

# **Benchmarking** Defined Contribution Plans: The Fiduciary Benchmarks Methodology

A WHITE PAPER BY



Fred Reish



Bruce Ashton



Summer Conley

**Drinker Biddle**



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*The law and Drinker Biddle's analysis contained in this White Paper are general in nature and do not constitute a legal opinion or legal advice that may be relied upon by third parties. Readers should consult their own legal counsel for information on how these issues apply to their individual circumstances. Further, the law and analysis in this White Paper are current as of April 2015. Changes may have occurred in the law since the paper was drafted. As a result, readers may want to consult with their legal advisors to determine if there have been any relevant developments since then.*

## INTRODUCTION

Oscar Wilde wrote about “A man who knows the price of everything and the value of nothing.”

Unfortunately, because of recent Department of Labor (“DOL”) guidance and 401(k) lawsuits, some plan sponsors think they need to use the cheapest investments and services for their plans. Even more unfortunate, some providers of benchmarking information support that misconception by providing data that reports only fees and costs but that ignores value. The plan sponsor impressions and those benchmarking services are both wrong . . . to the detriment of participants.

Instead, the discussion should start with what investments and services a plan needs to help participants successfully reach retirement. That is, what services are valuable to the plan and its covered employees? Only then can the conversation go to cost. What is the reasonable cost—based on market data—of the services that provide the value needed for the participants to reach a successful retirement?

This paper discusses the innovative methodology developed by Fiduciary Benchmarks, Inc. (“FBI”) to compare value and cost . . . and, in that way, to support plan fiduciaries (such as committee members), and the advisors and consultants who help the fiduciaries operate and evaluate their plans.

## CONCLUSION

ERISA requires that plan sponsors, as fiduciaries, engage in a prudent process for selecting and monitoring services provided to their plan. This requires a comparison of costs and value, which in turn involves gathering “relevant” information, analyzing it and then making an informed and reasoned decision. For assessing service providers, the DOL and courts have said that plan sponsors should obtain market data and evaluate plan services in that context.

The simplest and most cost-effective approach to gathering comparative market data is through the use of benchmarking services that comply with ERISA requirements. But like service providers, not all benchmarking services are created equal. Some use publicly available information that may not be current and/or may not be accurate, and others make comparisons using only quantitative information, without taking into account qualitative factors or detailed lists of services and value delivered to plan sponsors and participants.

## The Second Generation Benchmarking Service

FBI has created a new approach, a second generation of benchmarking service that helps plan sponsors evaluate both quantitative data and qualitative factors. That information supports the duty of plan sponsors to make prudent fiduciary decisions and it enables plan sponsors to use best practices for evaluating service providers. It does so by providing current data that is vetted for accuracy and by following a five-step approach that:

1. Customizes the Benchmark Group
2. Reviews Provider Quality
3. Assesses the Scope of Services
4. Examines Value Delivered to Plan Sponsors and Participants
5. Evaluates Fees

These steps, using proprietary mathematical models and analytical frameworks, consider similar services and providers for similar plans. This provides an independent, comprehensive and informed method that helps plan sponsors engage in a prudent process to fulfill their fiduciary duty to make sure that fees of each service provider to the plan are reasonable – as required by ERISA.

## The Benchmarking Evolution

Before looking at the FBI methodology, let's set the stage for the discussion:

Historically, most benchmarking services provided only cost data for plans, usually based on little more than total assets and number of participants. In recent years, though, there has been a realization that the selection and monitoring of 401(k) service providers is more complicated than that. The problem is primarily that “quantity,” or cost, data goes only so far . . . and cost must ultimately be compared with value, or “quality” (which includes the results being provided by the plan). As Warren Buffet says, “Price is what you pay. Value is what you get.” While quantitative data was available, qualitative information – information on the value of the services and providers – was elusive.

In the last decade, the discussion about services has changed from examining features offered by a service provider to looking at participant success measures. The issue for plan sponsors has become whether a service provider helps the plan and participants achieve a successful retirement. From a legal perspective, achieving successful results compared to its peers can justify a service provider's costs. From a best practices perspective, results can be the primary measure of the value of a service provider.

To correct the deficiency inherent in the first generation of benchmarking services, FBI has introduced the next generation in benchmarking – one that measures value.

## Legal Background

### ERISA Requires a Prudent Process

By way of background, the Employee Retirement Income Security Act (ERISA) requires plan sponsors to engage in a prudent process. They need to gather and evaluate “relevant” information to ensure that the arrangements with service providers are “reasonable.” (Plan sponsors generally act through officers or a committee appointed to manage the plan, who serve as the fiduciaries; however, we use “plan sponsor” for simplicity.) That process entails assembling and evaluating quantitative data and qualitative information about services, costs, service provider compensation, and conflicts of interest.

### The Prudent Process Requires a Comparative Analysis

The Department of Labor and courts have said that plan sponsors are required to perform a comparative analysis in order to make a prudent decision (that is, the costs and services must be compared to market data for comparable services). The DOL notes that one way to gather comparative data is through requests for proposals, though that is not the only way. Another more convenient and less costly approach is to use a benchmarking service that aggregates information about similar companies and plans and about comparable service providers. This enables plan sponsors to make the market comparison the DOL says is required...up to a point.

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## The Failure of Benchmarking Services

What most benchmarking services fail to provide – and what the new FBI service offers – is an assessment of quality and value, not just cost. In the early days of benchmarking services, the services offered limited information to plan sponsors: what type of service provider were they looking for, what were the assets of their plan, what were the costs, and how much was the service provider getting paid? The benchmarking reports were helpful, but rudimentary. They did not assess the quantity of services, did not look at different service levels and did not measure value and results. To prudently evaluate the reasonableness of services and costs, plan sponsors needed more information.

## The FBI Five Step Process

The FBI service uses a five step process to properly support plan sponsors in fulfilling their fiduciary obligations:

**Step 1** is to assemble a customized benchmark group to permit “apples to apples” comparisons. The benchmark criteria differ by type of provider. For recordkeepers, FBI looks at total plan assets, number of participants, average account balance and the type of plan, since all of these affect the recordkeeper’s fees. For advisors, the focus is on total plan assets, since this is generally the determining factor for an advisor’s fees. The number of participants and average account balance are not relevant in setting advisor compensation. For investment managers, again the major factor is plan size, because that largely dictates the asset classes and the expenses paid out of the investments...and thus the cost of the investments to the plan.<sup>1</sup>

**Step 2** provides a framework for plan sponsors to examine the quality of service providers. For recordkeepers and advisors, FBI evaluated the way leading firms describe “quality” and categorized them into three areas. For these service providers, this Step provides information about

- » the background, experience and expertise of the service provider;
- » the services and processes used by the provider, including how the firm defines “plan success”; and
- » the people, technology and resources of the firm.

For investment managers, FBI evaluated the principal due diligence approaches used in selecting investments and categorized them into three areas:

- » characteristics of the organization providing the investment management;
- » background, experience and track record of the investment decision makers; and
- » the process used by the firm in making investment decisions.

