



What Crayola Color of 3(16) Does Your Vendor Provide?

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Welcome!



“Hello”

I’m Patrick Curran!

Patrick Curran is a Senior Client Consultant for Unified Trust Company. He is a former Financial Advisor who is specialized in all aspects of retirement plan and pension consulting including plan design, operations, asset management, investments, fiduciary basics and advanced fiduciary plan governance. Patrick works closely with our Financial Advisor Partners as well as our Plan Sponsor Clients to help make their practices and plans as efficient as possible.

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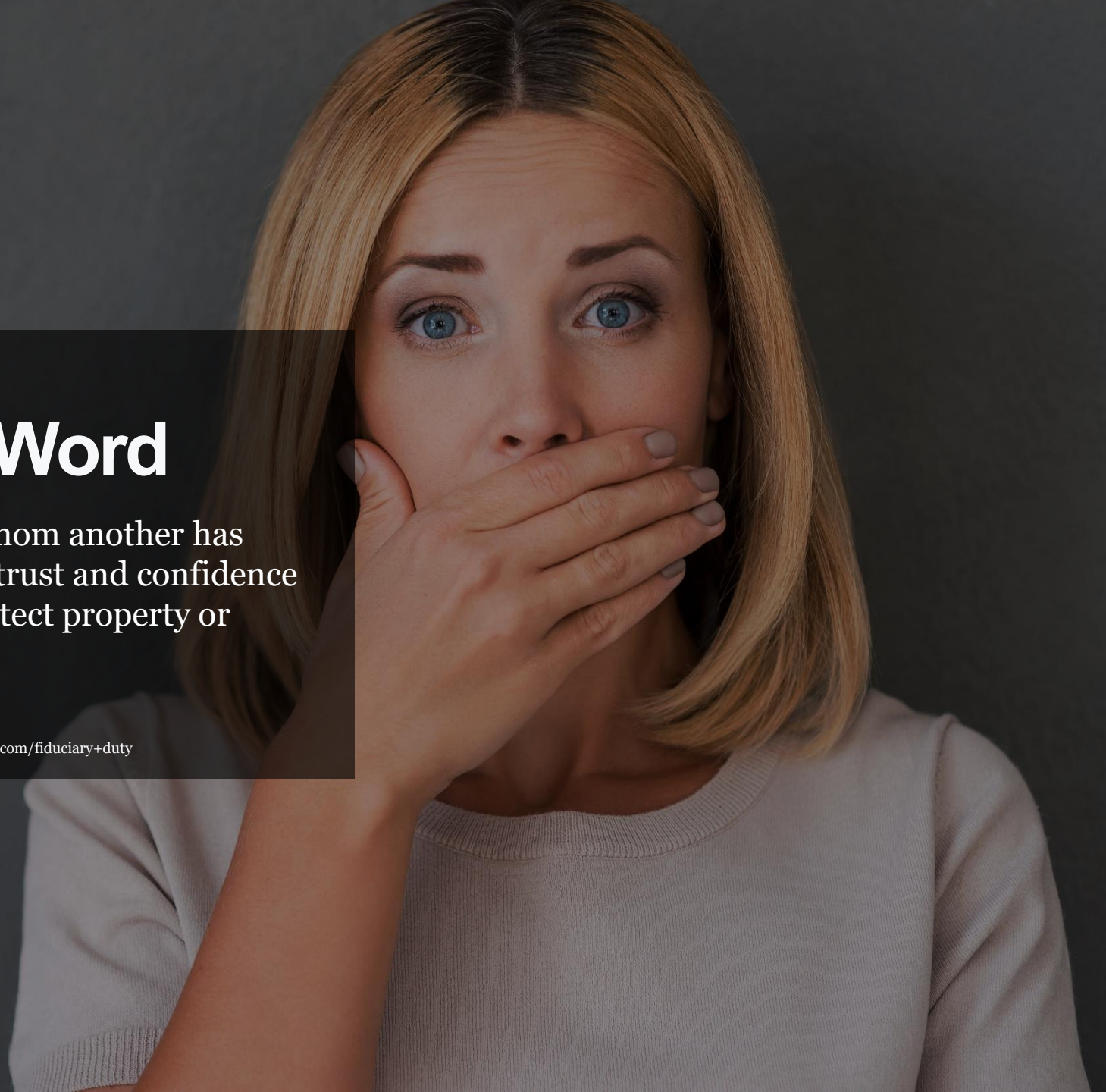
Presentation Agenda

1. What is a Fiduciary?
 - a. Risk
 - b. ERISA Intent
 - c. Roles
2. 3(16) Plan Administrator OR 3(16) Services Provider?
3. A new Advisor Value Add

The “F” Word

An individual in whom another has placed the utmost trust and confidence to manage and protect property or money.

