cash or in kind;
4. Whether new investment elections should be solicited from participants or whether investments should be mapped;
5. Whether to request a window of time during which the plan sponsor can elect to postpone the movement of the assets if market conditions dictate such action; and
6. How long the assets will be out of the market, if at all.

The most important thing fiduciaries can do is pay attention to the process of decision-making and

document this process. When considering a fiduciary's responsibilities, the test is not what decision would have achieved the best result based on what actually happened. The issue is whether the fiduciary considered the things that a reasonable and knowledgeable person would have considered and did the fiduciary make a reasonable decision based on the information available at the time the decision was made. There are four keys to this decision-making process:

1. Look at the transaction from different angles to determine if any issues need to be addressed;
2. Gather and consider relevant information;
3. Make a conscious decision about each issue; and
4. Document in meeting notes, memorandums, or other written materials what the issue was, what factors and information were considered and deemed relevant, what decision was reached, and why.

Steps in the Process: Coordinating the Action

For the point person, whether it be the ERISA counsel, the third party administrator, the human resource leader, or other team member, the most crucial step is to coordinate all of the actions needed to effect the conversion. The following tasks are helpful in this effort:

1. Set up an initial conference call with all of team members; human resources personnel, payroll personnel, decision makers for the company, third party administrator, ERISA counsel, and fundholder teams. This initial call will set the tone for all of the work that must be done. The leader of the process should establish his or her authority at this meeting, as well as to notify all other players that he or she is the point person for decisions or questions that need to be addressed during the process.
2. Create a timeline with assigned responsibilities. Make sure all parties sign off on the division of responsibilities and the time frame in which they will be accomplished, and update it along the way.
3. Schedule regular conference calls to assess the progress of the project and resolve any issues that require a collaborative effort. Go over the timeline and make sure that everything is happening on time. Adjust the timeframe as needed.
4. Make sure that someone is responsible for any needed blackout notice, and that the entity responsible for providing the notice has access to addresses for all affected participants.

5. Be flexible. Issues will crop up along the way.
6. Have someone monitoring the process on the conversion date to ensure that it goes smoothly. Be sure the needed parties are accessible to answer questions or make decisions that come up during the day.
7. Schedule the follow-up work after the conversion is complete to make sure that there are no loose ends and that the new system is running smoothly,

accurate information is being exchanged, and the team members understand their responsibilities going forward.

Conclusion

By keeping these basic premises in mind, the conversion process not only can be bearable, but may also be beneficial to the smooth administration of the plan. ■