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## Drinker Biddle Comment

We have concluded that a comprehensive and sophisticated benchmarking service, such as FBI’s, that includes measurements of value, and comparisons of value to cost, materially assists plan sponsors in meeting their ERISA fiduciary duties.

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**Step 3** recognizes that service providers offer different types and levels of services. This Step provides the following:

- » assembles data for the most important service categories, based on the type of service provider (recordkeeper, advisor or investment manager);
- » breaks the service categories down into core services and added services; and
- » assesses each on the extent to which the service provides an added benefit to the plan and adds to cost.

For example, for recordkeepers, the information measures:

- » recordkeeping, administration, compliance and consulting, and communication and education services; and
- » assigns a weighting to the anticipated value of each service to the plan.

Plan sponsors can use this information to assess what services the plan is getting and, by understanding whether the service is a basic (or core) service or an added service, whether the amount being paid to the service provider is appropriate.

**Step 4** examines the value of the services to both the plan sponsor and the participants. For example, FBi offers an assessment of the extent to which recordkeeper support services, service quality, and plan design assistance provide value to the plan sponsor. In looking at value in relation to the participants, it offers a comparison of participant “success measures.” For recordkeepers and advisors, these “success measures” include participation rates, deferral rates, assets in diversified investments, etc. FBi then compares each to specific benchmarks for the plan sponsor’s industry.

**Step 5** tracks all fees being paid to the provider, and then makes a two-part comparison. The fees are compared to the appropriate peer benchmark group identified through Step 1 and also to a proprietary benchmark called “FeePoint.” FeePoint is a market-based benchmark that reflects the unique set of services provided to the plan by the service provider.

In the following sections, we describe the legal obligations of fiduciaries to review information about service providers – that is, why it is important for plan sponsors to review benchmark information – and then we discuss the FBi five step process. Each of these steps includes a sample page from a benchmarking report, and the step is described in more detail, broken out by recordkeeper, advisor and investment manager.

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## ERISA Requirements

A long-standing principle under ERISA is that plan sponsors have a responsibility to prudently select and monitor service providers and to determine whether the compensation for their services is reasonable. This principle is the basis for understanding why comparative information is important and why the use of a benchmark service is appropriate.

### Fiduciaries Have a Duty to Evaluate Service Providers

The Department of Labor (DOL) described the duty as early as 1997 in its “Frost” Advisory Opinion:

“. . . the responsible Plan fiduciaries must act prudently and solely in the interest of the Plan participants and beneficiaries both in deciding whether to enter into, or continue, the above-described arrangement [with a service provider] . . . In this regard, the responsible Plan **fiduciaries must assure that the compensation paid directly or indirectly by the Plan to [the service provider] is reasonable, taking into account . . . services provided to the Plan** as well as any other fees or compensation received by [the service provider].”<sup>2</sup> [Emphasis added.]

For a decade and a half after the Frost opinion, plan sponsors had no legal “right” to get the data they needed to review to make prudent decisions about service provider compensation. Some relied on requests for proposal. Some obtained the information through consultants or advisors. Some asked the providers and assumed they were receiving credible answers.

### Getting the Information

This conflict between fiduciary “responsibilities” and legal “rights” was remedied in 2012 with an amendment to ERISA Regulation Section 2550.408b-2 (the “408(b)(2) regulation”), which imposes a duty on service providers to disclose information about their services, their total compensation directly or indirectly from the plan, and their status as fiduciaries. In adopting that amendment, the DOL described the responsibility of plan sponsors to review relevant information about service providers. It said:

“The Department believes that plan **fiduciaries need this information, when selecting and monitoring service providers, to satisfy their fiduciary obligations** under ERISA section 404(a)(1) to act prudently and solely in the interest of the plan’s participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan.”<sup>3</sup> [Emphasis added.]

In other words, to fulfill their fiduciary obligation under ERISA, plan sponsors must obtain, review and evaluate information about services, costs, compensation, conflicts of interest and fiduciary status to determine the reasonableness of selecting (or retaining) a service provider.

## There's a Duty to Consider Value

The DOL and courts have said that fees should not be considered in a vacuum. Rather, fees are only one factor to be considered in determining the reasonableness of a provider's compensation. Instead, plan sponsors must compare the value of the services relative to the costs and compensation. The DOL noted this point in 1997, even before the 408(b)(2) disclosure requirements as follows:

“a fiduciary should not consider one fact, such as the lowest fee bid for services, to the exclusion of any other factor, such as the quality of the work product. Rather, the decision regarding which service provider to select should be based on **an assessment of all the relevant factors, including both the quality and cost of the services.**”<sup>4</sup> [Emphasis added.]

This means that fees must be considered in light of the quality and quantity of the services. Through that process – and only through that process – can a plan sponsor determine whether compensation is reasonable. After considering the quality and quantity of services being provided, plan sponsors must determine if the value is within the range of reasonableness established by the market place. (Essentially, there is a “range of reasonableness” rather than one particular fee that is reasonable.) As one court said, “[F]or any particular type of investment, there is a range of fees that is considered reasonable.”<sup>5</sup>

## Plus a Duty to Obtain Market Data

As explained by the court in *Tussey v. ABB*, plan sponsors need to compare one provider's services against others and to do so using market-based data. Specifically, the court noted

“[t]o assess the prudence of a revenue sharing arrangement **ABB had to determine the market rate for the recordkeeping services** provided to the Plan. Without such a baseline, it would be impossible to determine whether a [particular] arrangement would add to the value of the . . . Plan.”<sup>6</sup> [Emphasis added]

The court further criticized ABB because it “did not obtain a benchmark cost of Fidelity's services prior to choosing revenue sharing as the Plan's method for compensating Fidelity Trust.”<sup>7</sup>

One approach for obtaining market data on service providers is through an RFP process. That process may have limitations compared to the use of benchmark reports in several respects. For example, the RFP process obtains data on a limited number of providers (those that respond to the RFP), whereas a benchmark report may have a peer group of many more providers. The bids discuss only the services offered to the plan by the provider versus a benchmark report, which may focus on the differences in services offered by a larger group of providers. And the cost of the RFP process is often much more than that of obtaining a benchmark report. (As an aside, the reasonable cost of either approach would generally be a proper plan expense so long as it is related to the fulfillment of the fiduciary duty to prudently select or monitor service providers rather than to determine the appropriateness or cost of changes to the plan.)

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...the decision regarding which service provider to select should be based on **an assessment of all the relevant factors, including both the quality and cost of the services.**

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## And a Duty to Evaluate **Relevant Data**

Another question for plan sponsors is what data to review. In the context of investment duties, the DOL explains this in ERISA Regulation Section 2550.404a-1:

“With regard to an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to his investment duties, the requirements of section 404(a)(1)(B) of the Act...are satisfied if the fiduciary (A) has given **appropriate consideration to those facts and circumstances** that...the fiduciary **knows or should know are relevant** to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan’s investment portfolio with respect to which the fiduciary has investment duties; and (B) has acted accordingly.”<sup>8</sup>  
[Emphasis added.]