Source: legal-dictionary.thefreedictionary.com/fiduciary+duty



The Word “Fiduciary”

“Fiduciary” is Used in Many Settings

- Too often used solely in marketing/sales to give the plan sponsor a false level of comfort without understanding the limitations of the service
- “Co-Fiduciary” = limited status
- Contracted Fiduciary Service Providers, the “3’s”, (16, 21, 38....)
- Named Plan Fiduciary – ERISA §402(a)
 - Plan Sponsor
 - Plan Administrator
 - Discretionary Trustee – Individual or Corporate

“Fiduciary” Verbal Sales Pitches

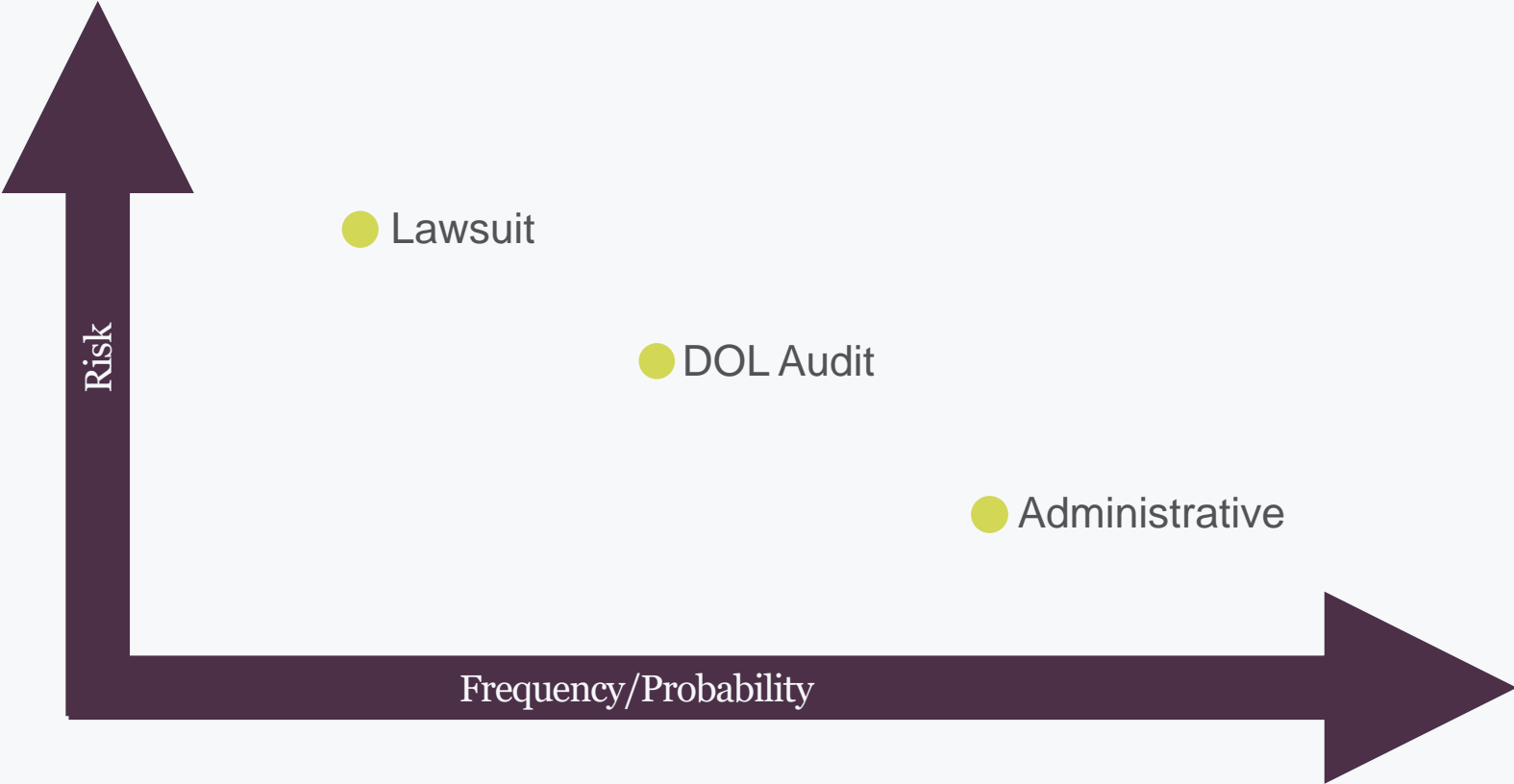
- “We are a fiduciary with regards to the quality of our administrative services.”
- “We put the client first 90% of the time.”
- “It doesn’t really matter because the plan sponsor is always responsible anyway.”
- “We have the best fiduciary warranty in the business.”
- “We do the same things a fiduciary does, only better.”

Plan Sponsors Tend to Believe Fiduciary Status is “All or None”



Fiduciary Risks

Vary in Frequency and Severity



Delegating Fiduciary Liability?

