To 3(16) or Not to 3(16)?
That is the Question!

Presented by
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How Did We Get Here?

- Retirement plans are complicated
  - PPA > 1,000 pages
  - Conflict of interest regs > 500 pages
- Plan sponsors generally are not experts in plan compliance
- H&W plans have long had true outside “management” services available
- Why not bring that concept to retirement plans?

ERISA §3(21) is the “garden variety” fiduciary definition:
- Has or exercises discretion over plan administration
- Has or exercises discretion over plan investments
- Gives investment advice for a fee or other compensation

ERISA §§3(16) and 3(38) are special types of fiduciaries (in other words, they are also §3(21) fiduciaries) with special duties
- §3(16): plan administrator
- §3(38): investment manager

ERISA by Numbers
ERISA by Numbers

ERISA reg §2509.75-8 provides that if performed “within a framework of policies, interpretations, rules, practices and procedures made by other persons” certain ministerial functions are non-fiduciary in nature, including:

- Application of rules determining eligibility
- Making recommendations to others for decisions with respect to plan administration
- Processing claims
- Calculation of benefits

Know the Line and When [Not] to Cross It

Duties of the Plan Administrator

(a/k/a I signed up for what?!)
Surely, the Code & ERISA Tell Us...

Actually, neither ERISA nor the Code specifically list all of the Plan Administrator’s responsibilities!

But both provide some guidance.

According to ERISA § 3(16), the term “administrator” means:

- The person specifically so designated by the terms of the instrument under which the plan is operated;
- If an administrator is not so designated, the plan sponsor;
- If the plan sponsor cannot be identified, such other person as the secretary may by regulation prescribe (which the secretary has not yet prescribed).

Surely, the Code & ERISA Tell Us...

According to Code § 414, the plan administrator is:

- The person designated by the plan, or
- In the absence of such designation, the employer (for a single employer plan) or the association, committee, joint board of trustees, or similar group (for a multiple employer plan)

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- Filing Form 5500
- Mandatory distributions
- Furnishing notices
  - SPD/SMM
  - Fee disclosure
  - Blackout
  - 204(h) and 402(f)
  - Diversification of employer securities
- Filing Form 1099-R
- Withholding taxes
- Hiring actuary and/or IPQA
- Administering QDROs
- Maintaining plan records
- Suing on behalf of plan
- Responding to ppt requests
- Acting as agent for legal process

It's All About that Plan Document...

- Plan doc describes roles and responsibilities of the PA and is usually quite broad.
  - Basic word search = the term Plan Administrator or its equivalent appears an average of 365.5 times!
- If you are naming yourself as Plan Administrator via the plan document, are you aware of all 365 of your duties?!

Critical Role
Discretion to interpret plan provisions and determine all questions re: administration.

That's a BIG job!
It’s All About that Plan Document...

Other responsibilities include but are not limited to:

- Establish rules and procedures
- Correct defects
- Authorize disbursements
- Determine liquidity needs
- Maintain records
- Select insurance providers
- Determine hours worked
- Appoint other advisors
- Enter into contracts
- Handle claims
- Determine QDRO validity
- Provide participant notices
- Assist participants with benefits/rights
- Establish/maintain loan program

So, Now You’re a Fiduciary

You Can’t Serve Two Masters

Your duty is now to the plan/participants not the plan sponsor!

According to ERISA § 404(a), you must act...

- ...solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries...
- ...with the care, skill, prudence and diligence...that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims...
- ...in accordance with the terms of the plan unless inconsistent with ERISA...
You Are on the Hook

With the DOL
For the fiscal year ended September 30, 2019
- Total recoveries > More than $2.5 billion

With the IRS
Fiduciary administrators are subject to IRC §4975 excise taxes

You Are on the Hook

With the Plaintiffs’ Bar
- Non-fiduciary TPA
  ✓ "You are named > you aren’t a fiduciary > you’re out early"
- TPA as 3(16)
  ✓ "You are named > you’re a fiduciary > you’re in for the long haul"

Co-Fiduciary Liability
- Under ERISA § 405(a), you are liable for the breaches of others if you:
  ✓ “[participate] knowingly in, or knowingly [undertake] to conceal, an act of commission or omission of such other fiduciary, knowing such act or omission is a breach;”
  ✓ “in failing to comply with [your duties]...[you enable] such other fiduciary to commit a breach;” or
  ✓ “have knowledge of a breach by such other fiduciary, unless [you make] reasonable efforts under the circumstances to remedy the breach.”
Know or Suspect a Breach?

What is Your Responsibility?

Explain to Client Early in the Relationship

As a 3(16) TPA
- You MUST try to fix it!
- Warn the “bad guy” to remedy the situation
- Report the situation
  - To someone higher up the food chain
  - To the participants
  - To the DOL
- File a lawsuit

As a Non-fiduciary TPA
- Maybe nothing
- Maybe resign
Time to Take Stock

- Risk/reward to the company
- Value to clients and referral sources
- Existing capacity and experience
- Access to information

Honest Assessment

- Responsibilities (and associated risk) you are willing to accept
  - Signing/filing Form 5500
  - Approving transaction requests
  - Providing participant disclosures
  - Others
- Whether clients/referral sources will see value for services they think you are already providing
  - Can you charge enough to make it profitable?

Expertise & Training

It isn't enough for the business owner, officers, etc. to know this stuff!

- Who will actually do the work?
  - Do they have requisite background to act with care, skill, prudence and diligence of a prudent expert?
  - Is there appropriate oversight?
- How do they keep up with changes and developments?
- Are there any ethical implications?
  - Circular 230
  - Professional codes of conduct
Time to Update

- Insurance
  - E&O for the company
  - Personal umbrella policies for owners/principals
  - Indemnification for employees?
- Employment agreements
- Service agreement

Proper Delegation

- ERISA §402(a)(1) provides that a plan must...
  - have one or more named fiduciaries who “jointly or severally shall have the authority to control and manage the operation and administration of the plan.”
- ERISA §402(b)(2) says that a plan shall...
  - “describe any procedure under the plan for the allocation of responsibilities for the operation and the administration of the plan.”

Proper Delegation

- ERISA §405(c)(1) states that...
  - “The instrument under which a plan is maintained may expressly provide for the procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.”
Service Agreement

- What does the plan document say about proper delegation of responsibility?
- Are the roles and responsibilities clearly defined in your service agreement?
- Have you included appropriate indemnifications and limitations of liability?
  - These can apply to the plan sponsor and/or other fiduciaries but not to participants.

Questions?

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