This requirement can be applied more broadly to any fiduciary decision. It means that fiduciaries must take into account the facts and circumstances that a knowledgeable person would conclude are relevant, or material, to making a decision. For example, when considering the reasonableness of a service provider’s fees, in addition to the fee itself, the fiduciary must consider all of the relevant facts, such as the amount, level, complexity and quality of services being provided.

DOL Regulations describe a number of requirements:

- » First, a fiduciary must have the information (the “facts and circumstances”) that a “knowledgeable” person would know was needed to properly make the decision.
- » Second, the fiduciary must know the information that is relevant to the decision. Thus, it is not sufficient to just gather quantities of data; the data must be the information needed to make a prudent and informed decision. And it is not sufficient for the fiduciary to rely only on what he or she knows; rather, the fiduciary must consider the information he or she should know is relevant to the decision (that is, the information that a person who is knowledgeable about the issues would want to review).<sup>9</sup>
- » Third, the fiduciary must give the information appropriate consideration. In other words, the fiduciary must weigh the information appropriately.<sup>10</sup>

In another context (the selection of an annuity provider for a plan), the DOL expanded on the scope of analysis required of plan sponsors. The regulation is illustrative of the type of diligence plan sponsors must apply in selecting and monitoring investments and plan services:

“In addition, the fiduciary obligation of prudence... requires, at a minimum that plan fiduciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers ....”<sup>11</sup>

The DOL also referenced the need to make comparisons of competing products and services in the context of selecting a default investment alternative.

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In evaluating service providers, plan sponsors need to give **appropriate consideration to those facts and circumstances they know or should know are relevant...**

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“A fiduciary must engage in an objective, thorough, and analytical process that involves consideration of the quality of competing providers and investment products, as appropriate.”<sup>12</sup>

The message of this guidance is clear. It means that plan sponsors must be diligent in gathering relevant market data and analyzing it thoroughly and objectively for the purpose of making informed decisions that are in the best interest of the plan and its participants. This is true regardless of whether the issue is investments, plan operation, or service providers.

### Finally, a Duty to Obtain **Current** and **Reliable** Data

With reference to benchmarking, the DOL guidance on the type of assessment a plan sponsor must make to fulfill its fiduciary obligations means that plan sponsors should use a benchmarking service that assists them with all of the elements of the decision they must make, whether it relates to monitoring of an existing provider or selection of a new one. The service should provide both quantitative, or cost, and qualitative, or value, information. The information should be up-to-date and analyzed by the benchmarking service for accuracy. It should provide information that enables the plan sponsor to compare market data on various providers...and it should be data that involves truly comparable plans. As the old saying goes, “garbage in, garbage out.” In this case, that means plan sponsors can only make prudent decisions if they have current information about comparable plans and services.

In the next section, we discuss the FBI five step benchmarking process and how it helps plan sponsors fulfill the prudent process requirement for selecting and monitoring service providers and investments.

## FBI’s Added Value Benchmarking

To help plan sponsors comply with their fiduciary obligations and observe best practices, a benchmarking service should provide the following:

- » A truly comparable peer group using the right data, data that is current and that has been thoroughly reviewed to improve accuracy
- » Information to analyze how a service provider helps achieve better participant outcomes
- » Tools to assess the quality of service providers...that is, how well they do their job
- » Examination of the scope of services that affect plan costs
- » Tools to assess the value delivered to the plan and the participants... that is, whether a service provider offers additional benefits to the plan and the participants
- » Fee comparisons that reflect additional services that plan sponsors may conclude are appropriate and thus worth the added fees.
- » Comparisons of plan fees to industry fees for the same kinds of services
- » Tracking and comparing of fees... but allowing for “extra credit”

A benchmarking service that offers these features enables a plan sponsor to make a fully informed decision about the reasonableness of the services and the compensation being received by service providers, which are the cornerstones of a prudent fiduciary process.

## THE FBI FIVE STEP PROCESS

### Step 1: Customize Benchmark Group

Plan sponsors are required by ERISA's fiduciary rules to do a comparative analysis when selecting and monitoring service providers. This means looking at market data about the costs of the plan services and the compensation being paid to service providers. But which "market" should the data come from? Clearly, looking at information on all types of service providers for different plan types and sizes would not provide a valid comparison.

In light of the ERISA requirements, it is critical for plan sponsors to select a benchmarking service that, at the outset, has a large database of information that is frequently updated and reviewed by the benchmarking service to ensure accuracy and eliminate redundancy. Some services obtain data from publicly available sources, e.g., from Form 5500 filings. Publicly available information can be inaccurate and is, by definition, out of date. As a result, it does not provide plan sponsors with the current, reliable comparative data they need to fulfill their fiduciary responsibilities. Similarly, if a benchmarking service does not make an effort to eliminate redundancies and obvious data errors, its comparative reports will be less accurate and less valuable...and potentially lead to erroneous conclusions.

FBI has a database with information on tens of thousands of plans. The information is obtained directly from providers rather than public sources, which means it is accurate and timely. To insure that the data remains current, FBI updates the information quarterly. To minimize the risk of inaccurate information, it is "scrubbed" and "normalized" to eliminate, as much as possible, any erroneous or repetitious information. As a result, FBI can provide data that a plan sponsor can reasonably conclude is accurate, timely and comparable to its own plan.

Neither ERISA nor any DOL guidance specifically requires a scrubbing and normalization process, but it seems obvious that the relevant data requirement contemplates that plan sponsors only consider accurate and timely information.

The steps that FBI uses in establishing the peer group is designed to help plan sponsors fulfill their ERISA duty to make "apples-to-apples" comparisons, *i.e.*, a market-based comparison of relevant and comparable information. The steps are:

- » **To establish an economically logical peer group.** The most logical peer group would be one based on the material factors that each type of service provider uses in pricing plan services. FBI has adopted that approach. In the case of recordkeepers, this is based on the following:
  - » total assets,
  - » number of participants and
  - » average account balances.

## APPLICATION OF LEGAL PRINCIPLES

ERISA requires that plan sponsors engage in an objective, thorough and analytical process that involves consideration of the quality of competing providers and products. This means, in part, looking at market data that is relevant or, in other words, data that is up-to-date, accurate and material to the decision. "Relevant" also means information for services to plans of similar size and characteristics and comparing plans that are comparable to the sponsor's plan. "Comparable" would be determined by marketplace factors for pricing plan services (e.g., factors such as plan size).

In Step 1, given the size of its database, FBI is able to provide information for a benchmark group that is both customized and relevant to the sponsor's plan so that it can make an "apples-to-apples" comparison. The information is reliable, since it is gathered from providers, is up-to-date and is reviewed to eliminate obviously erroneous information and duplications that can skew the results.

Step 1 supports a prudent fiduciary process by giving plan sponsors credible, market-based information on each type of service provider for comparable plans.

