# Advisory Council on Employee Welfare and Pension Benefit Plans

## Report to the Honorable Julie A. Su, United States Acting Secretary of Labor

## Recordkeeping in the Electronic Age

December 2023

**NOTICE**

This report was produced by the Advisory Council on Employee Welfare and Pension Benefit Plans, usually referred to as the ERISA Advisory Council (the Council). The Council was established under Section 512 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) to advise the Secretary of Labor (the Secretary) on matters related to welfare and pension benefit plans.[1] This report examines recordkeeping in the electronic age.

The contents of this report do not represent the position of the Secretary or of the Department of Labor (the Department or DOL).

[1] As used throughout, "pension plan" refers to plans defined in Section 3(2)(a) of ERISA, 29 U.S.C. § 1002(2)(a), and therefore includes both defined benefit, and 401(k) and other defined contribution plans.

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**ACKNOWLEDGEMENTS**

The Council recognizes the following individuals and organizations who provided testimony or information that assisted the Council in its deliberations and the preparation of its report. Notwithstanding their contributions, any errors in the report rest with the Council alone. The witnesses are shown in alphabetical order on the dates of their testimony. Their submitted written testimony can be found at https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council.

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## EXECUTIVE SUMMARY

The shift from paper to electronic recordkeeping has been in progress for decades. Older paper records are continually being converted from paper to electronic files, while most newly created records are generated only electronically. The 2023 ERISA Advisory Council explored the implications of the shift to electronic recordkeeping for compliance with ERISA's record retention requirements; the reliability, accuracy and completeness of electronic records; and the long-term availability and retention of plan and participant records. The Council investigated the transfer of records when plan-level transactions occur, such as recordkeeper transitions, corporate actions and pension risk transfers, and the length of time electronic records should remain accessible after a change in service provider. The Council also examined the fiduciary responsibilities of named and other fiduciaries, as well as the duties of service providers during times of transition.

The Council gathered evidence and heard testimony from a wide variety of witnesses, including third-party recordkeepers and plan service providers; attorneys who represent small- and medium-sized plans and multiemployer Taft-Hartley plans; attorneys and organizations who assist, represent and advocate on behalf of plan participants and beneficiaries; plan auditors; organizations representing third-party service providers; and others. The Council believes DOL guidance and education are needed on a number of issues as set forth in greater detail in the Rationales for Recommendations and Recommendations and Council Observations sections of this report.

This guidance is necessary, in the Council's view, for the following reasons, among others: (1) lack of sufficient clarity as to which records must be maintained by plan sponsors in order to comply with ERISA Sections 107 and 209; (2) lack of knowledge and clarity among plan fiduciaries as to their responsibilities in selecting and monitoring third-party recordkeepers, especially with regard to the transition from one recordkeeper to another; (3) wide disparity in recordkeepers' contracts with plans; (4) the need to maintain certain types of paper records or digitized copies of those records in order to resolve disputes or questions about entitlement to and amounts of benefits, and for purposes of plan audits; (5) the responsibilities of plan fiduciaries to preserve or provide for a third party to preserve certain records after termination of defined benefit pension plans; and (6) loss of data and unavailability of documents as a result of corporate

transactions, such as corporate mergers and acquisitions, that result in mergers of both defined benefit and defined contribution plans.

## BACKGROUND

### A. Prior ERISA Advisory Council Reports

A 2022 ERISA Advisory Council report focused on cybersecurity issues within health benefit plans. It examined the vulnerabilities and challenges faced by plan sponsors, fiduciaries and service providers, emphasizing differences related to plan size. The report also delved into existing frameworks and initiatives tailored to healthcare and health plan cybersecurity, as well as the interplay of overlapping regulatory regimes for health plans. Although the primary focus was on health plans, the findings and recommendations were expected to be applicable to other welfare benefit plans. The Council made six key recommendations, covering fiduciary responsibility for cybersecurity; requirements for health plan service providers; clarification of relevant guidelines and regulations; evaluation of HIPAA compliance; regular updates of best practices; and education and outreach to enhance understanding and fulfillment of cybersecurity duties among health plan sponsors and fiduciaries, particularly targeting small- and medium-sized plan administrators.

A 2014 ERISA Advisory Council report focused on the outsourcing of employee benefit plan services, particularly functions traditionally handled by employers, and the role of multiple employer plans (MEPs) in outsourcing. The Council aimed to assist the Department in providing education, outreach and regulatory guidance regarding employer outsourcing practices under ERISA. The report contains two items of particular relevance for the Recordkeeping in the Electronic Age topic: (1) a finding that outsourcing of responsibilities to service providers under ERISA is prevalent, and (2) recommendations for additional guidance on selecting and monitoring service providers.

The 2012 ERISA Advisory Council issued a report on beneficiary designations in retirement and life insurance plans; it examined challenges in paying beneficiaries correctly and improving administrative practices. Recommendations provided by the Council centered on the development of educational materials for plan participants to enhance their understanding of beneficiary designations, emphasizing the importance of timely and proper completion, regular updates in response to life events (e.g., marriage and divorce) and the need to maintain records of executed designations. The Council also recommended the DOL offer guidance to employers, plan administrators and service providers on enhancing plan design and administration practices to reduce disputes related to beneficiary designations. Focus areas included

responsibility for administering designations, default beneficiary provisions, addressing common dispute triggers, beneficiary location procedures, review and acceptance of designations, maintaining participant awareness of designation status and updating designation forms. Lastly, the Council recommended the DOL issue guidance for plans, administrators and fiduciaries concerning beneficiary designation disputes and that such guidance address ERISA claims procedures, charging participant accounts for dispute resolution costs and retention of beneficiary designations and related documents, including spousal waivers.

**B. DOL Guidance and Publications**

DOL publications provide guidance on fiduciary responsibilities but say little about recordkeeping. Specifically, the DOL document "Getting It Right – Know Your Fiduciary Responsibilities" from September 2021 advises business owners responsible for pension plans regarding adherence to federal laws, especially ERISA, and emphasizes that selecting and monitoring service providers are vital responsibilities. The guidance also reminds fiduciaries to check if service providers handling assets have fidelity bonds; verify the licensing status of licensed providers; and understand agreement terms, obligations, fees and expenses. It makes clear that fiduciaries should keep records of selection processes, make regular requests for service information, periodically review performance, address participant feedback and inquire about changes in a provider's status. This guidance promotes prudent selection and monitoring of service providers, thus protecting plan participants' interests. It does not specifically refer to records retention practices of third-party service organizations or discuss contractual provisions related to the retention and availability of plan records.

**C. ERISA Provisions Regarding Recordkeeping**

ERISA Section 107, 29 U.S.C. § 1027, provides that any person required to file a report or certify information in reports, should maintain those reports and information and data sufficient to enable the reports to "be verified, explained, or clarified, and checked for accuracy and completeness" and to keep those records available for "not less than six years from the filing date of the documents based on the information" in the records.

ERISA Section 209, 29 U.S.C. § 1059, imposes recordkeeping requirements on employers that sponsor employee benefit plans. It mandates that in accordance with any regulations that the Secretary of Labor

may prescribe, employers must maintain records with regard to their employees "sufficient to determine the benefits due or which may become due to such employees." It further requires employers to furnish information necessary for plan administrators to maintain records and reports required by the DOL. It does not specify the time period for which such records should be kept.

The only regulations prescribed by the Secretary with regard to these sections relate to electronic recordkeeping. Specifically, 29 C.F.R. § 2520.107-1 addresses "[u]se of electronic media for maintenance and retention of records." It applies to both ERISA Sections 107 and 209. In relevant part, it provides as follows:

> **(b)** ***General requirements.*** The record maintenance and retention requirements of sections 107 and 209 of ERISA are satisfied when using electronic media if:
>
> > **(1)** The electronic recordkeeping system has reasonable controls to ensure the integrity, accuracy, authenticity and reliability of the records kept in electronic form;
> >
> > **(2)** The electronic records are maintained in reasonable order and in a safe and accessible place, and in such manner as they may be readily inspected or examined (for example, the recordkeeping system should be capable of indexing, retaining, preserving, retrieving and reproducing the electronic records);
> >
> > **(3)** The electronic records are readily convertible into legible and readable paper copy as may be needed to satisfy reporting and disclosure requirements or any other obligation under Title I of ERISA;
> >
> > **(4)** The electronic recordkeeping system is not subject, in whole or in part, to any agreement or restriction that would, directly or indirectly, compromise or limit a person's ability to comply with any reporting and disclosure requirement or any other obligation under Title I of ERISA; and
> >
> > **(5)** Adequate records management practices are established and implemented (for example, following procedures for labeling of electronically maintained or retained records, providing a secure storage environment, creating back-up electronic copies and selecting an off-site storage location, observing a quality assurance program evidenced by regular evaluations of the electronic recordkeeping system including periodic checks of electronically maintained or retained records,

and retaining paper copies of records that cannot be clearly, accurately or completely transferred to an electronic recordkeeping system).

**(c)** ***Legibility and readability.*** All electronic records must exhibit a high degree of legibility and readability when displayed on a video display terminal or other method of electronic transmission and when reproduced in paper form. The term "legibility" means the observer must be able to identify all letters and numerals positively and quickly to the exclusion of all other letters or numerals. The term "readability" means that the observer must be able to recognize a group of letters or numerals as words or complete numbers.

**(d)** ***Disposal of original paper records.*** Original paper records may be disposed of any time after they are transferred to an electronic recordkeeping system that complies with the requirements of this section, except such original records may not be discarded if the electronic record would not constitute a duplicate or substitute record under the terms of the plan and applicable federal or state law.

### D. ERISA Fiduciary Standards

ERISA Sections 404–408, 29 U.S.C. §§ 1104–1108, set forth fiduciary standards and prohibit (with some exceptions) specific types of transactions involving plans and plan fiduciaries. One of those standards is the duty of prudence. The DOL has issued guidance to fiduciaries with regard to the selection and monitoring of plan service providers. 29 C.F.R. § 2509.75-8 (Q&A FR-11). That guidance provides that "the plan fiduciary will be deemed to have acted prudently in such selection and retention if, in the exercise of ordinary care . . . he has no reason to doubt the [provider's] competence, integrity, or responsibility…." In several information letters and a fact sheet, the DOL has issued further guidance with regard to selection of and delegation of tasks to service providers. See DOL Info. Ltr. From Bette J. Briggs to Diana O. Ceresi, Wash. Serv. Bureau No. DLO585, 1998 ERISA LEXIS 6 (Feb. 19, 1998); DOL Info. Ltr. From Susan G. Lahne to Gary E. Henderson, Wash. Serv. Bureau No. DLO59, 1998 ERISA LEXIS 11 (July 28, 1998); U.S. Department of Labor, "Understanding Retirement Plan Fees and Expenses (May 2004)," http//www.dol.gov/ebsa/publications/undrstndgtrmnt.html.