Myth: You cannot delegate fiduciary liability.

- This is explicitly false, ERISA clearly states that a fiduciary— such as a Plan Sponsor—can make a prudent appointment to a corporate trustee or another Named Plan Fiduciary
- If done correctly, the allocating fiduciary will not be held liable for the acts and/or omissions of the appointed fiduciary
- The duty to monitor remains, a Plan Advisor may assist Plan Sponsor in meeting these obligations
- The above is pursuant to ERISA §403(a) and ERISA §405(d)(1)

What is the connection?

What is the connection between these two images?



**1941 Studebaker
Commander**



**Employee Retirement Income
Security Act (ERISA)**

Studebaker - What Went Wrong?

- 3,600 age 60+ and fully vested = Full Pension
- 4,000 age 40-59 with at least 10 years of service = 15% of projected pension benefit
- Another 2,900 = Nothing
- Someone must be held responsible = Named Plan Fiduciary



The Purpose of ERISA

“Protect the Participant”

ERISA'S Vision

Congress thought the trustee would be discretionary!

“The House bill also provides that all plans must be in writing, that plan assets generally are to be held in trust, and that trustees generally are to have the exclusive authority to manage and control plan assets.”

United States. Subcommittee on Labor of the Committee on Labor and Public Welfare . *Legislative History of the Employee Retirement Income Security Act of 1974*. 94th Cong. 2d sess. Pub. L. 93-406. Vol. 2. (1976)



Thus ERISA Was Built Around Long Standing Trust Law

- “A trustee is held to something stricter than the morals of the market place.”¹
- Among the fiduciary duties of a trustee is the duty of loyalty, which requires the trustee “to administer the trust solely in the interest of the beneficiary.”²

¹ Doud v. Holmes, 63 N.Y. 635, 636 (N.Y. 1875)

² Restatement (Second) of Trusts § 170(1) (1959)

The ERISA Fiduciary Standard

Fiduciary Duties Under ERISA

“Are the highest known to law.”

Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir.), cert. denied,
459 U.S. 1069 (1982)



ERISA Has Two Types of Fiduciary Requirements — “Prudent Expert”

- ERISA 404(a) the “Prudent Person Rule”
- “**Duty of Loyalty**” a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries...
- (A) for the **exclusive purpose** of:
 - (i) providing benefits to participants and their beneficiaries; and
 - (ii) defraying reasonable expenses of administering the plan

Undivided Loyalty & Exclusive Purpose

ERISA § 404(a)(1)(A) requires that the fiduciary must act solely in the interest of the participants and beneficiaries for the exclusive purpose of providing a benefit to them.

“Must be made with an eye single to the interests of the participants and beneficiaries.”

Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir.), cert. denied, 459 U.S. 1069 (1982)





Expert Standard of Care

ERISA § 404(a)(1)(B) requires that in discharging his fiduciary duties, the fiduciary must act...

“With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use with like aims.”

Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir.), cert. denied, 459 U.S. 1069 (1982)

ERISA Has Two Types of Fiduciary Requirements- “Prohibited Transactions”

- ERISA 406(a) and 406(b) “Prohibited Transactions”
- 406(a) prohibits a wide range of transactions between the plan and a **party in interest**
- 406(b) prohibits a wide range of transactions between the plan and a **fiduciary**
- **15% Excise Tax** on the amount of the transaction for each year the transaction was in effect

ERISA Has Two Types of Fiduciary Requirements- “Prohibited Transactions”

- ERISA 406(b) “Prohibited Transactions” A fiduciary with respect to a plan shall not—
 - (1) deal with the assets of the plan **in his own interest** or for his own account,
 - (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose **interests are adverse** to the interests of the plan or the interests of its participants or beneficiaries, or
 - (3) **receive any consideration for his own personal account from any party dealing with such plan** in connection with a transaction involving the assets of the plan.