FBI also gathers information on industry groupings, which is used for comparison in several of the steps, but not in the context of establishing the peer group for fee comparison purposes. In establishing the economically logical peer group of advisors and investment managers, FBI looks at plan asset size, since this factor is most relevant for determining these providers' fees and participant data is not.

- » **To establish a statistically valid group.** This means using information on plans of the same type, since the services and costs will vary significantly among different types of plans. Where the plan seeking the information is a 401(k) plan, for example, FBI establishes a peer group that includes predominantly 401(k) plans, a small number of 403(b) plans (since they are similar in the way they operate) and possibly a few other defined contribution plans.
- » **To diversify the peer group among recordkeepers and, in the case of advisors and investment managers, among those groups.** With respect to recordkeepers, the objective is to ensure that no one type of provider dominates the peer group. Recordkeeping is provided by insurance companies, third party administrators, banks, mutual funds and others (such as brokerage firms). The peer group assembled by FBI is generally spread over all of these entities. In the case of advisors and investment managers, the objective is to establish a meaningful cross section of firms, individual advisors and investment options.

**Recordkeeper: Customize Benchmark Group**
Fiduciary Benchmarks  
Independent | Comprehensive | Informative

**Customize  
Benchmark Group**

**THE FIRST STEP** of Fiduciary Benchmarks' patented process (U.S. Patent 8,150,198) is to build a customized benchmark group from our proprietary database of tens of thousands of plans. Note that all data is sourced directly from service providers, is typically updated on a quarterly basis, and normalized to allow for valid comparisons. A proprietary and sophisticated mathematical model is then applied to build a custom benchmark group that maximizes the degree of predictability. The end result is illustrated by the three tables shown below.

**Economically Logical**

Total Plan Assets, Participants and Plan Average Account Balance are significant drivers of Recordkeeper Fees.

Characteristics	This Plan	Low	Median	High
Assets	\$12,459,886	\$10,000,000	\$11,915,668	\$15,000,000
Participants	177	129	173	249
Avg. Acct. Balance	\$70,395	\$50,000	\$64,825	\$90,000

**Statistically Valid**

Our mathematical model discards outliers and uses those plans that are most predictive of the fees for your Recordkeeper.

Characteristics	This Plan	401(k)	403(b)	Other
Plan Type	401(k)	29	1	1

**30 Plans**

Plans by Business Model

**13 Recordkeepers**

Recordkeepers by Business Model

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## Step 2: Review Provider Quality

Plan sponsors should assess both quantitative information and qualitative factors to answer a fundamental question: how good is the provider? Because the factors reflecting “quality” do not lend themselves to tabular presentation and comparison, FBI provides a framework of qualitative factors for a plan sponsor to use in making the assessment (though the plan advisor cannot assist in evaluating itself). FBI describes factors that are relevant to assessing the quality of service providers.

Advisors can be especially helpful in Step 2 because of their background, experience and familiarity with the various providers and products.

FBI provides a set of questions for each of the three major types of providers: recordkeepers, plan advisors, and investment managers. This breakdown is important because the services and organizational structures of these types of providers are significantly different. As a result, for each type of provider, plan sponsors should obtain different answers and information. In other words, FBI has provided factors that recognize the differences in how the three categories of service providers function.

For **recordkeepers**, FBI suggests the following items:

- » **Who will be providing the service?** Plan sponsors should ask about:
  - » the expertise of the firm and its personnel with retirement plans generally,
  - » its experience with similar plans and the plan sponsor’s industry,
  - » insurance and bonding coverage,
  - » non-401(k) plan experience where relevant, and
  - » the cultural “fit” between the service provider and the plan sponsor.
- » **Examine services and process.** What is the recordkeeper’s definition of “what is winning?” Also, ask about:
  - » the recordkeeper’s process to avoid conflicts of interest,
  - » its services for the plan sponsor and participants for protecting and improving the plan,
  - » the process for measuring client satisfaction,
  - » information about client retention and “success stories,” and
  - » references.
- » **Examine people, technology and other resources** available to the plan. This includes the following:
  - » aptitude and attitude of the team,
  - » employee retention,
  - » awards,
  - » available technology,
  - » educational resources,
  - » profitability and sustainability and
  - » data confidentiality and security.

For **advisors**, the questions are:

- » **Who will be providing the service?** In addition to the items identified for recordkeepers, FBI suggests asking about:
  - » the advisor's regulatory record,
  - » credentials and designations,
  - » awards and recognition,
  - » memberships in relevant professional or trade groups and
  - » fiduciary status capability.
- » **Examine services and process.** FBI suggests asking the following:
  - » What is the advisor's definition of "plan success"?
  - » What is the process for mitigating conflicts of interest?
  - » In the context of protecting and improving the plan, ask about
    - » investment services,
    - » vendor management services,
    - » plan management services and participant services.
  - » Also ask about
    - » the advisor's rollover process,
    - » the process for measuring and reporting results,
    - » client retention and "success stories," and
    - » references.

Examine people, technology and other resources available to the plan. The questions are the same as for recordkeepers but FBI suggests adding a question about shared staff versus dedicated staff.

For **investment managers**, the categories of questions are somewhat different, reflecting the difference in the type of service being provided:

- » **Organizational characteristics.** FBI suggests asking about
  - » the history of the firm,
  - » its ownership structure,
  - » assets under advisement,
  - » organizational stability,
  - » the firm's code of ethics and
  - » information about conflicts of interest.
- » **Investment decision makers.** FBI suggests asking for the following about the individuals who will be making the investment decisions:
  - » their education, background and experience,
  - » professional designations,
  - » track record,
  - » turnover,
  - » succession plans and
  - » the alignment of incentive and compensation programs.

» **Investment process.** FBI identifies the following as key process characteristics that should be considered:

- » clearly defined and repeatable processes,
- » changes in historical process, and
- » procedures to manage risk, composition and style versus its stated objectives.

These factors may not represent all of the questions that a plan sponsor would ask in seeking to assess the quality of the service provider under consideration, but they are material to the decision. And the assessment of the quality of services, in addition to quantitative elements of cost, is relevant to the fiduciary process.

## APPLICATION OF LEGAL PRINCIPLES

The quality of competing providers and products is one of the factors that ERISA requires plan sponsors to evaluate, in addition to quantitative issues such as cost and compensation. Unfortunately, there is little specific regulatory guidance or case law on what that “quality” entails.

Step 2 is designed to assist fiduciaries in making this assessment by providing them with appropriate questions to ask the three principal types of 401(k) providers. While a number of the questions relate to how the provider renders its services, the fundamental issue they ask is how the provider defines a successful outcome for its clients. By identifying this key element, plan sponsors are better able to determine whether the provider is focused on the same concerns as the plan sponsor.

As the DOL pointed out in 1997, “the decision regarding which service provider to select should be based on an assessment of all the relevant factors, including **both the quality and cost of the services.**”<sup>13</sup> [Emphasis added] Because Step 2 helps plan sponsors focus on successful outcomes, it helps a plan sponsor fulfill the duty to assess the quality of the providers its plan uses.