However, none of this guidance addresses the specifics of how to monitor a service provider's recordkeeping systems or services.

ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), provides, among other things, that a person may be a plan fiduciary to the extent he "exercises any discretionary authority or discretionary control respecting management of such plan" or "has any discretionary authority or discretionary responsibility in the administration of the plan."

The DOL's 1975 guidance, outlined in 29 C.F.R. § 2509.75-8, Q&A D-2, distinguishes "ministerial functions" in the context of ERISA fiduciary duties. It clarifies that individuals who perform purely administrative or clerical tasks related to employee benefit plans, without discretion or judgment, are not considered ERISA fiduciaries. Such tasks include processing paperwork, recordkeeping functions and conducting transactions as directed.

## WITNESS TESTIMONY

## AUDITORS

1. **Sandra Carrier, Deloitte**

   Sandra Carrier is a partner at Deloitte and a member of the AICPA's Employee Benefit Plan Audit Quality Center's Executive Committee. Plan sponsors are responsible for the operation and administration of a plan. Records may be maintained by the employer or third-party administrators and outside service organizations, such as trustees, insurance companies, consulting actuaries and contract administrators. ERISA requires plan sponsors to retain broad categories of records related to meeting its fiduciary responsibilities. ERISA Sections 107 and 209 establish the requirements for record retention by the sponsor. Section 107 of ERISA requires plan records used to support filings be retained for at least six years from the filing date, and it also provides general record retention requirements for employee benefit plans.

   Section 209 of ERISA states that an employer must "maintain benefit records, in accordance with such regulations as required by the DOL, with respect to each of [its] employees sufficient to determine the benefits due, or which may become due, to such employees." It also requires the maintenance of records by employers relating to individual benefit reporting. DOL Rule 29 C.F.R. § 2520.107-1, Use of Electronic Media for Maintenance and Retention of Records, provides guidance on the retention of plan information through electronic format. Among other things, it provides that an electronic recordkeeping system must have reasonable controls to ensure the integrity, accuracy, authenticity and reliability of the records kept in electronic form. The electronic records should be maintained in reasonable order and in a safe and accessible place, as well as in such manner as they may be readily inspected or examined. The electronic recordkeeping system may not be subject, in whole or in part, to any agreement or restriction that would, directly or indirectly, compromise or limit a person's ability to comply with any reporting and disclosure requirement or any other obligation under Title I of ERISA. Adequate records management practices should be established and implemented.

   Regarding the understanding of auditable requirements and evidence, Statement on Auditing Standards (SAS) No. 145, Understanding the Entity and Its Environment and Assessing the Risks

of Material Misstatement, addresses the auditor's responsibilities to identify and assess the risks of material misstatement in the financial statements through understanding the entity and its environment. SAS 142, Audit Evidence, explains what constitutes audit evidence in an audit of financial statements and sets out attributes of information that are taken into account by the auditor when evaluating information to be used as audit evidence.

Ms. Carrier recommends the DOL provide further guidance on what records need to be retained and the length of time records need to be maintained. She recommends the DOL set requirements to establish and implement records management practices, and the DOL provide guidance on policies and procedures to ensure an electronic recordkeeping system has reasonable controls to ensure the integrity, accuracy, authenticity and reliability of the records kept in electronic form. She further recommends guidance on policies and procedures to ensure electronic records are maintained in reasonable order and in a safe and accessible place. Finally, she recommends the DOL educate plan sponsors and service organizations on ERISA requirements and auditing standards.

Written policies regarding record retention are not established by many employers, but large employers are more likely to have them in place. Regarding cybersecurity or ransomware situations, auditors do not have access to System and Organizational Controls (SOC) 2 reports, but that would be useful. It might be helpful to seek legal opinions that support or clarify the appropriate handling of frozen benefit records. Regarding historical records that may not be authentic, auditors try their best to exhaust all possibilities, but ultimately auditors may need to limit the scope of a given audit or further "qualify" their audit opinions.

**2. Patrick Moss, Marshall & Moss Group**

Patrick Moss is a partner at Marshall & Moss Group. He has more than 12 years of experience in financial accounting, third-party administration and payroll auditing services. He specializes in accounting for both labor unions and their associated major employee benefit funds; third-party administration of single employer and multiemployer worker funds; and payroll compliance auditing for multiemployer benefit funds.

Mr. Moss testified that the hybrid-style fund office involves both paper recordkeeping and electronic recordkeeping. Paper records are cumbersome and hard to search. An electronic recordkeeping system allows all information to be at one's fingertips. Moving to electronic recordkeeping allows for efficiency and helps answer participant inquiries quickly.

He further stated that a disadvantage of the electronic recordkeeping world is training staff. Data security goes both ways in the electronic world. It is both an advantage and a disadvantage. The more things that are converted to electronic records, the more that is available to malware, hackers and ransomware. But it is also an advantage, only letting certain people have access to certain levels of records. Data breaches, cyber-attacks and unauthorized access are becoming more common in today's world. Moving paper records into an electronic format is very time-consuming and expensive.

Mr. Moss also testified that with regard to record retention in the digital world, everyone should have their own record retention policy. Most recordkeepers and third-party administrators will store records indefinitely as long as a given plan sponsor is still a client. Electronic records allow control and maintenance of multiple versions of the same documents. Backup and disaster recovery for record retention is important.

Recent trends in the industry involve cloud-based solutions, mobile access and analytics. Artificial intelligence (AI) is a nice potential feature, especially when it comes to answering routine questions. AI is effective for analysis of large quantities of data and bank transactions and allows for potential identification of fraudulent activities.

The biggest problem with data, according to Mr. Moss, is during transitions. The data provided by prior recordkeepers is not always complete. A plan has a requirement to maintain data for a certain amount of time. If done in-house, scanning is easy because the person scanning information is "testing it" as they go. Testing is required if you're using a third party. Scanning companies provide hard drives. Once information is scanned, it should be acceptable to dispose of applicable paper records the next week. To address the challenge of data loss during vendor transitions, he recommended the plan specifically request that participant elections and copies of the pension application get transferred over to the new vendor, as these seem to get lost the most in transitions.

3. **David Dorsey and Aaron Slaughter, Withum**

In a written statement to the Council and through David Dorsey and Aaron Slaughter, Withum, a national firm that audits ERISA plans, especially multiemployer plans, testified that COVID-19 accelerated the shift to digital recordkeeping, including cloud-based operations. However, they noted that not all organizations have the same ability to make this shift given cost and workforce time considerations and in view of their familiarity with technology. Multiemployer plans in particular have unique considerations. Fewer rely on national firms for administration and recordkeeping. Instead, they are more likely to use smaller offices that may be slower to fully adopt electronic recordkeeping.

For clients who have not yet fully embraced electronic recordkeeping in the post COVID-19 world of employees working from home or abroad, issues have arisen regarding transfers and accessibility of paper records. Electronic records tend to be more precise and equipped with features that allow auditors to search documents and save time when compared to searching paper files for supporting documentation.

In their written statement, Mr. Dorsey and Mr. Slaughter also pointed to numerous other advantages of having electronic records, especially when records originate in an electronic format and where participants have the ability to view and obtain plan information online. They noted, however, that consideration should be given to participants without access to necessary technology.

Mr. Dorsey and Mr. Slaughter described challenges surrounding the use of electronic records, especially with regard to preserving the authenticity and integrity of records. They also noted trends in protecting information against cyber-theft.

Mr. Dorsey and Mr. Slaughter believe updated guidance is needed from the DOL in the form of guidelines or best practices as to how electronic records should be received, used, stored and otherwise handled. This guidance could be accepted as an industry standard, similar to the published cybersecurity guidelines. It should provide a baseline directive as to all plans, regardless of size. In addition, the unique differences of multiemployer plans should be considered.

## ATTORNEYS

1. **W. Waldan Lloyd, Dentons Durham Jones Pinegar P.C.**

   W. Waldan Lloyd is an attorney at Dentons Durham Jones Pinegar P.C. He specializes in representing employers and ERISA plans with regard to employee benefits issues. In particular, he represents and has represented many small- to medium-sized employers and plans. His testimony focused on the retention of plan records as required by ERISA. Mr. Lloyd highlighted the key provisions of ERISA, specifically Sections 107 and 209, which mandate the maintenance and availability of records related to employee retirement plans. His testimony centered on retirement plans that are small, individual account (defined contribution) plans sponsored by closely held companies. He provided a comprehensive overview of the ERISA requirements for retaining records related to individual account retirement plans and the complexities involved in transferring such records when necessary.

   Key points discussed in his testimony and written materials:

   - Required Records: ERISA Section 107 stipulates that anyone required to file reports must maintain copies of these reports and related records for at least six years after filing. These records should pertain to the matters for which disclosure is required.
   - Employee Records: ERISA Section 209 requires every employer to maintain records related to each employee to determine benefits due or potentially due to them. Failure to comply with this requirement may result in civil penalties.
   - Types of Information: His testimony detailed the specific information required to determine benefits due in an individual account plan, including basic personal information, employment information, plan information, deferral elections, contributions, earnings and distributions.
   - Recordkeeping Responsibility: The employer typically retains basic personal and employment information, while the plan recordkeeper often holds plan-related details. Small employers sometimes use employee leasing companies, which may also act as plan sponsors.
   - Plan Information Detail: "Detail" could encompass every deferral election, paycheck reflecting deferral amounts, employer contribution, employee investment election and investment earnings. Summaries of this detail may be acceptable, but the frequency (e.g., monthly, quarterly or annually) may vary.

- Scenarios Requiring Detailed Information: His testimony provided scenarios where detailed account information might be needed, such as determining benefits for alternate payees under a Qualified Domestic Relations Order (QDRO) or for distribution purposes.
- Transfers of Plan Records: He discussed the requirements and implications of transferring plan records, including during mergers, spin-offs and changes in recordkeepers. ERISA Sections 101(i) and 208 must be adhered to in such cases.
- Record Transfer Requirements: ERISA Section 208 focuses on the transfer of assets, ensuring that each participant receives a benefit no less than what they were entitled to before the transfer. This provision impacts the transfer of information between recordkeepers, as the employer must still access information for determining benefits.
- Industry Practices: Common industry practices may include purging records after the transfer. Former recordkeepers are not incentivized to maintain prior records, which may contain errors they have no interest in disclosing.
- Challenges in Record Transfer: He highlighted the challenges related to record transfers, including additional fees, proprietary software, data conversion and the accuracy of data transmission to new recordkeepers.
- Recordkeeper Contracts: He presented numerous examples, which varied widely as to the responsibilities of a recordkeeper with regard to transfer of data and records upon termination of the agreement or the plan, and often had no such provisions at all.

