Delegating Fiduciary Risk and Responsibility

The significance of being a fiduciary has been given much attention recently, especially with the DOL’s proposed changes to the definition of fiduciary, which are expected to be released this year. With this heightened awareness, many Plan Sponsors are seeking to outsource these duties and associated risks. Because the selection and subsequent monitoring of service providers is a fiduciary duty itself, Plan Sponsors can never entirely delegate their fiduciary responsibilities. However, Plan Sponsors may delegate certain fiduciary duties to service providers, usually as either a 3(16), 3(21), or 3(38) fiduciary (a more detailed discussion of each is provided in Part 2 of this article).

Part 1: The Scope of Fiduciary Roles, Risks & Responsibilities

The delegation of fiduciary duties generally involves the delegation of discretionary authority or control over the management of the Plan or its assets. Risk and responsibility follow discretion and so it is important to understand how much discretion is being delegated. The table below illustrates the shift in risks and liabilities in relation to the amount of discretionary authority delegated. This table is just one possible scenario, however, and the actual scope of discretionary authority and the risks and liabilities that follow will vary depending on the terms of the Plan and/or the service agreements between the Plan and any third-party service providers to whom these fiduciary responsibilities are being delegated.

![SCOPE OF FIDUCIARY ROLES](image)

Figure 1: As discretion over the plan increase, risks and liabilities follow

Although Plan Sponsors can delegate certain fiduciary responsibilities, it is important to understand what risks and responsibilities remain after such delegation occurs. To that end, we have prepared a brief overview on the types of fiduciaries under ERISA and the roles and responsibilities that are generally delegated to each. This information is provided in Part 2.

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Part 2: The Fiduciary Roles

Generally, Plan Sponsors can delegate certain fiduciary responsibilities to service providers serving as either a 3(16), 3(21), or 3(38) ERISA fiduciary.

**3(16)**

ERISA sets out specific fiduciary duties required for the Plan Administrator and Section 3(16) defines who may serve in this role. Unless the Plan Document expressly provides otherwise, the Plan Sponsor is considered the Plan Administrator. As a practical matter, most Plan Sponsors choose to serve in this role. However, a recent trend is for Plan Sponsors to hire an independent 3(16) Fiduciary to be named as the Plan Administrator. In that case, the independent 3(16) Fiduciary assumes the responsibility as the Plan Sponsor outsources it. A 3(16) Fiduciary should not be confused with a third-party administrator (“TPA”). The primary difference here is the level of discretionary control over the administration of the Plan. With a TPA, the Plan Sponsor delegates some of its administrative duties to the TPA, but retains discretionary control; whereas with an independent 3(16) Fiduciary, the Plan Sponsor delegates both its duties and discretionary control.

**3(21)**

ERISA Section 3(21) fiduciaries include individuals with discretionary authority or control over the Plan or the Plan’s assets, as well as their appointees. The amount of discretion given to appointees varies by the terms of the Plan and/or appointment. Risk and responsibility follow discretion, and so the amount an individual has under 3(21) can vary widely (illustrated below). To address this, 3(21) fiduciaries are often referred to as Full, Specific, or Limited Scope Fiduciaries. These categories are not formally defined, which has led to some discrepancies in terminology. For this reason, Plan Sponsors must ensure they understand the scope of any fiduciary delegation agreement, and not rely solely on the terminology.

**3(38)**

Plan Sponsors can delegate fiduciary responsibilities relating to the investment of Plan assets to an independent Investment Manager. Section 3(38) sets strict requirements on who can qualify and requires that the Investment Manager acknowledge and agree to the fiduciary delegation in writing, and be solely responsible for the selection, monitoring, and replacement of the Plan’s investment options. A 3(38) fiduciary must be a bank, an insurance company, or an RIA subject to the Investment Advisers Act of 1940. Section 3(38) Investment Managers should not be confused with Plan Advisors. Investment Managers have legally defined discretion under ERISA, which gives them the ability to make decisions regarding investment options. Conversely, Plan Advisors are hired to provide recommendations and advice regarding investment options, but the Plan Sponsor has the discretionary authority to accept or reject the advice. Plan Sponsors often choose to appoint both an Investment Manager and Plan Advisor.

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The above information is meant to provide a general overview of fiduciary roles under ERISA. Similar to the Chart in Part 1, actual fiduciary roles and responsibilities may vary depending on the specific terms of the Plan and applicable service agreements. Further, it is important to note that although Plan Sponsors can delegate certain fiduciary responsibilities, they can never entirely delegate their fiduciary duties because Plan Sponsors have a duty to prudently select and monitor the Plan’s service providers. This duty cannot be delegated or waived.