**Advisor/Consultant: Review Provider Quality**


**Fiduciary Benchmarks**  
Independent | Comprehensive | Informative



Review  
Provider Quality

**THE SECOND STEP** is to examine "What You Are Getting." In that regard, the DOL has specifically noted in prior rulings that the quality of a Service Provider can be considered when determining fee reasonableness. Fiduciary Benchmarks examined how leading Advisor/Consultant firms describe "quality" and we evaluated those quantitative and qualitative factors and categorized them into the three areas shown below. While Fiduciary Benchmarks does not currently benchmark the factors listed on this page, we do believe you should ask your Advisor/Consultant to discuss the items below that they believe are most important.

Advisor/Consultant	Services/Process	People/Technology/Resources
<div style="text-align: center; margin-bottom: 10px;">  </div> <p style="font-size: 8px; margin: 0;">Ultimately, Advisor/Consultant Services are greatly dependent on the Firm and the individuals that service your account. Therefore, listed below are a number of items you should consider with respect to the Firm and the people that are servicing your plan.</p> <ul style="list-style-type: none"> <li>Clean and transparent regulatory record</li> <li>Expertise with Retirement Plans</li> <li>Experience with similar plans and/or industry</li> <li>Credentials and Designations</li> <li>Awards and Recognitions</li> <li>Memberships and Associations</li> <li>Fiduciary Status Capability</li> <li>Insurance and Bonding Coverage</li> <li>Non-401(k) Plan Expertise</li> <li>Cultural "Fit"</li> </ul>	<div style="text-align: center; margin-bottom: 10px;">  </div> <p style="font-size: 8px; margin: 0;">The services and processes used by your Advisor/Consultant are also important qualitative items that should be considered when determining fee reasonableness.</p> <ul style="list-style-type: none"> <li>Definition of "Plan Success"</li> <li>Process to Mitigate Conflicts of Interest</li> <li>Process for Protecting and Improving Your Plan:               <ul style="list-style-type: none"> <li>- Investment Services</li> <li>- Vendor Management Services</li> <li>- Plan Management Services</li> <li>- Participant Services</li> </ul> </li> <li>Rollover Process</li> <li>Process for Measuring and Reporting Results</li> <li>Client Retention/References/Success Stories</li> </ul>	<div style="text-align: center; margin-bottom: 10px;">  </div> <p style="font-size: 8px; margin: 0;">Finally, the resources available to your Advisor/Consultant will have a large impact on their ability to deliver timely and accurate service on an ongoing basis. Listed below are people, technology and other resources that should be discussed as part of Fee Reasonableness.</p> <ul style="list-style-type: none"> <li>Aptitude of Team</li> <li>Attitude of Team</li> <li>Shared Staff versus Dedicated Staff</li> <li>Employee Retention</li> <li>Technology for Delivering Plan Sponsor Services</li> <li>Technology for Delivering Participant Services</li> <li>Educational Resources</li> <li>Profitability/Sustainability</li> <li>Confidentiality/Security</li> </ul>

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### Step 3: Assess Scope of Services

The third Step in the FBI process is to assess the scope of the services delivered by the service providers. In this context, “scope” means the range of services being provided and their impact on costs charged by the provider. FBI has identified the services that have the greatest impact on a plan or that are more difficult to provide and developed mathematical models that can be used to facilitate the comparison process. It places less weight on basic services and more weight on services that are more difficult or more costly to provide. This mathematical model is then used to compare the services being provided to the peer group of plans as compared to the sponsor’s plan. The mathematical evaluation is somewhat different for investment managers, though the concept is the same.

The purpose of this Step is to help plan sponsors analyze their plan services versus those that are available in the marketplace. This is important to fulfill the duty to assess costs in comparison to the plan’s services. Low cost for less services may be acceptable, but high cost for low services is not. In essence, Step 3 enables a plan sponsor to make this assessment by looking at costs in an appropriate context, that is, by taking into account the range of services and the impact on costs.

For **recordkeepers**, FBI has identified four service categories and divided them into the “core” services, those one would expect from any provider, and “more services,” meaning those that require more specialized or individualized handling. The four categories of services are basic recordkeeping, plan administration, compliance and consulting, and communication and education. In consultation with leading recordkeepers and utilizing the experience of FBI’s staff, FBI lists the “core” services in each category; it then lists the “more services” on a scale developed by FBI showing those that have a small cost impact, a medium cost impact and a large cost impact. One of the reasons for this breakdown is to reflect the higher cost of more individualized services. By using this breakdown, a plan sponsor will be able to determine whether the cost of certain services is justified if it concludes that these services are valuable to its plan. Identifying all of the “core” versus “more” services is beyond the scope of this paper, but some examples include:

- » **Recordkeeping:** “Core” services include basic recordkeeping of participant accounts, handling investment transfers and withdrawals. “More” services that have a small cost impact include handling a larger than anticipated number of participant terminations; those with a medium cost impact include recordkeeping model portfolios; and those that entail more work for the provider and result in a higher cost to the plan include recordkeeping company stock and handling plan consolidations.
- » **Administration:** “Core” services including providing the plan document, SPD and administrative forms and calculating forfeitures. “More” services at the higher cost end of the spectrum include plan termination services, reconciling bad or inconsistent data, auto enrollment and assistance in moving a plan from one recordkeeper to another.
- » **Compliance and Consulting:** “Core” services include testing, providing required notices and preparing the Form 5500. For “more” services, at the lower cost end are handling ADP/ACP refunds and failed 415 tests;

at the high end, extra meetings, consulting on merger and acquisition issues and extra support in plan audits.

- » **Communication and Education:** “Core” services include producing enrollment kits, participant statements and providing a call center and internet site. The “more services” items at the lower end range from digital education campaigns and solicitation of beneficiary designations; at the higher end, they include extra group meetings and one-on-one meetings

For **advisors**, the categories of services are split into investment services, vendor management, plan management and participant services. For each, FBI has identified specific services and, through consultation with over 400 advisors and statistical modeling techniques, established weightings for each service according to the degree of difficulty and thus the cost impact of the service. For example, fiduciary services are given a higher degree of difficulty than non-fiduciary services, as are the use of customized tools, checklists, online access and monitoring of education resources provided by the recordkeeper.