2. **Teresa Renaker, Renaker Scott LLP**

Teresa Renaker, Partner at Renaker Scott LLP, represents plaintiffs in ERISA litigation, including individual, multi-plaintiff and class actions for benefits and breach of fiduciary duty, as well as related state-law claims.

Ms. Renaker stated that the 1975 guidance provided by the DOL has resulted in some courts concluding that calculating pension benefits is always a non-fiduciary, "purely ministerial" function. However, the landscape of benefit calculations for large defined benefit plans has evolved significantly due to changes in benefit formulas and corporate acquisitions, leading to increased complexity. Ms. Renaker shared information from cases litigated by her and others on behalf of participants who received and relied on erroneous benefit statements generated by recordkeepers in the course of electronic recordkeeping and which participants accessed via online

platforms. Examples included a case involving plan documents with 74 appendices, each of which governed benefits earned under a different acquired plan; a case where an employer had more than 20 legacy plans; and cases revealing missing or incomplete records, misapplication of plan benefit formulas, failure to segregate alternate payee benefits and errors in calculations resulting in discrepancies between benefits communicated to participants and the benefits the participants actually received, which were significantly less. Participants may not have the ability to independently verify these calculations. Calculation errors can have life-changing consequences for participants, with cases where benefits were initially overstated, then later corrected, causing financial distress.

Ms. Renaker testified that the introduction of electronic recordkeeping in defined benefit plans has made pension benefit information more accessible to participants. While this accessibility of electronic records is advantageous, automation can sometimes perpetuate calculation errors over time and across participants. Further, affirmative defenses asserted by recordkeepers in litigation include arguments that participants acted negligently in relying on the calculations provided by recordkeepers and knowingly and voluntarily assumed the risks. Calculation errors pose a significant issue, as participants who rely on erroneous pension figures may have limited recourse under ERISA's fiduciary duty provisions.

To address these challenges, she recommended the DOL clarify that its 1975 guidance on ministerial functions does not apply to named plan fiduciaries and the communication of pension benefit amounts to participants is indeed a fiduciary function when the communication is made by an entity that establishes the calculation system or methods. Further, she recommended the DOL clarify plan fiduciaries also have a responsibility to monitor service providers, including how they are calculating benefits.

3. **Shaamini Babu, Saltzman & Johnson Law Corporation**

Shaamini Babu, President of Saltzman & Johnson Law Corporation, advises Taft-Hartley employee benefit plans on compliance with federal and state laws for the benefit of thousands of unionized employees.

Ms. Babu testified there has been a significant shift from traditional hardcopies to electronic formats. This transition reflects a broader industry trend aimed at enhancing efficiency and accessibility. A diverse range of documents, from plan documents to benefit calculations and contracts, have made the leap to digital platforms. Digital signatures have emerged as a more convenient and efficient means of authenticating documents and streamlining administrative processes. Once documents are scanned and digitized, the physical hard copies are often shredded. This practice not only reduces storage requirements but also leads to cost savings in the long run.

Ms. Babu indicated there is an emphasis on the permanent maintenance of specific crucial documents, such as trust agreements, plan documents and amendments, benefit statements and beneficiary designations. On the other hand, certain records are retained for a standard seven-year period, such as insurance policies and banks statements.

Ms. Babu indicated changes in service providers have been expedited through secure portals, ensuring immediate access for recipients and facilitating more efficient data transfer. The handling of QDROs has notably improved with electronic methods, resulting in reduced processing delays.

Digital signatures are becoming increasingly prevalent, providing added convenience and efficiency in document authentication. The incorporation of contractual terms now often includes provisions for the ongoing maintenance of records, ensuring continuity even in the event of contract termination. Inventory control sheets are a valuable tool for documenting the transfer of documents, helping keep track of all involved parties and ensuring the organized transition of records.

In Ms. Babu's view, the duration for which records should be maintained varies, with certain documents, such as trust agreements, plan documents and amendments, requiring permanent retention. Benefit calculations often extend until the death of the participant and beneficiary. Professional records like audits and contracts are typically retained for at least seven years, while investment manager agreements are kept for six years from the time the investment is exited.

While digital signatures are suitable for most documents, spousal consent and waivers still require wet signatures and notarization. Digital signatures have significantly improved the efficiency of obtaining signatures and provided a cost savings as well.

She also testified that contractual responsibilities between the administrator, the recordkeeper and the custodial bank require that if there is a change or transition in a system or database, they need to notify all parties (e.g., board of trustees, attorneys and auditors) to minimize disruption and ensure access is maintained. Ms. Babu has been building in contract terms that allow for continuity upon termination, including by requiring an inventory control sheet. The latter enables all parties to work together in real time to authenticate that the necessary documents have been transferred.

One key question is whether plan sponsors should be mandated to digitize records. Ms. Babu suggested a gradual transition towards digitization over a specified number of years would be a prudent and efficient approach. This transition is largely driven by the benefits of digital access and the need to ensure accurate records to support the payment of benefits.

Ms. Babu recommends the DOL provide guidance for the establishment of a data bank and address the challenges of email archiving and historical records, considering the retention period as well as cost considerations.

## CONSULTANTS

1. **Jamie Curcio, Curcio Webb**

   Jamie Curcio, Chief Executive Officer of Curcio Webb, reviewed the various challenges and issues faced by plan sponsors and recordkeepers related to recordkeeping and data conversion in the context of employee benefit programs, specifically 401(k) plans. She highlighted the need for a standardized process for converting data between recordkeepers; the difficulty in maintaining, retaining and accessing historical data; the challenges of using paper, microfiche and imaged documents for data storage because the data can be lost or become obsolete; and the potential use of AI technology in recordkeeping. Ms. Curcio addressed the time and cost implications of resolving data-related issues and suggested recordkeepers are under pressure to lower fees, limiting their ability to assist their clients. She emphasized the importance of retaining participant records and providing guidance for smooth transitions between service providers. Overall, Ms. Curcio provided insights into the complexities and considerations involved in managing and transitioning employee benefit program data.

In conclusion, Ms. Curcio made the following four recommendations related to data conversion and retention:

- Create guidance on how plan sponsors ensure data is converted accurately between providers.
- Provide guidance on what plan sponsors should do to ensure information is accurately moved into a new plan from an acquired business.
- Offer guidance on what information needs to be retained, especially for human resource information systems (HRIS), payroll and 401(k) records, along with ideas for storing this information in a usable format.
- Develop guidance as to contract requirements related to transition services requiring the prior recordkeepers to be responsive for some time after the transition, and perhaps guidelines as to the definition of "responsiveness."

2. **Tim Horner and Christina Meadows, Mercer**

Tim Horner, Partner, Legal Retirement Consulting Practice Leader, and Christina Meadows, Principal, Senior Project Manager at Mercer, testified about the importance of recordkeeping in the electronic age, focusing on data requirements for defined benefit pension plan terminations. They highlighted the current state of data in defined benefit plans and common deficiencies in data management.

They noted most defined benefit plan sponsors have transitioned from paper to electronic records, except for plans that have been frozen for a long time. However, for participants who have already terminated employment, the data used to calculate their benefits often has not been transitioned to electronic records. This lack of electronic data poses challenges when terminating defined benefit plans, as plan sponsors are frequently unaware of the amount of electronic data needed for proper termination. This results in unexpected work at plan termination and an inability to provide all required data to participants as mandated by the Pension Benefit Guaranty Corporation (PBGC).

Mr. Horner and Ms. Meadows also highlighted that beneficiary data, particularly for participants who have been retired for several years, often resides in paper records. This poses a problem when referencing beneficiary data upon the death of a participant.

To comply with PBGC regulations, plan sponsors must maintain specific data for pension plan participants, including dates of service, hours of service, total years of service, compensation used to calculate benefits and participant personal data such as name, address, date of birth, Social Security number and gender. Additionally, information about beneficiaries, both for participants in pay status and deceased participants, must be retained, and QDROs must also be documented.

The testimony highlighted several common data deficiencies in defined benefit plans. Many sponsors have the accrued benefits for participants who terminated earlier but lack the underlying service and compensation data used to calculate those benefits. This is especially common when there have been changes in actuaries or third-party administrators, or when the plan has been involved in a merger or acquisition. The witnesses also noted information regarding beneficiaries of retirees and for pre-retirement death benefits is frequently incomplete. Furthermore, many participants who should already be in pay status are frequently identified.

Mr. Horner and Ms. Meadows recommended the DOL educate plan sponsors on the data needed for defined benefit plan terminations. This would facilitate the plan termination process for sponsors and avoid issues with participants and regulatory bodies. It would also ensure participants receive the correct information during the plan termination process to confirm they are receiving accurate benefits. Education should include a reminder for plan sponsors to retain records after defined benefit plan termination in case questions arise later, such as from participants, insurers or PBGC audits.

Overall, the testimony emphasized the importance of proper recordkeeping in the electronic age and the need for plan sponsors to be aware of and maintain the necessary data for defined benefit plan terminations.

3. **Chris Thixton, Pension Consultants Inc.**

Chris Thixton, Principal at Pension Consultants Inc., addressed the implications of retirement plans shifting to digital records. He emphasized the importance of accurate plan records in fulfilling a plan sponsor's responsibility to provide benefits to participants. Mr. Thixton shared real-life observations from actual plans and vendors, highlighting the challenges of transferring complete history during recordkeeper transitions and the need for access to source documentation. He noted

the importance of plan sponsors reviewing service provider agreements and the need for them to have the necessary expertise or consult with plan advisors or benefit attorneys to ensure that the proper standards for accurate, timely and cost-effective access to plan records are incorporated.

Mr. Thixton's recommendations focused on standardization, accessibility and retention of digital records to address the challenges faced by small employers and improve the efficiency and effectiveness of retirement plans. His recommendations included standardization in the industry to make the use of digital data more efficient. He proposed creating annual digital folders that would be sent to plan fiduciaries or administrators. These folders would contain all the necessary reports and data labeled in a mutually agreed upon manner. This would ensure information is readily available and easily accessible, thereby reducing audit costs and saving time for plan administrators.

Also, Mr. Thixton recommended recordkeepers providing services for calculating benefits adopt best practices to make the data available to plan sponsors indefinitely, as it is necessary for plan administration. He emphasized the need for best practices to ensure the retention and availability of accurate and complete data for the provision of benefits.

In conclusion, Mr. Thixton stressed the importance of not making the process too burdensome for plan sponsors, while still ensuring the availability and accessibility of correct records.

