

July 10, 2023

Christine Donahue, Executive Secretary  
ERISA Advisory Council  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Ave, NW  
Washington DC 20210

*via email to donahue.christine@dol.gov*

**Re Statement to the ERISA Advisory Council Regarding Recordkeeping in the Electronic Age**

Dear Ms. Donahue,

The American Retirement Association (ARA) is pleased to provide a statement to the ERISA Advisory Council (the Council) on Recordkeeping in the Electronic Age, a matter which will be before the Council at its meeting on July 17-19, 2023. The ARA's statement is intended to assist the Council in examining issues relating to employee benefit plans' shift to electronic/digital recordkeeping, including for compliance with ERISA's record retention requirements and related matters. Our statement discusses the following issues:

- **Tools and technologies used by plan administrators and third-party service providers to manage and retain plan records electronically,**
- **Recent trends in electronic recordkeeping systems, potentially including using artificial intelligence,**
- **The authenticity, accuracy, and completeness of the electronic recordkeeping, the long-term availability and retention of plan records, and**
- **The disclosures and controls in place to ensure the reliability of electronic records**

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer sponsored plans. In addition, ARA has nearly 37,000 individual members who provide consulting and administrative services to the sponsors of retirement plans. ARA and its underlying affiliate organizations are diverse but united in their common dedication to the success of America's private retirement system.

### **Discussion**

The ARA is presenting the following issues and concerns to the Council:

- **Tools and technologies used by plan administrators and third-party service providers to manage and retain plan records electronically are not uniformly implemented**

While the Department of Labor (the Department) has provided guidance on retaining and maintaining records, in practice, policies concerning such matters are not common among service providers. Further, some plans have records that must be retained which were generated in disparate ways, which can complicate compliance. For example, plan documents, adoption agreements, related business resolutions, are often printed on paper, executed by wet signatures or signed electronically through a third-party vendor. Participant elections for distributions, elections and QDROs similarly are often presented on paper, signed with a wet signature or signed electronically through a third-party vendor. Participant census and contribution information may be transmitted electronically, delivered to the recordkeeper printed on paper, or entered directly into the recordkeeper's system via an online portal.

The volume of data that is required to administer plans has grown exponentially over time, and plan administrators sometimes do not have the tools and technologies to manage that data. To illustrate, early 401(k) plans typically offered 3 investment funds and 3 types of contributions that required separate accounting. In 2021, plans offered an average of 17.5 investment funds and the availability of more types of contributions. Moreover, balancing participant access to plan information with data security and controls over personal identifying information (PII) adds complexity that many plan sponsors are not equipped to manage. Worse yet, service providers can have a data architecture and use encryption methods and standards that differ from other service providers or the plan administrator.

- **Recent trends in electronic recordkeeping systems, potentially artificial intelligence**

Electronically signed records (e.g., DocuSign) records are often contained on separate operating systems, which, of course, complicates plan administration. Recent developments in the business of recordkeeping, however, for example, application programming interface, a software application used to interface between two applications is a recent innovation. Cloud-based and document management services such as SharePoint, OnDemand and many others that have a wide range of purpose for the employee benefit plans. The pace of innovation is rapid.

- **The authenticity, accuracy, and completeness of the electronic recordkeeping, the long-term availability and retention of plan records**

The shift to electronic/digital recordkeeping is a constant progression as new electronic methods are developed, and older records are stored on paper or via electronic images. This evolution also presents challenges to long-term availability and retention of records and the technologies needed to access and use that data. The evolution of plan administration adapted to the availability of personal computers both on the job and at home leading to storage of information on microfiche/microfilming of paper documents, voice response systems, hard drive storage, the internet, solid state storage, smartphone apps, cloud storage, e-mail and now on the horizon artificial intelligence. Records generated on paper need to be captured or imaged and retained. Imaged paper most likely is held on systems separate from the recordkeeping system. The transition from one technology to the next can result in inaccessible of some data because of obsolete technology.