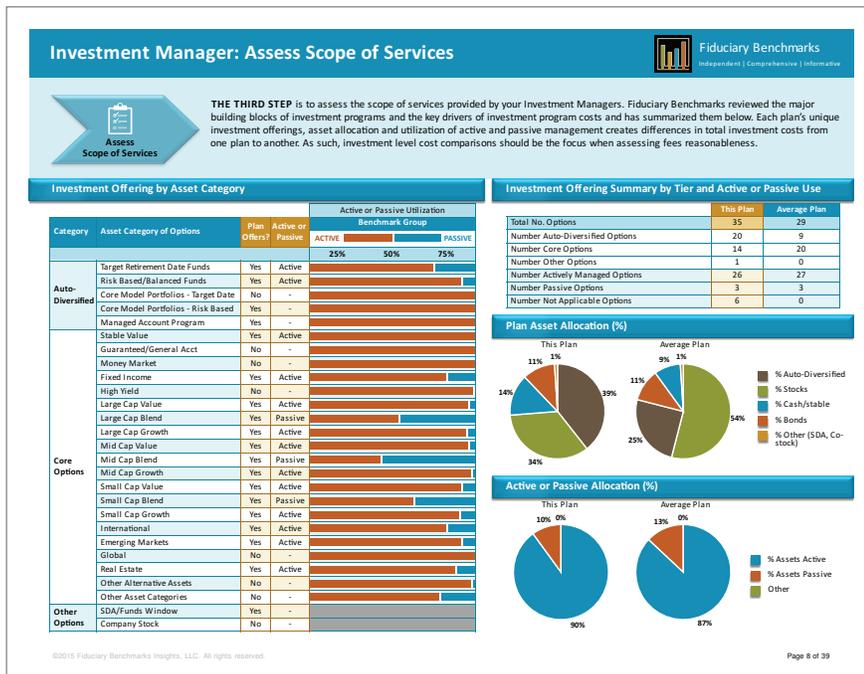
For **investment managers**, FBI has reviewed the major types of investment programs and the key factors that drive investment costs. In so doing, it is able to provide a detailed analysis of the elements of cost involved in a plan’s investment lineup, including for example, active versus passive investment management, the number of professionally managed options (such as target date funds, risk based funds and model portfolios), the number of core funds and other options such company stock. By understanding how the plan assets are invested across these categories, a plan sponsor can compare its plan to the peer group in a more granular way. Instead of looking at a gross number for investment costs and trying to compare the plan to the peer group plans, the plan sponsor is able to see why its plan may differ from the peer group and determine whether changes in the investment lineup are appropriate.

## APPLICATION OF LEGAL PRINCIPLES

ERISA requires that plan sponsors analyze costs in relation to the services being provided. As the DOL has explained, “fiduciaries must assure that the compensation paid...is reasonable, taking into account...services provided to the Plan...”<sup>14</sup> But plan sponsors are not in a position to make this analysis unless they understand both the services their plan is receiving and the relative complexity and added cost that a given service might entail.

FBI’s Step 3 is designed to help plan sponsors make this assessment. It lists for each type of service provider the array of services that a plan might receive and then weights them according to complexity, difficulty and impact on cost. It shows which services cost more in light of greater levels of service or complexity. This provides plan sponsors with the additional information they need to determine which services are more “valuable” to their plan and thus whether paying more for them is justifiable.

Given the fiduciary obligation to determine the reasonableness of service provider compensation in relation to the services being provided, Step 3 is especially useful to plan sponsors. It breaks down the services into categories based on complexity and how helpful the service is to plan sponsors and participants. Using this information, a plan sponsor is able to make the type of assessment required under ERISA.



## Step 4: Examine Value Delivered

FBI's fourth Step is designed to help plan sponsors understand the value being delivered by the service providers. In the case of recordkeepers and advisors, the services are divided into those that help the plan sponsor and those that provide value to participants. For participants, "value" is determined using a variety of "success measures" that compare a plan to the median of the peer group. For this purpose, the peer group is identified by industry – in addition to the other factors identified in Step 1. These success measures are used because the results of the factors for investment managers are somewhat different, as described below, since the assessment is for a different purpose.

For **recordkeepers**, the three categories to be considered for the value delivered to the plan sponsor are:

- » the accuracy and timeliness of the services,
- » the support services available to assist the plan sponsor in managing the plan, and
- » plan design assistance which can lead to improved participant behavior and retirement outcomes.

Plan sponsors are encouraged to ask the recordkeeper about each of these elements, especially how they measure their service standards and the types of reports they provide to the plan sponsor. The evaluation of the recordkeeper also takes into account "success measures" for participants, that is, the factors that most significantly impact whether participants are likely to accumulate significant retirement savings. These include:

- » participation rate,
- » deferral rate,
- » the percentage of participants maximizing their deferrals to obtain the company match,
- » the percentage invested in professional managed options (what FBI refers to as "auto-diversified" options),
- » the percentage who receive professional advice,
- » those who are properly diversified without receiving professional advice, and
- » the percentage who do not cash out of the plan on termination.

In order to help plan sponsors understand how small differences in these metrics can have a meaningful impact on participant balances, FBI projects the average account balance of the plan's participants, assuming they will retire in approximately 25 years. This calculation is compared across similar industries. By using this projection, the differences in participation rates, deferral rates and higher rates of return from investments in automatically diversified options becomes more apparent.

For **advisors**, the factors considered for plan sponsor value are:

- » investment services,
- » vendor management, and
- » plan management.

In each category, FBI calculates a “PlanCheck Score” using a model developed from consultation with over 400 advisors, that associates certain services with current legal issues, issues addressed in DOL investigations and best practices. The PlanCheck Score measures the following for each of the value factors how well the services provided by the Advisor follow best practices that protect the plan sponsor as a fiduciary. To develop the PlanCheck Score, FBI uses a proprietary mathematical model based on surveys of approximately 400 Advisors to determine which services are “worth” more in terms of best practices and fiduciary protection.

This Score is compared to the peer group. If the plan has a higher PlanCheck Score, this indicates that the plan is getting more value.

For participants, because the same factors that affect participant outcomes used in assessing the value of recordkeeper services apply to advisor services, the success measures for participants used for advisors are the same.

For **investment managers**, FBI suggests that plan sponsors consider investment performance, including absolute performance, risk adjusted performance, performance compared to an index and peer group and volatility; compliance with the plan’s investment policy, using similar factors; and how indirect compensation is used by the investment manager, i.e., whether it is retained as compensation for services, credited to the plan as an offset of explicit fees or rebated to participant accounts. For this Step, advisors play a critical role in helping plan sponsors with the evaluation, given their experience in analyzing investments.

## APPLICATION OF LEGAL PRINCIPLES

ERISA requires that plan sponsors evaluate the cost of services in relation to the services being provided. This evaluation can be done on a purely quantitative basis: the plan is receiving specified services and the cost is \$x; or the evaluation can also take into account the value of the services to the plan, that is, whether they are helpful to the plan sponsor in its role as the responsible plan fiduciary and to the participants.

Step 3 looked at what the services are. Step 4 helps plan sponsors make an in-depth assessment of these services – by looking at whether those services help the plan sponsor run the plan and whether those services help the participants achieve more successful retirement outcomes. For example, in the case of advisors, it offers a means of evaluating whether the services provide average, below average or above average value to the plan.

Thus, Step 4 helps a plan sponsor meet its obligation to act in the interest of the participants and to act prudently in selecting and monitoring the necessary services for the plan by helping them understand whether the services are worth the cost being paid.