## INDUSTRY ASSOCIATIONS

1. **Denise Matthews-Serra, ARA**

   Denise Matthews-Serra testified on behalf of ARA. Her career in the retirement field has spanned more than 20 years and has included positions in administration of defined contribution and defined benefit retirement plans, client transition management, plan design and client relationship management. Her testimony covered the following topics:

   Tools and technologies: The tools and technologies used by plan administrators and third-party service providers for electronic recordkeeping are not uniformly implemented. Different plans have records that were generated in disparate ways, which can complicate compliance. The volume

of data required to administer plans has also grown exponentially over time, and some plan administrators lack the necessary tools and technologies to manage that data.

Recent trends: Ms. Matthews-Serra discussed recent trends in electronic recordkeeping systems, including the use of AI. She mentioned the use of electronically signed records and the development of innovative software applications like application programming interfaces. The pace of innovation in this field is rapid.

Authenticity, accuracy and completeness: The shift to electronic recordkeeping presents challenges in ensuring the authenticity, accuracy and completeness of the records. Ms. Matthews-Serra noted records are stored on various platforms and technologies, and the transition from one technology to another can result in inaccessible data due to obsolete technology. Long-term availability and retention of records are also concerns, as different technologies and storage methods may be vulnerable to media corruption.

Disclosures and controls: Ms. Matthews-Serra emphasized the importance of having disclosures and controls in place to ensure the reliability of electronic records. Plan auditors commonly use SOC reports to test plans, but smaller plans may not have the benefit of such audits. Privacy policies have evolved to restrict the use of personal identifying information (PII), and secure transmission methods like encryption are now required for sensitive data.

Her testimony also addressed additional issues, including concerns related to the transfer of records during plan-level transactions such as recordkeeper transitions, spin-offs, plan terminations, orphaned plans and pension risk transfers. These circumstances can complicate record retention and access to necessary data. Ms. Matthews-Serra highlighted the lack of industry standardization for status codes used in recordkeeping systems and the need for translation between the systems of service providers. The transfer of information between service providers for plan loans was also identified as an area of concern.

Ms. Matthews-Serra made the following recommendations for consideration by the Council:

- The adoption of a minimal industry standard dataset that would be delivered to plan fiduciaries no more frequently than annually.
- Establishment of written document retention standards that are common not only to third-party administrators or bundled providers but also accounting firms, trust companies, financial institutions and payroll providers.
- Issuance by the DOL of 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. Such reports would be permitted where the report is generated by the platform that collected and implemented participant elections and would be in lieu of having to collect and retain detailed individual interactions with such platforms for the entire plan history.
- Adoption of a concurrent set of validations/reconciliations to assure data quality.
- Issuance by the DOL of 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.

Ms. Matthews-Serra cautioned that most companies in the industries that service plans are small businesses, and most service providers are small businesses. Imposing costly solutions will exacerbate the complaint of small plans sponsors that plans are too expensive to administer.

2. **Jason Eddy and Susan W. Hicks, AICPA**

Jason Eddy, who is a Managing Director of Grant Thornton and the national practice leader for Grant Thornton's employee benefit plan practice, submitted written testimony and additional documents, and testified before the Council on behalf of the AICPA Employee Benefit Plan's Expert Panel, of which he is a member.

Susan W. Hicks, Associate Director, EBP Audit & Accounting with the AICPA, was also present during the testimony and assisted in the written testimony.

Mr. Eddy testified that guidance as to records retention, the authenticity and reliability of electronic records, and data security would help plan sponsors meet their fiduciary responsibilities and would help ensure participants receive benefits due to them. He stressed that plan audits by the accounting

profession provide protection for participants. As a result, independent auditors require access to relevant, reliable and complete records in order to perform proper audits.

Mr. Eddy addressed the value of SOC 1 reports and SOC 1 Type 2 reports, the differences between them and the need to educate plan sponsors about their availability from recordkeepers and their uses and limitations. These reports may reduce audit costs, but many plan sponsors are not aware of their existence. A supplemental submission, "Effective Monitoring of Outsourced Plan Recordkeeping and Reporting Functions," a publication of the AICPA's Employee Benefit Plan Audit Quality Center, went into greater detail as to the use of such reports, the differences between the two types and the necessity for complementary user entity controls.

He described the relevant Statements on Auditing Standards, SAS Nos. 142 and 145, which are particularly relevant in an electronic environment in which source documents are not created and or maintained. If data on hard copies is transferred to electronic media and the hard copies are not maintained, then auditors may have to test whether there are sufficient controls in place to ensure the data transfer is reliable. This may require the use of IT experts to do controls testing. Smaller auditing firms may not have that expertise and therefore may be unable to take on the audits. The number of firms performing plan audits has shrunk significantly over the past decade. As a result, the cost of audits may increase to the detriment of plan sponsors and participants.

In cases of changes in service providers, the prior service providers may not retain records for the plan or may not grant auditors access to the records. This is particularly important for small plans that have been around for a number of years and have grown so as to now require audits. If auditors are unable to obtain sufficient evidence on which to base their opinion, they may have to issue either a qualified opinion (if the possible effects of undetected misstatements could be material but not pervasive) or they may have to disclaim an opinion (if the possible effects could be both material and pervasive).

Mr. Eddy discussed ERISA Sections 209 and 107 and the regulations pertaining to the latter, 29 C.F.R. § 2520.107-1. Section 107 requires plan records used to support filings of returns or reports to be kept for at least six years from the date of the filing. The regulation provides guidance on the retention of plan information through electronic records. He also described Revenue Procedure

98-25, which provides Internal Revenue Service (IRS) guidance on maintaining electronic tax records. Mr. Eddy testified that, as stated in the Revenue Procedure, outsourcing to a third-party service provider does not relieve the taxpayer/plan of recordkeeping obligations and responsibilities. In their experience, standards are lacking with regard to monitoring outsourced service providers. A supplemental written submission, "The Importance of Retaining and Protecting Employee Benefit Plan Records," which is a publication of the AICPA's Employee Benefit Plan Audit Quality Center, set forth best practices for record retention. These include establishing a written record retention policy; monitoring; maintaining participant records indefinitely; and maintaining necessary paper records. It also notes that use of a service organization does not relieve a plan sponsor or fiduciary from the responsibility to retain written records.

In addition, Mr. Eddy testified that plan audits require retention of records that are not addressed by ERISA and have not been addressed by the DOL. The DOL should provide additional guidance related to the records plan auditors may need to perform audits of the plan's financial statements, including initial information necessary to perform the audit as well as detailed information to support plan transactions and testing.

Mr. Eddy provided detailed recommendations to the DOL as to steps it should take regarding the authenticity and reliability of plan records, records retention and data protection. As to the first of these, he recommended educating plan sponsors and fiduciaries as to strong records management practices and the availability and use of SOC reports. With regard to records retention, he recommended the DOL issue more detailed regulations and guidance. These recommendations are detailed in the written materials.

3. **Mariah Becker and Stuart Lerner, NCCMP**

Mariah Becker is the Director of Research and Education for the NCCMP. She is an Enrolled Actuary and a member of the American Academy of Actuaries Multiemployer Plans Committee. Stuart Lerner is a Senior Vice President and Administration and Technology Consulting Practice Leader with Segal New York.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization created in 1974 with members, plans and contributing employers in every major segment of the multiemployer universe. The NCCMP is the only national organization devoted exclusively to representing the interests of multiemployer plans, organized labor and the job creating employers of America who jointly sponsor them, and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP's purpose is to assure an environment in which multiemployer plans continue their vital role in providing retirement, health, training and other benefits to America's working men and women.

Ms. Becker and Mr. Lerner discussed several areas related to the receipt, maintenance of and access to source documents and electronic records, primarily in the context of third-party administrators and fund offices.

Third-party administrators and fund offices receive source documents in various formats, including paper and electronic. Source documents can be stored in hard copy, electronically or in backup computer files. Some source documents are submitted electronically by participants through secure portals. Document retention policies, often developed by fund counsel, determine which source documents are maintained.

They testified that ensuring secure transmission of electronic documents, especially those containing sensitive information like Protected Health Information (PHI) and PII, can be challenging. Budget constraints may limit the adoption of electronic document management systems. Scanning and indexing hard copy documents for electronic storage can be resource intensive. Converting historical hard copy documents to electronic format can be a significant effort and cost.

There is a notable shift from paper to electronic submission, especially in employer contribution remittance reports. There has been increased use of participant portals for secure document uploads and distribution.

Electronic record technologies, including benefit administration software and enterprise content management (ECM) systems, often play a crucial role. Third-party administrators and fund offices

utilize various systems and tools, including benefit administration software and ECM software. These tools allow for scanning, indexing and linking of documents with participant records.

AI is developing as an emerging technology in electronic record systems. AI is currently being used in document scanning and imaging for improved document recognition.

They highlighted data accuracy, access controls and retention policies and emphasized compliance with security regulations. Accuracy and completeness of electronic recordkeeping varies based on the systems and tools used. Access controls are implemented to restrict access to authorized personnel, especially for handling electronic PHI (e-PHI). Data retention policies are developed in compliance with statutory, regulatory and accounting guidelines.

Ms. Becker and Mr. Lerner also testified about record transfers. During transitions between recordkeepers, outgoing administrators provide plan records and data in a prescribed format. Data integrity is ensured through reconciliation and balancing during the transfer.

Their recommendations for future guidance included clarity on the use of electronic signatures (e-signatures), scalability and financial considerations.

4. **Norman Stein and Anna-Marie Tabor, Pension Rights Center**

Norman Stein is Senior Policy Consultant and Acting Legal Director at the Pension Rights Center. He is also a professor emeritus at the Thomas R. Kline School of Law at Drexel University.

Anna-Marie Tabor is a Visiting Professor of Law at the University of Massachusetts School of Law – Dartmouth. From 2018–2023, Ms. Tabor served as the Director of the Pension Action Center, a free legal services program at UMass Boston that secures retirement benefits for older people and their families and where she continues to serve as an advisor.

The Pension Rights Center, founded in 1976, serves a vital role in assisting individuals in receiving and retaining the benefits they have earned. It provides services to over 2,000 participants annually.

Their testimony indicated that electronic recordkeeping is impacting almost every aspect of ERISA. While electronic recordkeeping has expedited certain administrative processes and reduced costs, it has also introduced new challenges and compounded unresolved issues.

At its core, ERISA's fundamental purpose is to ensure the security of earned benefits for participants and their beneficiaries. Record retention is a critical issue, especially in the context of electronic recordkeeping. The duration for which records should be retained is a core concern for participants because without this information, their benefit eligibility and benefit amounts may not be ascertainable.

Their testimony covered ERISA Sections 107, 209 and 404(a). Section 107 imposes a limited records maintenance obligation on every person required to file a report or certify any information under Title 1 of ERISA. Under Section 107, records providing necessary basic information and data from which required documents may be verified, explained or clarified and checked for accuracy and completeness must be maintained for at least six years. ERISA Section 209 requires every employer to maintain records sufficient to determine employee benefits due or which may become due. Section 404(a) requires plan fiduciaries to administer a plan for the exclusive purpose of providing benefits to participants and their beneficiaries, subject to ERISA's prudence requirements. In Mr. Stein's view, Section 404(a) also imposes an obligation on plan fiduciaries to maintain records sufficient to determine the benefits due to participants and their beneficiaries.

