

### The Most Critical Gap of All

I was shocked to learn from a leading industry consultant recently, that when conducting an investigation into a specific account, he found that critical data had not been retained by the service provider. In fact, it had only been kept on file for one month! This raises a good question: should record keepers, in fact, keep records – and, if so, for how long? We are fortunate today to have one of the industry's leading lawyers in pension litigation to comment on this potentially significant information gap, **Hugh O'Reilly** of **Cavalluzo Hayes Shilton McIntyre & Cornish**. Joining Mr. O'Reilly and sharing her own perspectives on the issue is one of Canada's leading DC plan consultants, **Michelle Loder** with **Mercer Investment Consulting**.



Hugh O'Reilly



Michelle Loder



Joan Johansson

**JJ:** Do you not think it is implicit in the role of the record keeper to do their utmost to retain critical information on behalf of the plan sponsor? And if so, what kinds of data would you consider important for retention?

**HO:** At one level I believe that record keepers do have an implicit responsibility to retain records. However, I believe it is better for the plan sponsor and the record keeper to set out their expectations in writing and to agree on

who will do what. Quite often, plan administrators make assumptions about what they think the record keeper is doing, and this can lead to surprises. Information is critical, whether it is about the plan member/beneficiaries, investment choices made by members, records of materials sent to members, enrolment information, to information given when members leave the plan. I also think that records need to be maintained when employees decide not to join a plan.

**ML:** Most of our clients would indeed assume that it is implicit in the recordkeeping services of their plan provider that "records" are in fact "kept". Two points to clarify are 1) what is considered a "record"? and 2) how long should records be retained? In our view, there are two principle types of information that the record keeper should retain: **plan documentation** and **member records**. Plan documentation includes: contractual documentation, service/fee agreements, historical booklets and plan documentation, regulatory filings, employee communications, account statements/notices, employee education sessions and company reports. Additionally, we believe it is implicit in the role of the recordkeeper to retain daily unit values of segregated funds, contribution remittances, evidence of transaction requests, enrollment information, investment direction and member elections, beneficiary designations, etc.

Another key issue that sponsors should be aware of is what happens to their plan documentation and member records in the event of a transition to another service provider. They must ensure that historical information survives such a transition.

**JJ:** What might be the degree of risk to the plan sponsor if this data were not retained? Is there anything that the plan sponsor can do to protect themselves, like acquiring a printed copy of the service provider's retention policy?

**HO:** If no data is maintained, then I think that the plan sponsor will be in a position of having to rebut the claim without essential support. Also, as a fiduciary, the sponsor has a responsibility of maintaining records in order to ensure that members/beneficiaries get their entitlements. Given these considerations the sponsor could be in a very difficult legal position. I think that obtaining a copy of the document retention policy is a good beginning, but it is not enough. The sponsor needs to be aware of its legal liabilities and then take the steps required to ensure that records are maintained. The sponsor should enter into an agreement with the record keeper.

**ML:** The risk to a plan sponsor is primarily driven by a member challenge brought against the sponsor requiring evidence of documentation and/or records to establish a viable defense. The degree of risk exposure will depend on the type of challenge presented. One could imagine the following scenario; say a plan member was to challenge that the asset based fees applied to their segregated funds were overstated and they request compensation. Without being able to access daily unit value calculations for the segregated funds in question, the plan sponsor could be in the undesirable position of being unable to confirm or dispel the challenge.

At a minimum, plan sponsors should follow the CAP Guidelines issued by the Joint Forum and consider industry best practices. Then establish their own formal document retention policy. This policy would include records kept internally as well as those delegated for retention to a recordkeeper. This should also include policies on accessibility to the documentation and records. Many recordkeepers have formalized their retention policies and plan sponsors should periodically review them and see how well they are being adhered to.

**JJ:** Would and should the average plan sponsor be aware of this? Where should they turn for guidance and assurance relative to their own plans?

**HO:** The law of trusts is where I would start. I think that certain information may well need to be kept for an almost indefinite period. The bottom line is that sponsors need to ask themselves if and what information they need in order to prove that they met their obligations to the members. The decision should be based on potential liability. I think that most sponsors are unaware of the issue of record retention until it is too late. Record retention needs to be viewed from a legal risk management perspective. Once viewed through that imperfect prism, sponsors will be in a better position to meet the challenge of legal liability and do the best job for plan members.

**ML:** Yes, I agree. The plan sponsor has a fiduciary duty to its members and that entails in part, the obligation to monitor the recordkeeper selected, including record retention. Again, the best starting point is to create their own document retention policy, and an accompanying policy that outlines how periodic independent reviews should be conducted and by whom. Due diligence is the "buzz-word" to increasing assurance and comfort when drafting and reviewing adherence to document retention policies. This includes obtaining periodic certifications of compliance from outside service providers.

**JJ:** On behalf of Integra Group Retirement Services, I wish to thank today's guests Michelle Loder, Mercer Investment Consulting and Hugh O'Reilly of Cavalluzo Hayes Shilton McIntyre & Cornish for sharing their experiences and expertise with us on what, legally, could be the most critical gap of all – retention of DC records. Thank you.

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