Advisor/Consultant: Examine Value Delivered

**Fiduciary Benchmarks**  
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Examine Value Delivered

**THE FOURTH STEP** in understanding “What You Are Getting” is to examine the value being delivered. For you as Plan Sponsor, Fiduciary Benchmarks calculates a PlanCheck Score using a proprietary model that associates certain services with current legal issues, DOL Audit concerns and relevant best practices (100 is the maximum score). For your Participants, we compare the Participant Success Measures for your plan versus your industry. We also may project how these metrics impact the projected account balances of all participants, assuming they are all “average.”

Value Delivered to You as Plan Sponsor

**INVESTMENT SERVICES**

**Average\***

Your **PlanCheck Score** is shown on the left. This score is **Average** versus a typical score of 75.

In addition, you should examine the **additional investment performance** being generated by your Advisor/Consultant. Note that 10 basis points of additional investment performance for your plan is worth **\$12,460**

**VENDOR MANAGEMENT**

**Well Above Average\***

Your **PlanCheck Score** is shown on the left. This score is **Well Above Average** versus a typical score of 50.

In addition, you should examine how well your Advisor/Consultant is making sure that your **service levels meet or exceed expectations** from your Recordkeeper and TPA for a **reasonable (not low) price**.

**PLAN MANAGEMENT**

**Below Average\***

Your **PlanCheck Score** is shown on the left. This score is **Below Average** versus a typical score of 55.

In addition, you should examine how well your Advisor/Consultant keeps you apprised of **leading edge Plan Design** provisions with respect to Eligibility, Participant Contributions, Employer Contributions, Investment Structure, and Distributions.

\*See details on prior page

Value Delivered to Your Participants

Participant Success Measures	Your Plan 2015-02-23	Industry Median <sup>1</sup>
Participation Rate	75.0%	64.0%
Deferral Rate	4.5%	4.4%
Percent Maximizing Company Match	32.0%	48.0%
Percent Assets in Auto-Diversified Options	65.1%	14.0%
Percent 'Delegators' (80% in Auto-Diversified Option)	***	***
Percent 'Doers' Diversified & Auto-Rebalancing	***	***
Percent Terminated Participants NOT "Cashing Out"	75.0%	81.0%

<sup>1</sup>Industry 11 - Agriculture, Forestry, Fishing and Hunting  
\*\*\* Available upon request via Retirement Outcomes Evaluator

The chart below projects current account balances in 2015 for the 177 active participants in the plan **assuming all participants are average** using the metrics shown above.

Assumptions	Your Plan 2015-02-23	Industry 2014-02-28
Average Age	42	42
Average Salary	\$61,050	\$61,050
Inflation Rate	3.0%	3.0%
Beginning Balance	\$70,395	\$70,395
Employee Deferral	4.5%	4.4%
Employer Contribution	1.5%	1.5%
Rate of Return	6.4%	5.5%
Ending Balance	\$511,923	\$432,421
Number of Parts	177	151
Projected Balance	\$97,415,667	\$69,750,222

Current

\$97,415,667

Industry

\$69,750,222

This is a hypothetical example and individual results will vary. The difference in the rates of return used are due to research sharing. "Advised" investors do better than "Not Advised" investors. See the Disclaimers page for an example of the rate of return calculation. Also note that this example does not show the expenses associated with investing.

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## Step 5: Evaluating Fees

Step 5, the last step in the FBI benchmarking process, looks at fees. In a sense, it is the culmination of the process, since plan sponsors are required by both the fiduciary rules and the prohibited transaction restrictions to ensure that the costs borne by a plan are reasonable. But the FBI comparison of fees has a broader foundation based on a customized peer group, assistance in reviewing provider quality, and assessment of the scope and value of services being provided. For recordkeepers and advisors, the report lists all fees paid to the provider and then compares them to the peer group and to a proprietary market-based benchmark called FeePoint. As part of the report, FBI includes a description of the elements that make up the FeePoint benchmark.

The FeePoint benchmark is designed to assess whether a plan is receiving additional services that may warrant additional fees. FeePoint consists of a base fee identified by FBI through mathematical modeling of the fees of the providers in its database and then adjusts for the assumption of fiduciary status and for extra services. This produces a benchmark number that can then be compared to the actual fees being paid by a plan to assess whether the plan is receiving added value for which additional fees are appropriate or is over-paying for the services it is receiving.

For **recordkeepers**, Step 5 lists the source of the fees being received by the recordkeeper, *e.g.*, from investments, from participant contributions and other sources, payments to other service providers and credits of revenue sharing to the plan and participant. This amount is then compared to the recordkeeping fees of the peer group by quartile. Finally, the fees are compared to the FeePoint fee, which consists of the FBI “predictive” base fee, plus adjustments for fiduciary status, extra communication services and other extra services.

For **advisors**, the process is identical. The total fees are identified and compared to the benchmark group. The fees are also compared to the FeePoint amount, which may be viewed as the hypothetical fee that a plan sponsor might expect to pay for the level of services being received. The following example illustrates the usefulness of the FeePoint comparison: suppose a comparison of the fees paid to an advisor in relation to the peer group shows that a plan is paying fees in the 70th percentile, that is, well above the median for its peer group. But the fee compared to FeePoint may show that the plan is receiving additional services, that the fees being paid are less than the hypothetical fee and that the extra compensation is justified.

For **investment managers**, Step 5 provides a framework for comparing a plan’s investments with the peer group. For each investment, FBI considers the relevant characteristics, such as asset class, whether it is actively or passively managed and whether it pays revenue sharing. It then determines the total expense ratio, which consists of the total expenses paid by the investment less any revenue sharing or credits, and the net money manager fee. The same net amounts are then developed for the investments of the plans in the peer group and shown by quartile. The plan sponsor is able to use this information to understand how the costs of its plan’s investments

compare with those of the plans in the peer group, that is, whether the costs of a given fund fall at or near the median or are above or below. This information enables a plan sponsor to assess whether the investments it has selected, including the share class it has selected, are appropriate (and thus prudent) for the plan.

### Recordkeeper: Evaluate Fees

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**Evaluate Fees**

**THE FIFTH STEP** is to evaluate the fees being paid to your Recordkeeper. First, Fiduciary Benchmarks tracks ALL fees being paid to your Recordkeeper. Second, because Recordkeeper services vary greatly, we **compare your fees to the benchmark group** and to FeePoint – a proprietary market-based benchmark that reflects the unique services provided by your Recordkeeper. Third, we provide a detailed explanation of FeePoint so you can have a better understanding of the unique services provided by your Recordkeeper. FeePoint adjusts for services related to plan fiduciary status, meetings and consulting hours/expenditures. Other qualitative and quantitative services are NOT part of FeePoint.