Mr. Stein's testimony also covered proposed regulations from the 1980s, which indicated the importance of records being maintained as long as any possibility exists they might be relevant in determining benefit entitlements. While these regulations were not finalized, the DOL wrote a letter to a plan sponsor in 1983 stating that the principles in the proposed regulation may serve as a guide for plans maintaining and retaining records. The IRS also published a fact sheet for retirement plan sponsors on record retention indicating that records should be retained until the trust has "paid all benefits and enough time has passed that the plan won't be audited…."

Mr. Stein recommended the DOL issue clarifying guidance to make clear that records should be maintained so long as any possibility exists that they might be relevant in determining individual benefits, which may be indefinitely, and publish a non-exhaustive list of documents that are potentially relevant for determining benefits. He also testified that electronic recordkeeping should make it possible for the creation of a so-called electronic shoebox for participants. He recommended the DOL consider educating plan sponsors and fiduciaries on their recordkeeping responsibilities; asking Congress to increase the penalties to reflect inflation and the critical

importance of accurate and complete recordkeeping; and revising its claims procedures regulation so participants and beneficiaries do not have to bear the risk of lack of documentation when a plan fails to maintain benefit records. Mr. Stein also recommended the DOL address the issue of recordkeeping responsibilities between the principal plan sponsor and employers who have adopted the plan in MEPs.

Mr. Stein's also addressed the fiduciary status of third-party recordkeepers as a significant concern. While a 1975 DOL interpretative bulletin suggested purely ministerial services do not result in fiduciary status, modern third-party recordkeepers often provide more than ministerial services and should be considered plan fiduciaries. This distinction has significant consequences for a plan's named fiduciary.

Lastly, Mr. Stein indicated that the shift from paper to electronic disclosure has implications for participants' own recordkeeping. A participant independently retaining documents is a powerful check against recordkeeping errors. During the paper era, participants often maintained the proverbial shoebox of documents. Under the DOL's notice and access rule, participants automatically receive electronic disclosures, unless they affirmatively elect paper. This potentially reduces the number of participants who maintain critical documents in personal archives. The DOL should reconsider the default rules related to electronic notice and access.

Ms. Tabor noted the quality of retirement plan recordkeeping can make or break a participant's access to benefits. In her experience, the most common problem encountered is the loss of benefits, and in nearly every instance the loss of benefits is linked to missing or inaccurate records.

Ms. Tabor provided examples of two specific cases where participants faced challenges when trying to access benefits to which they were entitled. First, a participant in a defined benefit plan at a bank (original bank) was denied benefits. The basis for the denial was that after multiple bank mergers and consolidations, the successor plan had no records of the participant. The successor plan incorrectly denied any liability for benefits owed to the participant. Electronic recordkeeping was the root of the issue as data from an old system was no longer in use and the records of employees of the original bank, which were included in old data, had not been integrated into the new system. Second, a surviving spouse was denied benefits due, and a subsequent appeal was

also denied. The plan asserted the surviving spouse must have received a distribution even though the plan records had no information about a distribution. The plan explicitly treated the lack of information in its own database as evidence supporting the denial despite the extensive documentation the surviving spouse had showing she was entitled to those benefits. In both of these examples, the root cause for the improper denial of benefits was the plans explicitly treated the lack of information in their own databases as evidence supporting the denial of benefits.

Ms. Tabor indicated there is insufficient guidance related to recordkeeping and there are insufficient consequences for errors that ultimately result in participants losing their benefits.

In conclusion, Ms. Tabor and Mr. Stein testified it is evident that corporate mergers, transitions, system upgrades and transactions are potential stress points for electronic data, often leading to data corruption or loss of data. To address these challenges, it is crucial for plans and their recordkeepers to collaborate effectively, ensuring that participant data is not lost during these stress points or transitions. Moreover, plans and recordkeepers would greatly benefit from guidance from the DOL regarding data practices. This guidance should encompass scenarios where data is known to contain errors or omissions and outline how plans should respond when a participant is missing from plan records. Currently, the costs of these issues are often borne by individual participants whose benefits are wrongly denied.

**RECORDKEEPERS**

1. **Deba Prasanna Sahoo, Fidelity**
   Deba Prasanna Sahoo, Senior Vice President and Product Area Leader of Employer Servicing and Integration at Fidelity Investments' Workplace Investing business, reviewed emerging recordkeeping-related tools and technologies used by recordkeepers, third-party service providers and plan sponsors. He addressed five categories of tools and technologies he believes will have a significant impact by either improving or transforming the way data gets shared or retained:

- AI — using deep learning and natural language processing (i.e., computers understanding, learning from and recognizing patterns of data, specifically human languages) to enable computers to perform human-like tasks — is already being employed and is likely to become a critical tool in the recordkeeping industry. AI will make searching unstructured text contained

in things like images, .pdf documents and word processing documents and extracting information from it more efficient and accurate and less costly. AI also will be used to draft letters and documents used in recordkeeping. In both instances, people will need to validate the AI output. AI also could be used to create more easily accessible electronic records by extracting information from images and .pdf documents.

- Application programming interfaces (APIs) — technology intermediaries that allow two systems to communicate, exchanging data securely in real time — are currently being used by many recordkeepers for their internal systems and increasingly to exchange data with external organizations. Going forward, APIs will be used to exchange in real time financial and demographic data between recordkeepers and payroll or human resource providers; communicate between current and legacy recordkeepers during and after plan transitions; exchange information directly between advisors or third-party administrators and recordkeepers; and share information directly between recordkeepers and plan sponsors. Tools like APIs also make it possible to keep data in its original form with the organization that originally created it, but access to it ultimately depends on the cooperation of that organization.
- Flexible data format exchange — data format transformation technologies that convert structured data from one format to another — will allow data maintained in differing formats by recordkeepers or services providers to be exchanged more easily and cost efficiently. Most recordkeepers and some service providers are starting to experiment with this technology, which could reduce or eliminate many of the constraints on data exchange.
- Cloud computing — storing data and using applications hosted on third-party infrastructure (e.g., Amazon Web Services, Microsoft Azure and Google Cloud) — provides real-time transaction processing capability with access to innovative technologies. Most recordkeepers and service providers have already moved to or begun to move to cloud computing.
- Cloud data warehouses — data warehouses hosted on third-party infrastructure — offer the same benefits as cloud computing plus easier access to and use of data and direct data sharing. Recordkeepers are starting to move their core data to them, in place of maintaining their own data centers.

In response to a Council member's question, Mr. Sahoo noted that although the unit cost of storing data has decreased, the significant increase in the amount of plan data — as much as 100 times as

was generated in previous decades — means it is not reasonable to maintain all data indefinitely, and it is important to identify the appropriate amount of time data should be kept.

Mr. Sahoo made two general recommendations. First, any rulemaking should consider the future, including the possibility that constraints faced by recordkeepers over recent decades could be reduced or eliminated with technologies that already are being developed. Second, any best practice guidance should be flexible enough that it will not become outdated quickly.

2. **Thomas Nash Pfeifle, Transamerica**

Thomas Nash Pfeifle, Director of Regulatory Support at Transamerica Retirement Solutions, provided an overview of the evolution and benefits of electronic recordkeeping in the retirement industry. Mr. Pfeifle emphasized the positive impact of technology on efficiency, reliability and security in managing and retaining plan records.

The transition from manual, paper-based systems to digital recordkeeping has significantly improved accessibility and security. He discussed the role of various technologies, such as proprietary recordkeeping systems and third-party vendor solutions, emphasizing the industry's commitment to regular updates and enhancements.

Electronic recordkeeping has become the industry standard, offering ready access to accurate plan and participant records. This digital shift enables efficient calculations, storage and output. The use of electronic recordkeeping has streamlined payroll validation, facilitating more accurate and timely transfers of participant contributions to plan trustees.

Mr. Pfeifle testified that participants access and engage with their retirement plans online, which enhances their retirement readiness. Plan administrators and employers can leverage electronic recordkeeping for insights into participant engagement, receiving reports on logins and interactions, something not possible with traditional mailed statements.

Mr. Pfeifle further testified that the regulatory framework governing record retention, including ERISA and DOL regulations, applies uniformly to paper, electronic and digital recordkeeping. The industry adheres to Section 2502.107-1 of the DOL's regulations, providing a framework for electronic recordkeeping innovation. Recordkeepers utilize either proprietary systems or third-

party vendor solutions, with both requiring continuous updating and monitoring to align with evolving legal and regulatory requirements and meet auditing standards.

The maintenance of accurate and reliable retirement plan records is crucial. The AICPA has established Generally Accepted Auditing Standards (GAAS), particularly in the form of SOC for auditing electronic plan recordkeeping systems. Independent auditors review electronic transactions, withdrawals and participant benefit statements, employing well-developed audit procedures suited for electronic environments.

Mr. Pfeifle also testified that record retention policies typically grant plan administrators access to plan records for seven years following the termination of a service provider's relationship with the plan. Compliance with ERISA, particularly Sections 107 and 209(a), ensures reasonable access for participants, administrators, auditors and regulatory examiners. In cases of transitioning to a new service provider, a comprehensive strategy is developed for the orderly transfer of plan data and assets, ensuring ongoing plan administration and access to historical records.

Mr. Pfeifle indicated electronic recordkeeping in the retirement industry is witnessing notable trends, with two major developments being the widespread adoption of cloud storage and computing and the exploration of AI capabilities. Cloud computing offers a cost-effective, resilient and secure solution, allowing the retirement industry to move away from building individual data centers. The use of AI is gaining traction, and the retirement industry is in its early stages of exploring the potential applications of these tools.

Mr. Pfeifle concluded fiduciary standards for electronic recordkeeping should continue to be determined through a facts and circumstances analysis. The digital landscape is dynamic in nature — tomorrow's electronic recordkeeping environment may differ significantly from todays. His point of view is the existing fiduciary rules, robust independent auditing standards and the industry's proven adaptability to the digital environment are sufficient safeguards, eliminating the immediate need for specific best practice guidance from the DOL.

## THIRD-PARTY ADMINISTRATORS

1. **Karin Peters and Ivelisse Berio LeBeau, NEBA**

   Karin Peters is the co-owner, President, and CEO of NEBA. Ivelisse Berio LeBeau is NEBA's General Counsel. NEBA has provided third-party administrative services to multiemployer pension and welfare benefit plans across the United States since 1994. NEBA's plan clients are exclusively collectively bargained and primarily multiemployer. NEBA provides third-party administrative services to both fully insured and self-funded health plans and both defined benefit and defined contribution retirement plans.