Further, long-term paper storage, microfiche, backup tapes, hard drives are vulnerable to media corruption. Policies must consider these risks and mitigation methods in cases of unforeseen for unavoidable circumstances. Records that were previously generated in one manner may now be generated electronically because outsourcing of processes to third party service providers and TPAs has become more common with the development of technology and changes in documentation requirements (e.g., hardship substantiation rules, electronic spousal consents). These outsourced services are more likely to involve electronic records (scanning and email) or online elections.

Since enactment of the Electronic Signatures in Global and National Commerce (ESIGN) Act on June 30, 2000, use of DocuSign has become increasingly common. Yet, record retention requirements span plan years which may involve multiple processes for the same type of record (e.g., plan document, distribution form). The predominance of use of paper, outsourcing, etc. varies by plan type (DB,401(k), 403(b)), plan sponsor size, and industry. For example, actuaries for defined benefit plans keep historical information to the extent needed for the calculation of benefits. Depending on the benefit formula and participant's service, this information may extend over several decades. In other cases, such as with 403(b) plans, there may be multiple vendors including for frozen plans and annuity contracts and platforms with varied outsourcing and electronic capabilities.

Plan sponsor information provided to the plan's third-party service providers are created within evolving technology that is designed to generate and retain data for unrelated purposes (e.g., payroll taxes). Remittance of data by Payroll Providers are key to the administration of virtually every plan. The movement of data from and to payroll commonly is a point of vulnerability of the quality of data. Human resources systems may be a source of plan data that parallels the payroll system. Data inconsistency between HR systems and payroll can affect the accuracy of plan data.

- **The disclosures and controls in place to ensure the reliability of electronic records**

Ensuring the reliability of electronic records must remain a top priority. Plan auditors commonly use SOC 1 and/or SOC 2, if available, to test plans. However, smaller plans generally are not audited and do not have the benefit of determining whether controls meet requirements. Privacy policies have evolved to restrict the use of PII. In the past, social security numbers that may have been transferred insecurely now require secure transmission, such as encryption. Two-step verification and the use of credit unions to ensure participant data accurately matches systems.

#### *Additional Issues*

- **Concerns relating to the transfer of records when plan-level transactions occur, such as recordkeeper transitions, spin-offs, plan terminations, orphaned plans, and pension risk transfers**

Plan terminations, spin-offs, orphaned plans, and pension risk transfers present difficulties from a record retention perspective because the circumstances often involve the dissolution or removal of the plan sponsor. The plan sponsor or a representative may not be available to authorize the transmission of necessary data from service providers if it is still available. Identifying relevant service providers, necessary reports, and the meaning of data and codes within the reports can be severely limited. Depending on the length of time, the plan's service providers may have purged the plan's data. Successor plan sponsors or vendors responsible for dissolving the plan are not able to access or require record retention at the relevant time. These circumstances as well as service provider transitions can be complicated by a number of factors. Recordkeeping systems and compliance systems commonly use status codes to identify a participant's characteristics, (e.g., active, terminated, disabled, HCE, NHCE), classification (e.g., union, non-resident alien, intern), coverage (e.g., includable, excludable, otherwise excludable). There is no industry standardization for the status codes and this data must be translated between service providers. Another example is the transfer of information between service providers of plan loans, which is an area of particular concern. Loan amortization schedules may not have been provided to the new service provider. As a result, the new service provider will regenerate a loan amortization schedule that changes the amount and even possible the frequency of loan repayments in order to conform to its systems.

Additionally, certain data elements such as tax basis, loans (in particular loans related to a primary residence), pre- and post-1986 earning on deferrals, service history (eligibility, vesting and benefit accrual), must be available for an extended period of time. This information will generally be needed for future purposes but isn't always transferred which can impact administration (e.g., paid off or offset loan).

Finally, changes in payroll systems can impact year-to-date values not transferring to the successor provider thus affecting accurate monitoring of limits such as elective deferral and compensation maximums.