**1 Track all Fees**

Description	Amount	%
<b>Source of Fees</b>		
Fees from Investments	\$ 26,702	0.214%
Other Fees	\$ 22,500	0.181%
<b>Payments</b>		
Payment to TPA	\$ -	-
Payment to Advisor/Consultant	\$ -	-
Payment to Others	\$ -	-
<b>Credits</b>		
Credits to Plan	\$ (20,000)	(0.161%)
Credits to Participants	\$ -	-
<b>Total</b>	<b>Total Recordkeeper Fee</b>	<b>0.234%</b>

**2 Compare Fees to BMG and FeePoint**

**3 Understand FeePoint**

Adjustments	Plan	BMG*	Amount**
FBI Predictive Model for Base Recordkeeping Fee	-	-	\$ 36,690
Should Auto Increase Be Used By The Plan - Hours	25	-	\$ 3,750
New Design Provision Analysis - Hours	15	-	\$ 2,250
Group Meetings - Hours	8	-	\$ 1,200
Newly Supported DocuStorage - Expenditure	-	-	\$ 1,000
Extra Committee Meetings - Hours	4	-	\$ 600
<b>FeePoint Total</b>			<b>\$ 45,490</b>

\* BMG represents the most common occurrence. Higher and lower occurrences exist.  
\*\* Assumed Hourly rate for Recordkeeper = \$350

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### Recordkeeper: Summary and Documentation

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To assist you in the evaluation of your Recordkeeper, Fiduciary Benchmarks has pulled the most relevant data and statistics from our patented process and displayed them below. As a Fiduciary, you have the ultimate responsibility of making sure you assess and negotiate REASONABLE fees from your Recordkeeper. The information below should help you in that decision-making process.

**Customize Benchmark Group** → **Review Provider Quality** → **Assess Scope of Services** → **Examine Value Delivered** → **Evaluate Fees**

**Benchmark Group**

The Characteristics of your customized benchmark group are shown below:

**YOUR PLAN**

- Assets: \$12.5 M
- Participants: 177
- Avg. Balance: \$70,395

**ASSETS DRIVE FEES**

- Low Value: \$10 M
- Median: \$11.9 M
- High Value: \$15 M

**AVG. BALANCE DRIVES FEES**

- Low Value: \$50,000
- Median: \$64,825
- High Value: \$90,000

**30 PLANS IN YOUR BENCHMARK GROUP REPRESENTING**

- 13 Recordkeepers

**Provider Quality - Scope of Services - Value Delivered**

Shown below are **QUALITATIVE** components that should be examined when assessing the reasonableness of your Recordkeeper.

Provider Quality - Scope of Services - Value Delivered	Your Plan	Benchmark	FBI Score
Service Provider Quality			
Service Quality: Accuracy and Timeliness			
Support Services: People, Processes and Technology			
Plan Design Assistance			

Your discussion of these items should be documented and the related notes, as well as any other report notes, should be placed into your fiduciary file to assist in satisfying your fiduciary obligations.

Shown below are **QUANTITATIVE** components evaluated by Fiduciary Benchmarks that can also be examined when assessing the reasonableness of your Recordkeeper.

Provider Quality - Scope of Services - Value Delivered	Your Plan	Benchmark	FBI Score
Scope of Services - Recordkeeping	61.5	55.8	Above Average*
Scope of Services - Administration	7.2	3.4	Well Above Average*
Scope of Services - Compliance & Consulting	13.5	8.5	Well Above Average*
Scope of Services - Education & Communication	37.6	7.3	Well Above Average*

\* See details on Assess Scope of Services pages

**Fees**

Shown below are how your fees compare to the Benchmark Group median and to Fiduciary Benchmarks' proprietary benchmark for your Recordkeeper: FeePoint.

**Note: FeePoint adjusts for services related to plan fiduciary status, extra communications items, extra consulting hours and extra meetings. Other qualitative items are NOT part of FeePoint.**

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## APPLICATION OF LEGAL PRINCIPLES

Plan sponsors have a fiduciary responsibility to ensure that their plan pays no more than reasonable costs, that the compensation paid to service providers is reasonable in the context of the services being provided and that the costs of the investments is reasonable. As explained by the DOL in a recent court filing, "[T]he trustee must be cost-conscious...in carrying out the trustee's investment duties," and "Put simply, '[w]asting [participants'] money is imprudent.'"<sup>15</sup> [Emphasis added] In particular, the courts have begun to examine the selection of investment share classes in determining whether fiduciaries have fulfilled their duty to ensure that the plan pays only reasonable expenses.

The FBI benchmarking service provides plan sponsors with detailed information about fees and then adds an element that helps them fulfill their fiduciary obligation to evaluate costs and fees in relation to services. The added element is FeePoint which looks at fees in relation to the hypothetical cost of the actual services the plan is receiving. When combined with the other steps in the FBI process, this helps plan sponsors fulfill their fiduciary obligation for evaluating costs and compensation. In the context of investments, it helps plan sponsors be "cost-conscious" and ensure that they are not wasting participant money. It helps them assess whether the costs of the investments chosen for the plan are reasonable in relation to the costs that other plans are able to achieve... and thus determine whether a change in investments or asset classes is warranted.

## ENDNOTES

1. In this context, “investment manager” refers to the entity that manage plan investments, such as mutual funds, insurance company separate accounts, collective trusts, etc.
2. DOL Advisory Opinion 97-15A.
3. Preamble to Final 408b-2 Regulation, 77 Fed. Reg. 5632.
4. DOL Information Letter to Theodore Konshak, December 1, 1997 (the “Konshak letter”).
5. *Dupree v. Prudential Ins. Co. of America*, 42 EBC 1510, 1527 (S.D. Fl. 2007).
6. *Tussey v. ABB, Inc.*, 52 EBC 2826, 2838 (W.D.Mo 2012).
7. *Id.* at 2834.
8. DOL Regulation Section 2550.404a-1(b)(1).
9. See *Tibble v. Edison Int’l*, 56 EBC 1245, 1262 (9th Cir. 2013) (failure to consider information that an experienced investor would have reviewed is imprudent); *In re Unisys Savings Plan Litigation*, 19 EBC 2393, 2407 (3rd Cir. 1996) (“the thoroughness of a fiduciary’s investigation is measured not only by the actions it took in performing it, but by the facts that an adequate evaluation would have uncovered”).
10. While beyond the scope of this White Paper, the Regulation provides some explanation of “appropriate consideration,” indicating that it includes but is not limited to determining whether a particular investment or investment course of action is reasonably designed, as a part of the portfolio, to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain, and considering the composition of the portfolio with regard to diversification, the liquidity and current return of the portfolio relative to anticipated cash flow requirements and the projected return relative to the funding objectives of the plan. DOL Regulation Section 2550.404a-1(b)(2).
11. DOL Interpretive Bulletin 95-1.
12. QDIA Regulation Preamble, 72 Fed. Reg. 60453 (October 24, 2007).
13. The Konshak letter.
14. *Id.*
15. Brief for the United States as Amicus Curiae Supporting Petitioners, *Glenn Tibble, et al., Petitioners v. Edison International, et al.*, In the Supreme Court of the United States (December 2014).