   Ms. Peters and Ms. LeBeau began their testimony by outlining the differences in health plan and retirement plan claims administration. Unlike retirement plans, health plans are covered by HIPAA, which sets forth requirements for the privacy, security and transmission of e-PHI. Moreover, health plan claims information is primarily maintained electronically with standardized industry practices for creation and maintenance. There are no federal standards or established industry practices for creating, maintaining or transmitting data or information for retirement plans, and retirement plans have much longer-term recordkeeping needs than health plans.

   In preparing their testimony and recommendations they focused on retirement plans because health plans are ahead of retirement plans due to HIPAA, and it is difficult to contemplate how a universal standard like HIPAA could apply to retirement plans, because there is so much variety across retirement plans. Retirement plans have been slower than health and welfare plans in converting to electronic records. They testified that they can only maintain the documents and information as they receive it, and that as a third-party administrator and recordkeeper, they have no way of knowing the accuracy of the information that is contained in the records that they receive. Further, in terms of the transition of new clients from other third-party administrators, while they request all plan documentation in all forms from the predecessor third-party administrator, they typically cannot confirm whether NEBA has received all documents and information and may not be able to identify any potential gaps at the time of transition.

   Ms. LeBeau also made a distinction between “electronically created records” and “electronically stored records.” Electronically stored records in an electronic database are what is really used on

a day-to-day basis for claims administration. She described the different types of electronic records they have:

- Paper equivalents — scanned paper documents that are not read by optical character recognition (OCR) and need to be saved individually in files, rather than as electronically generated records.
- Records generated using an office's software like Microsoft Word or Excel — can be word-searched but still need to be saved as individual files. These are mostly plan documents.
- Electronically generated records in the database such as contribution/distribution records and investment elections (i.e., not batch files) that are created when members fill out electronic forms in their database. These do not need to be saved individually.

Ms. LeBeau encouraged the Council to consider differences in the types and uses of electronic records in deciding whether to recommend changes that could affect how electronic records are created, used, stored or maintained. As illustrated above, the terms "electronic records" and "electronic recordkeeping" include both electronically stored documents that are similar to paper documents and electronically stored data held in electronic databases and used to administer benefit plans.

2. **April Mitchell, USI**

April Mitchell is a Senior Consultant with USI, which provides employee benefit and retirement consulting. Ms. Mitchell's testimony focused on defined contribution plans.

In her written testimony, Ms. Mitchell provided a list of records that must be maintained, and she pointed out in her oral testimony that such lists can never be exhaustive because new records come up periodically with things like new regulatory requirements. Ms. Mitchell explained there is confusion among plan sponsors, and generally within the retirement industry, as to whether all of the items listed in her written testimony can be stored electronically, or if there any records employers need to maintain in hard copy. As a practical matter, USI recommends its clients still maintain beneficiary designations in paper because the recordkeepers' systems for tracking beneficiaries are often for reporting only and are not legally binding beneficiary designations.

Another key theme of Ms. Mitchell's testimony was plan sponsors need to be more aware of the contents of their legal agreements with service providers. Further, plans sponsors often do not fully understand their responsibilities as distinct from the responsibilities of their third-party service providers, even though it is the plan sponsor's fiduciary responsibility to make sure their plan's service providers are accurately processing plan transactions. In times of transition from one provider to another, Ms. Mitchell advises her clients to have a periodic process for pulling down electronic records and saving them for future reference rather than relying on the recordkeeper or third-party administrator to provide access to these records for any length of time since standards are different across the industry with different recordkeepers. This also makes the contents of the service provider agreements very important to understand.

Finally, Ms. Mitchell stressed the importance of SOC reports to identify controls currently in place at service providers and determine whether they are operating effectively. Many plan sponsors, especially small companies that have never been audited, are not aware of the information available in the SOC reports, including complementary user entity controls (CUECs), or how this information affects their plan and their responsibilities.

Ms. Mitchell provided several recommendations including: (1) more detailed guidance on the amount of time and types of data to be maintained indefinitely under Section 209; (2) that service provider agreements should outline their record retention policies, plan sponsor access to historical records at the time of transition and later and the cost of providing prior documents; (3) guidance and education with respect to the plan sponsor's duty to understand and interpret the controls and findings in SOC reports and relevant CUECs; 4) consider offering a model data retention policy template for plan sponsors to customize and adopt.

Ms. Mitchell encouraged the DOL, IRS and PBGC to synchronize their records requirements as much as possible.

## COUNCIL OBSERVATIONS

### A. IMPLICATIONS OF THE SHIFT TO ELECTRONIC RECORDKEEPING

The move to electronic recordkeeping has meant more plan records are created only in an electronic format and only accessible by plan service providers. This has several implications for plan sponsors and fiduciaries. First, outsourcing of recordkeeping responsibilities to outside service organizations has made it more challenging for plan sponsors to understand the scope of their recordkeeping and control responsibilities. Second, there is greater need for effective controls in the electronic environment because electronic records are only as good as the controls over the information systems creating and maintaining the data. A lack of effective controls calls into question the reliability, accuracy, authenticity and completeness of electronic data, and with most records now created electronically, there are very few paper source documents to verify the information in electronic records. Third, historical plan records are becoming less accessible with vendor changes and asset transfers, and the importance of vendor contracts and agreements to ensure accessibility of historical records at a reasonable cost has increased. The Council's report and recommendations specifically address these implications of the shift from paper to electronic recordkeeping. Finally, the quantity of records being generated has skyrocketed due to participants turning to websites and other digital methods of contacting their plans, rather than traditional call centers. This generates greater participant engagement but also creates significantly more records, such as when participants access educational resources, view account balances, change investment allocations and update beneficiary designations. Further increasing the number of records being generated and stored is the focus on digitization and personalization by recordkeepers and service providers.

### B. RECORDS RETENTION RESPONSIBILITIES AND REQUIREMENTS

The Council received testimony about the retention of records for the purpose of ensuring the accurate payment of benefits due to plan participants, beneficiaries and alternate payees. The Council's observations underscore the importance of clear and comprehensive records retention policies.

Plan sponsors and fiduciaries bear the ultimate responsibility for maintaining plan records. However, it is common for them to delegate responsibility for these functions to recordkeepers,

third-party administrators and actuaries. Furthermore, these service providers may delegate responsibility to other entities by outsourcing certain tasks related to plan recordkeeping. This complex web of outsourcing can lead to confusion and potential gaps in records retention. Ultimately, however, if a service provider fails to fulfill its obligations, the plan sponsor or fiduciary may still be held accountable for any recordkeeping deficiencies. Therefore, it is crucial for plan sponsors to establish clear lines of communication and oversight with their service providers to ensure compliance with records retention requirements.

The Council's findings also highlight a lack of understanding among some plan sponsors and fiduciaries regarding the division of responsibilities between themselves and their third-party service providers. This lack of clarity can lead to gaps in records retention and to potential compliance issues. Plan sponsors should take the initiative to educate themselves about their specific responsibilities and ensure that their service providers are fulfilling their respective responsibilities.

Another significant observation made by the Council is the general lack of understanding regarding the types of records that need to be maintained for audits and the duration for which certain records should be retained. Plan sponsors and fiduciaries would benefit from a clear understanding of the records necessary for plan audits and regulatory audits as well as which records need to be maintained indefinitely or for the duration of the lives of participants and beneficiaries to ensure accurate benefit calculations and payments.

## C. LONG-TERM AVAILABILITY OF ELECTRONIC PLAN RECORDS

The shift to electronic recordkeeping is increasingly impacting plan sponsors' and fiduciaries' ability to meet their responsibilities related to records retention, and therefore, impacting the long-term availability of plan records to meet plan audit requirements and, in cases of disputes, determine that benefits have been properly calculated and paid. Several auditors noted in their testimonies that ERISA and current regulations do not specifically address the retention of records related to a plan audit, and plan sponsors often are not aware of the importance of retaining the extensive list of records required for the plan audit. The Council is cognizant that a list of required records can never be fully exhaustive because auditors use a dynamic sampling process that differs by plan and new records are created periodically through new regulations and technologies (e.g.,

self-certifications). The Council's recommendations related to records retention address the types of records auditors commonly request when auditing the financial statements of an employee benefit plan, the records auditors find are most commonly missing or incomplete and the records necessary to resolve participant or beneficiary inquiries about or disputes over plan benefits.

The Council determined plan-level transactions, such as vendor changes, corporate transactions and defined benefit plan terminations, present a significant challenge to records retention and availability in the electronic age. Specific to recordkeeping vendor transitions, there are no industry standards for records to be maintained or procedures to be followed when there is a recordkeeping vendor change. Further, since there is no standard for or guidance as to the length of time historical records should be stored by the legacy vendor before they are purged, the retention of these records can vary depending on, among other things, a plan's agreement with the legacy vendor. It is very common for historical data to be lost in these transitions as many recordkeepers do not receive any paper or scanned paper from legacy vendors, so paper records such as benefit elections and QDROs are lost in the transition. The Council's recommendations in this area underscore the importance of plan sponsors and their recordkeepers collaborating to ensure no participant data or other essential documents are lost in these transitions.

Corporate transactions such as mergers and spinoffs are also problematic. The bulk transfer of data between systems and vendors during these events creates a greater risk of data being lost or corrupted in the transition. Witnesses provided examples of important records being lost in the migration between the different HRIS, payroll, recordkeeping and pension administration systems. The Council received testimony that plans sponsored by successor companies involved in corporate transactions have denied participant benefits due to a lack of records in the successor company's electronic database, when in fact the records existed but had not been transitioned properly from the legacy system to the new system.

The Council also explored recordkeeping practices for defined benefit plan terminations. To create the required Notice of Plan Benefits (NOPB) for full defined benefit plan terminations, paper records are converted to electronic format. The Council heard testimony that plan sponsors often do not understand the need to maintain all the records used to develop the NOPB (not just the final accrued benefit) after the plan has terminated, in the event of PBGC audits or questions from

participants or the insurer. Records for deferred vested participants, who have terminated their employment but have not started receiving their pension benefits, are particularly important since those participants might dispute the benefit amounts when they later claim their benefits. In practice, the plan sponsor provides the insurer with the data needed to calculate the deferred vested participants' benefits as necessary, and after that the insurer is likely to purge the data. The Council's recommendations include educating plan sponsors about the need to retain such records until after the plan has terminated and the last participant, beneficiary or alternate payee has received all accrued benefits under the plan.

D. IMPORTANCE OF CONTROLS IN THE ELECTRONIC ENVIRONMENT

The Council learned the significance of controls over electronic records cannot be overstated. In the electronic environment, the reliability of the information is only as good as the controls over the systems that produce and protect that information. Controls are essential in safeguarding sensitive information and ensuring the reliability, completeness and accuracy of both plan and participant statements and records. Those statements and records are necessary for the proper administration of employee benefit plans, to properly calculate benefits due to participants and beneficiaries and to perform plan audits as required by ERISA.