- **Plan-level transactions and the fiduciary responsibilities of named and other fiduciaries, as well as the duties of service providers (e.g., recordkeeping and payroll) during times of transition, must be handled with care**

Among third party service providers, maintenance of plan records is seen as the primary responsibility of the plan's fiduciaries, and service provider records are treated as secondary records. Recordkeeping firms often based record retention policies on a seven year from the transaction time frame and provide for destruction of records seven years following the termination of the agreement with the plan. The industry standard for payroll providers to maintain records ranges from two to four years depending on the type of information. A standard for holding payroll files related to retirement plans would be reasonable. Some Trust companies retain trust account information for at least 18 months and cannot or will not provide older such information. A standard for not only holding but the distribution of said information to plan sponsors and service providers may also be helpful.

- **Contracts and service level agreements in place between plan sponsors or plans and recordkeeping and payroll service providers should adequately address the wide range of potential outcomes associated with plan-level transactions**

The suggested industry best practice for plan administrators is to benchmark their service providers every three to five years. With such possible turnover, it is important that service providers, develop procedures and methodologies to effectively transmit data between predecessor and successor service providers. Some industry groups have tried to develop standards for the exchange of data among their members. These standards identify common data elements that are required based on the type of plan and its design. Consensus is needed among service providers of the data that needs to be provided during a change in providers, whether it be for ongoing administration or the transfer of historical records. The transmission of this information to a new provider is not uniform within the industry because different systems used by the various third-party service providers may not conform easily to standard formats. Contract and service level agreement provisions regarding plan-level transactions and record retention are generally implemented consistently for all plans on the platform and are often not negotiable or are stated generically to allow for changes without amending all client agreements.

- **The availability of historical plan records when plan sponsors or plan fiduciaries change service providers, and the length of time electronic records should remain accessible after a change in service provider should be considered**

Retention policies vary by service provider accounting and other firms that service the retirement plan including accounting and trust firms, payroll providers and financial institutions. Retention guidelines for all can be different based on industry or firm preference.

Finally, the ARA believes with respect to records retention, the authenticity and reliability of the electronic records, and the data security of electronic records would be very helpful. With the shift to most data being generated and stored electronically, the probability that plan administrators do not have possession of or control over the records they are required to retain increases. As long as service providers view plan sponsors as owning the primary records, there is little incentive for them to create mechanisms for creation of records the plan fiduciary can retain to comply with ERISA.

The ARA recommends that the Council consider:

- Advocating for the adoption of a minimal industry standard dataset that would be delivered to plan fiduciaries no more frequently than annually
- Advocating for written document retention standards that are common to not only TPAs, or bundled providers but accounting firms, trust companies, financial institutions and payroll providers
- Requesting that the Department issue guidance that allows for aggregated annual reports of participant activity to meet the “as long as they may be relevant to a determination of benefit entitlements” requirement if certain requirements are met where the report is generated by the platform that collected and implemented participant elections in lieu of having to collect and retain detailed individual interactions with such platforms for the entire plan history
- Adopting a concurrent set of validations/reconciliations to assure data quality
- Requesting that the Department issue guidance to fiduciaries on language to be contained in service provider agreements related to obligations to supply plan fiduciaries records regularly and at plan termination
- Understanding that the majority of companies in the industries that serve plans are small businesses and most (in terms of numbers, not size) service providers are small businesses. Imposing costly solutions will exacerbate the complaint of small plan sponsors that plans are too expensive to administer

The ARA very much appreciates the Council’s work on issues relating to recordkeeping in the electronic age. The ARA shares the Council’s interest in these matters and would welcome the opportunity to discuss this further with you. Please contact Allison Wielobob, General Counsel, at [AWielobob@USARetirement.org](mailto:AWielobob@USARetirement.org) or (703) 516-9300.



Thank you for your time and consideration.

Sincerely,

/s/ Brian H. Graff, Esq., APM  
Executive Director/CEO  
American Retirement Association

/s/ Allison Wielobob  
General Counsel  
American Retirement Association