While electronic recordkeeping has many advantages, such as the ready accessibility and ease of transferability of records, the authenticity and reliability of the information is critical. Therefore, the risk of loss or manipulation of electronic data must be mitigated. Controls help mitigate these risks.

Controls are critical in all aspects of recordkeeping: the accuracy of the participant data, the authorization of transactions and reporting at both the plan and participant level. In many cases, there are no source documents to substantiate transactions as transactions or records are initiated or created electronically. Controls may be preventative or detective and manual or automated. Given the dynamic nature of technology, controls must be evaluated and evolve to ensure the security, authenticity and reliability of the information being used to administer the plan in accordance with plan provisions and to ensure the accuracy of benefits. Training and awareness of the importance of controls is equally crucial, as controls are essential to data protection and the reliability of electronic records and reporting.

Most service providers, generally recordkeepers and payroll providers, obtain SOC reports. SOC reports are audits of the internal controls at the service provider and are essential to the reliability of services performed by and reporting obtained from those service providers. SOC reports contain CUECs. These CUECs are essential and must be in place and operating effectively at the user organizations to rely on the service provider's controls. Common CUECs include ensuring the accuracy and completeness of the information provided to the service provider; reviewing reports and notifying the service provider in a timely manner of any errors or discrepancies; reconciling information per the service provider to user source data and authorizing access controls. It is concerning that many fiduciaries and plan sponsors are not aware of their responsibilities to obtain and read the SOC reports and to ensure that the CUECs are in place and operating effectively. Without these proper controls, the reliability, accuracy and completeness of the information is in question (garbage in, garbage out).

Further, when transfers occur between service providers or a service provider changes recordkeeping or information technology platforms, there is an additional risk related to the proper transfer of data and participant and plan records. Controls are integral to maintaining the accuracy and completeness of information to ensure both plan and participant records and account balances are properly transferred.

## E. THE ROLE OF VENDOR CONTRACTS AND SERVICE AGREEMENTS

Plans and their recordkeepers enter into service agreements to document the terms of their service arrangements. These agreements contain provisions regarding the receiving, maintaining and accessing of plan records, generally for the span of the parties' active engagement. However, the agreements typically contain few to no details regarding the transition of services.

Some witnesses offered that the challenges and concerns surrounding a plan's data transfer (i.e., the completeness, integrity and accuracy of the plan's records), its recordkeeping services and its transition issues should be addressed by the DOL issuing guidance requiring plan service agreements with recordkeepers to contain provisions conferring certain obligations on recordkeepers. To this end, witnesses suggested recordkeeper service agreements include provisions that provide for: (i) details on the transition of recordkeeping services and the actual data transfer process; (ii) a legacy recordkeeper's obligation to promptly confirm the completeness,

integrity and accuracy of the plan's data following a transfer to a new recordkeeper; (iii) a new recordkeeper's obligation to promptly confirm the completeness, integrity and accuracy of the plan's data received from a legacy recordkeeper; (iv) a recordkeeper's obligation to retain a plan's records in compliance with the plan's record retention policy; (v) the legacy recordkeeper's commitment to be responsive to the plan sponsor following termination of the engagement and to maintain the plan's access to its historical records indefinitely for a mutually agreed upon reasonable cost; (vi) a recordkeeper agreeing to provide plans with its annual SOC reports, including the SOC 1 and SOC 2 reports; and (vii) a recordkeeper agreeing to cooperate with a plan's auditors and grant them access to the recordkeeper's records to conduct an audit and confirm the plan's and the recordkeeper's compliance with their legal and contractual obligations. Further, the guidance should make clear that recordkeeper service agreements must not contain complete disclaimers of liability or unreasonable limitations on damages as these are not reasonable contract terms. One witness suggested it would be helpful for the DOL to undertake an informational campaign to make plan sponsors and fiduciaries aware of the importance of their recordkeeping (i.e., record retention) obligations and the prudence of including applicable provisions in their recordkeeper service agreements. Further, they should be educated about the risks to the completeness, integrity and accuracy of plan data when transitioning from one recordkeeper to another.

## F. CONSIDERATIONS FOR MULTIEMPLOYER PLANS

Several witnesses highlighted the challenges and considerations for multiemployer plans, including security, retention, record transfers and access control. Multiemployer plans can be found in various industries, including construction, hospitality, entertainment, transportation and health care. These plans are not administered in the same manner as single or multiple employer plans.

Section 414(f)(1) of the Internal Revenue Code defines a multiemployer plan as a plan (i) to which more than one employer is required to contribute, (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer and (iii) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation. It is important to note that Section 3(16)(B)(iii) of ERISA provides that the "plan sponsor" for a multiemployer plan is a joint board of trustees with equal representation from both

management and labor, not an employer. ERISA governs the administration and management of multiemployer plans.

Multiemployer plans are funded solely by contributions determined as a result of collective bargaining. The contributions are made by participating employers, and in some instances by employees, and such monies are negotiated as part of employees' wage and benefits packages. The contributions are held in a trust fund that is managed by a board of trustees that operates independent of either collective bargaining party, and the contributions are used for the exclusive purpose of providing benefits to participants and their beneficiaries and for paying the reasonable expenses of plan administration. Multiemployer plans vary in the number of participants, how they are administered and in their electronic recordkeeping capabilities.

These plans utilize various tools, systems and technologies to maintain electronic records, including benefits administration systems, web portals, ECM systems, spreadsheets and databases. Witnesses testified that there has already been a significant movement from paper to electronic recordkeeping, including for the collection of contributions.

Newer tools and technologies are enabling employers, plan participants and beneficiaries to submit documents electronically through a secure portal. The shift is towards ECM systems that can comply with a plan's record retention policy.

Multiemployer fund offices and their third-party administrators or recordkeepers receive source documents (e.g., pension applications, enrollment forms, birth certificate, marriage certificates and contribution reports) in a variety of ways. Some fund offices still receive this information in paper form, while others receive it in an electronic format or in a combination of the two. Hard copy source documents may be maintained on-site or off-site or be converted to an electronic format and stored in an ECM. Documents may also be stored in older forms (e.g., on microfilm, microfiche, disks, tapes and other media).

Technologically advanced fund offices may store electronic documents in the cloud.

Third-party administrators, other recordkeepers and fund offices follow whatever record retention policies and guidelines they have in place, both for hard copy and electronic documents. The

retention periods for hard copy and electronic documents may not be the same. Electronic records are not typically purged. The accuracy, authenticity and completeness of electronic recordkeeping vary depending on the electronic systems used.

Record transfers between recordkeepers involve the transfer of all plan records (electronic and hard copy), including contribution records and participant data. When transferring plan records between recordkeepers, the outgoing recordkeeper is required to provide all plan records to the incoming recordkeeper. Data integrity during the transfer is achieved through reconciliation and balancing of the data. It was noted there is a possibility of data discrepancies due to differences in the interpretation of plan rules between vendors. In connection with multiemployer plans' electronic recordkeeping practices, a witness highlighted the lack of clear guidance on the use and acceptance of e-signatures by plans. Guidance could be helpful in this area.

Generally, multiemployer plans have very limited budgets to implement any upgrades in the fund office's hardware and software. Witnesses emphasized that were the DOL to conclude that guidance was needed in this area, it should be (i) subject to a notice and comment period and (ii) flexible and scalable based on plan sizes and their ability to obtain adequate resources to invest in and implement appropriate electronic system upgrades and related tools.

## G. FIDUCIARY RESPONSIBILITIES WITH REGARD TO RECORDKEEPING

As observed above, witnesses identified a number of issues that arise during recordkeeper transitions. These have resulted in claims against plan fiduciaries and service providers due to miscalculations and misstatements of benefits, both oral and in annual statements of benefits (or calculations available through on-line platforms).

Sometimes, necessary information (e.g., historical plan documents that govern some participants' benefits) has not been transferred to or properly incorporated into successor recordkeepers' systems for generating benefit statements or similar purposes. Although it is clear plan fiduciaries have a duty to prudently select and monitor service providers, courts have hesitated to delineate the scope of the fiduciaries' duties upon hiring or replacing a recordkeeper, especially with regard to the duty to monitor.

At the same time, courts generally have held that recordkeepers are not acting as fiduciaries when they calculate benefits or communicate with participants and beneficiaries. In some of these cases, courts have relied on guidance issued by the DOL as part of a Q&A published in the Federal Register more than 40 years ago, stating that calculations of benefits and similar activities are ministerial rather than fiduciary activities.

## H. EMERGING TOOLS AND TECHNOLOGIES

A suite of emerging tools and technologies are expected to change how records are created, stored and transferred. Tools and technologies include: AI that is used to recognize patterns in speech and processes — usage will likely increase and become more critical; APIs that make it possible to keep data in its original form, and allow two systems to communicate and exchange data in real time; flexible data format exchange, which is a technology that converts structured data from one format to another and allows data maintained in differing formats by recordkeepers or services providers to be exchanged more easily and cost efficiently; and cloud computing and storage, which create the opportunity to house and process a vast amount of data on third-party infrastructures and allow for direct data sharing. We heard testimony that there are challenges with the volume of data being stored, and it may be unreasonable to maintain all data indefinitely. Future guidance should be flexible enough to accommodate rapidly evolving technologies so as to not become quickly outdated.

## I. RECOMMENDATION PROPOSED BUT NOT ADOPTED

In view of a number of the observations above, especially those pertaining to erroneous benefit determinations and inaccurate communications to participants, particularly those occurring after certain corporate transactions (such as mergers and acquisitions) and plan level events (such as mergers, changes in recordkeepers or terminations), five Council members felt the DOL should give further guidance to pension plan fiduciaries with regard to transfers of records. They proposed the following recommendation:

> The DOL should make clear that the selection and monitoring of recordkeepers by pension plan fiduciaries includes the duty to convey to the recordkeeper within a reasonable time all data and governing plan documents necessary for the determination of benefit eligibility and that this duty includes, upon hiring a successor recordkeeper, acting prudently to confirm that the new

recordkeeper has the data and documents necessary to correctly apply the plan terms, and to prepare annual statements of benefits and otherwise convey accurate information to participants and beneficiaries.

Some members of the Council believe the proposed recommendation went beyond the scope of the existing fiduciary duty to monitor recordkeepers and would impose unnecessary new obligations on fiduciaries who had prudently selected recordkeepers and/or would impose unrealistic duties on fiduciaries. Other members noted fiduciaries already have the duty to ensure recordkeepers have the necessary information to properly administer the plan; therefore, the above proposed recommendation is not needed.

## RATIONALES FOR RECOMMENDATIONS AND RECOMMENDATIONS

The rationales for recommendations and the recommendations are as follows:

### RATIONALE FOR RECOMMENDATIONS 1 AND 2

The rationale for recommendations 1 and 2 addresses the Council's understanding that pension plan sponsors and fiduciaries would benefit from more detailed guidance about types of records to be maintained indefinitely under ERISA, including examples. ERISA Sections 107 and 209 provide general records retention requirements for employee benefit plans and reference broad categories of records. The Council also heard from several witnesses that after certain corporate events, such as mergers, spinoffs and acquisitions, and plan level events, such as mergers, vendor changes and plan terminations, these records are not always kept and are therefore, unavailable to resolve questions as to eligibility, benefit amounts and benefit elections. The Council believes the records and documents listed in Recommendations 1 and 2 need to be maintained for no less than seven years after the plan has terminated and the last participant, beneficiary or alternate payee has received all accrued benefits under the plan to support plan audit and inquiries and in the event of litigation or complaints.

### RECOMMENDATION 1

The DOL should issue guidance to plan sponsors of pension plans[2] making clear that as part of their obligations under ERISA Section 209, they should retain the following documents in a retrievable electronic or paper format for no less than seven years after the plan has terminated and the last participant, beneficiary or alternate payee has received all accrued benefits under the plan.

- Payroll records from which eligibility for benefits and the amount thereof can be determined (e.g., dates of hire and termination, employment classification, compensation and hours worked).
- Birth certificates, marriage certificates and divorce documents, including QDROs, if maintained as a matter of course before plan termination.

[2] As used throughout, “pension plan” refers to plans defined in Section 3(2)(a) of ERISA, 29 U.S.C. § 1002(2)(a), and therefore includes both defined benefit, and 401(k) and other defined contribution plans.

In drafting such guidance, the DOL should recognize and address the facts that (1) some plan sponsors employ the services of a third party, such as a payroll processing or human resources information systems company, to perform such functions, and (2) in the case of a multiemployer plan, where the board of trustees, not an employer, is the plan sponsor, the plan may not have access to payroll records but rather may receive only employer remittances and contribution reports. The guidance should provide that where birth certificates, marriage certificates and divorce documents, including QDROs, were submitted in paper format, they must be preserved either in paper or in an easily retrievable electronic reproduction.

In the event of a corporate transaction, the successor entity is responsible for maintaining records for the employees of the acquired or merged entity in the manner outlined above. The Council did not hear testimony about or investigate the issue of so-called "orphaned plans," i.e., where the employer has ceased doing business, and there is no successor. The Council studied this issue and issued a report and recommendations in 2002.[3] That report, however, did not address the issue of preservation of records required by ERISA Section 209.

In addition, the Council recommends that the DOL consider standards that the Department of Health and Human Services utilized for the HIPAA Security Rule, as it was designed to be flexible and scalable to allow each plan sponsor to implement policies, procedures and technologies that are appropriate for the plan sponsor's particular size, organizational structure and risks.

RECOMMENDATION 2

The DOL should issue guidance to pension plan fiduciaries making clear that as part of their obligations under ERISA Section 107, they should retain the following documents in a retrievable electronic or paper format for no less than seven years after the plan has terminated and the last participant, beneficiary or alternate payee has received all accrued benefits under the plan.

- Benefit elections, including where applicable, spousal waivers of benefits.
- Records of benefit payments, such as copies of checks, checking account registers or other documents that would establish that payments were made to a participant or beneficiary in situations where that is disputed and/or where a database does not include the person.

[3] Available at https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2002-orphan-plans.

- Plan documents, adoption agreements and trust agreements.
- Plan amendments.
- Summary plan descriptions and statements of material modification.
- IRS determination or opinion letters.
- Annual trust statements.
- Plan investment/fiduciary committee minutes and notes.
- Annual participant level reports.
- Annual participant statements.
- Divorce documents, including QDROs.

This obligation could be satisfied, (1) in the case of an annuity purchase, by transferring the documents to the annuity provider and agreement by the annuity provider to maintain the documents, or (2) by arranging for one or more service providers to maintain the documents.

The DOL should consult with the ERISA plan auditor community as to (1) whether there are other documents that should be included in this guidance, and (2) whether some types of documents may be kept for fewer years.

With regard to annual participant level reports, the data that should be preserved for this period should include (1) end-of-year (EOY) balance by fund by source; (2) EOY loan balance and new loans initiated; (3) year-to-date (YTD) employee contribution by source; and (4) YTD employer contribution by source. The guidance should not require that the following be preserved for this period, but rather should provide that it be preserved for a shorter period: (a) transfer between investment alternatives/funds activity; (b) investment election changes; and (c) investment performance.

In addition, any guidance should be flexible enough to provide for the retention of other documents that may become important to auditors or others to ensure that benefits are properly paid to participants and beneficiaries in light of technological developments or new legal requirements.

RATIONALE FOR RECOMMENDATIONS 3 AND 4

The rationale for Recommendations 3 and 4 is that recordkeeping roles and responsibilities may not be fully understood by plan sponsors and fiduciaries, relative to the roles and responsibilities of their service providers. It is the plan sponsor's responsibility to maintain plan records in accordance with applicable ERISA and DOL regulations; however, in today's electronic environment, most plan records are not maintained by the plan sponsor, but rather by plan or fund offices or outside service organizations. The creation and maintenance of a records retention policy provides further clarity and documentation about roles and responsibilities. Although the IRS does not require a written document retention and destruction policy for tax exemption, the IRS does ask whether a nonprofit, including a welfare plan, has one as part of Form 990, signaling that the IRS views written document retention policies to be governance best practices. The model policy should specify what types of documents need to be retained, how long they must be kept for and who is responsible for maintaining them.

RECOMMENDATION 3

The DOL should encourage the maintenance of a written records retention policy that documents how the organization maintains, reviews, updates and discards documents related to plan administration, and indicate that having such a policy is consistent with ERISA's fiduciary obligations. The DOL should also consider offering a model records retention policy for plan sponsors and plan fiduciaries to customize and adopt.

RECOMMENDATION 4

The DOL should update regulations under ERISA Sections 107 and 209, as appropriate, to include a comprehensive list of plan documents and their applicable retention periods for inclusion in a plan's written records retention policy, including but not limited to, the plan's governing documents, government-related documents, administrative records, employment records, payroll records, benefit statements and any other documents sufficient to determine individuals' benefit entitlement.

## RATIONALE FOR RECOMMENDATION 5

Recommendation 5 clarifies that the 1975 guidance on ministerial functions may not always apply to recordkeeping institutions; instead, facts and circumstances determine whether a fiduciary function is being performed. That guidance safeguards nonfiduciary employees from undue fiduciary responsibilities, ensuring that only those making discretionary decisions that impact the plan and its participants are held to fiduciary standards. However, some courts have interpreted it to preclude recordkeepers from ever being treated as fiduciaries.

## RECOMMENDATION 5

The DOL should clarify that its 1975 guidance on ministerial functions does not mean that recordkeeping institutions may never be found to be fiduciaries, but rather that it is a facts and circumstances test as to what, if any, discretion the recordkeeper has exercised in determining benefits due or communicating with participants and beneficiaries.

## RATIONALE FOR RECOMMENDATION 6

The basis for Recommendation 6 is the Council's perception that although contractual provisions with third-party service organization are critical in defining the practices for transitioning records and the availability of historical plan records after a plan-level transaction, these agreements typically contain little to no detail surrounding the transition of services.

## RECOMMENDATION 6

The DOL should issue guidance as to what terms should be in contractual agreements between plans and recordkeepers and payroll providers in order for the terms of such agreements to be reasonable under ERISA Section 408. These should include the following provisions:

- Provide for reasonable periodic monitoring by fiduciaries.
- Require that service providers retain all records (copies in the case of paper documents) for a period of no less than seven years after termination of their contracts and provide them, upon request, to the plan fiduciary or plan sponsor. If a cost is associated with providing records subsequent to termination of services, the cost should be reasonable. Further, we recommend

that the DOL make clear that under no circumstances can recordkeepers or payroll providers fail to provide plan data following a change in recordkeepers or payroll providers as this directly restricts the ordinary course of plan administration and benefit determination.

- Provide that all data and documents necessary for any successor to apply plan terms correctly and to communicate accurate information to participants be transferred to the successor within a reasonable period of time, and, in the case of data, in a mutually agreeable format.
- Provide that a predecessor recordkeeper or payroll provider deliver a written acknowledgement to the plan fiduciary or plan sponsor that it has transferred all of the information in the recordkeeper's or payroll provider's possession, whether in electronic or paper form, to the new respective recordkeeper, payroll provider or the plan sponsor.
- Provide for the annual or other periodic transfer of, or electronic access to, participant data, at the plan fiduciary's option, necessary to ensure the accurate payment of benefits to the participant, beneficiary or alternate payee.

The guidance should also make clear that complete disclaimers of liability or unreasonable limitations on damages are not reasonable terms. Further, the guidance should make clear that an electronic recordkeeping system should not be subject, in whole or in part, to any restriction that would, directly or indirectly, compromise or limit a fiduciary's or other person's ability to comply with any reporting and disclosure requirement or any other obligation under Title I of ERISA.

RATIONALE FOR RECOMMENDATION 7

Recommendation 7 underscores the increased importance of operating controls in the electronic environment. When there is a lack of controls, the reliability, accuracy, completeness and authenticity of plan records comes into question.

RECOMMENDATION 7

The DOL should educate plan sponsors and fiduciaries about SOC reports. This should include, but not be limited to, an explanation of SOC reports and how they are used; the importance of inquiring with recordkeeping and payroll service providers about the availability of SOC reports as part of the initial vendor evaluation and contracting process; the importance of obtaining and understanding the annual SOC reports; and ensuring that the required CUECs are implemented.

RATIONALE FOR RECOMMENDATION 8

Recommendation 8 is necessary to address witness testimony that plan sponsors and fiduciaries often do not fully understand their recordkeeping responsibilities, including the need to preserve certain records after termination of defined benefit pension plans. This has been exacerbated in the electronic age by greater prevalence of electronic record creation and many responsibilities for recordkeeping being shifted to third-party service organizations.

RECOMMENDATION 8

The DOL should consider an informational campaign to make pension plan sponsors and fiduciaries aware of their recordkeeping obligations. The Council believes some plan sponsors and plan fiduciaries, particularly those for smaller plans, are not fully aware of the responsibilities that ERISA places on them for records retention. This informational campaign should include education about the data requirements for defined benefit pension plan terminations and the records plan sponsors and fiduciaries need to retain after the defined benefit plan termination or partial termination for a variety of reasons, including questions arising from participants or the insurer after the plan terminates and in the event of a PBGC audit.