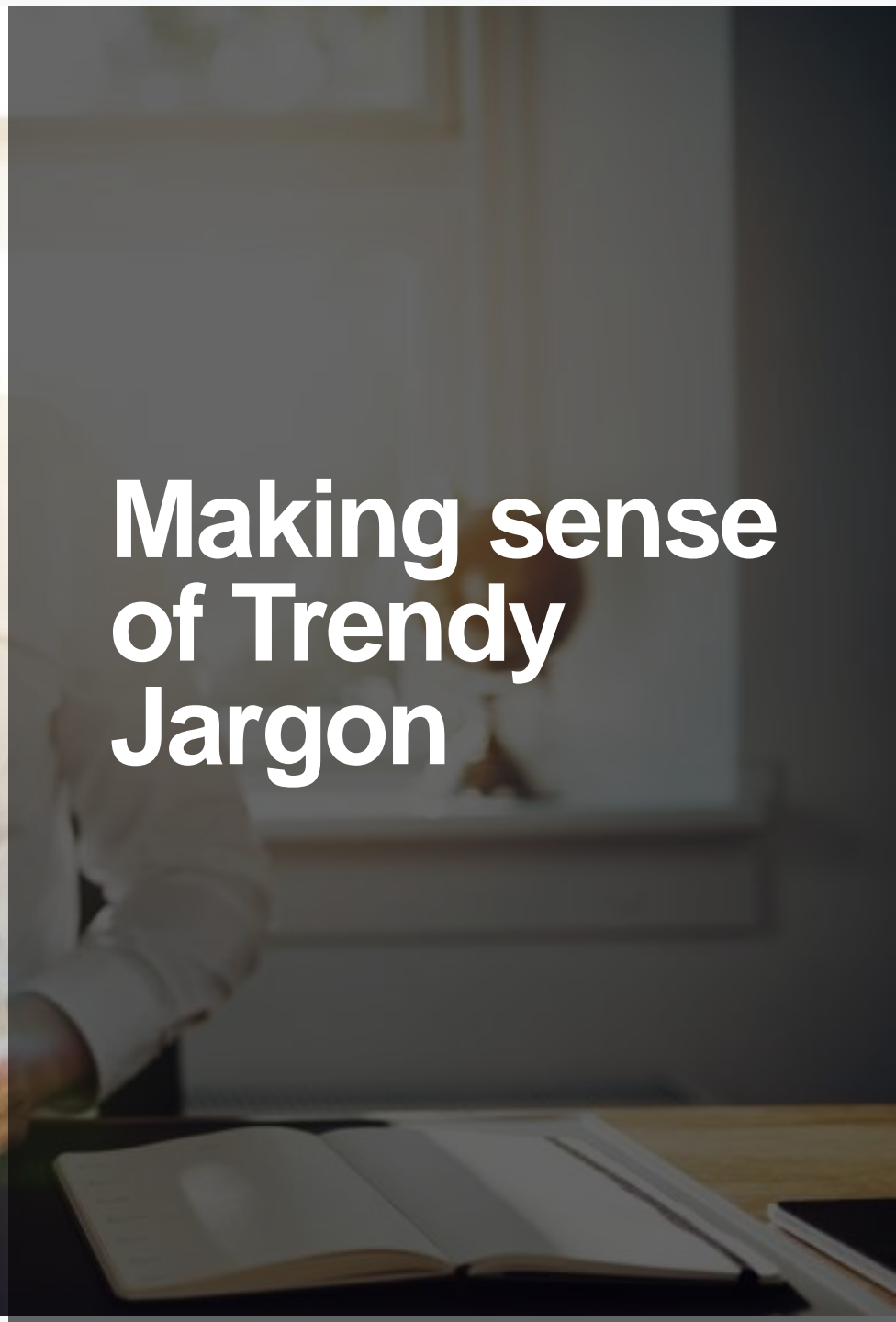
A photograph of a business meeting. Two people in blue shirts are looking at financial documents on a desk. One person is pointing at a chart with a pen. A laptop is open in the foreground. The background shows a window with a view of a building.

What Makes Someone a Fiduciary?

- Discretion
- Control
- Based on functions performed



Making sense of Trendy Jargon



ERISA Fiduciary Terminology

Fiduciary status can be by title or by activity

- 3(16)
- 3(21)
- 3(38)
- 402(a)
- 403(a)



After Studebaker

402(a) Named Fiduciary

- Functions as the plan's "CEO"
- "Most important fiduciary"
- Plan may have more than one named

Who is an ERISA Fiduciary?

The named plan fiduciary under 402(a)

- An ERISA plan must have at least one fiduciary (a person or entity) **named** in the written plan, or through a process described in the plan, as having control over the plan's operation.
- The named fiduciary can be identified by office or by name. For some plans, it may be an administrative committee or a company's board of directors.

Who is an ERISA Fiduciary?

The named plan fiduciary under 402(a)

- This is called a **named plan fiduciary** under section 402(a) of ERISA
- The named plan fiduciary is generally the highest fiduciary in the plan
- The named plan fiduciary will always be someone associated with the plan sponsor, and can also be a discretionary corporate trustee
- Thus some plans will have more than one named plan fiduciary

ERISA Fiduciary Terminology

The plan trustee under 403(a)

- 403(a) An ERISA Section 403(a) fiduciary acts as the **Plan Trustee**.
- “Benefit plan assets to be held in trust; authority of trustees Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees.
- Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan,
- **except to the extent that.....”**

ERISA Fiduciary Terminology

The plan trustee under 403(a)

- “... (1) the plan expressly provides that **the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee**, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or
- (2) authority to manage, acquire, or dispose of assets of the plan is delegated to **one or more investment managers** pursuant to section 402(c)(3) of this title.”

The “3’s”

3(21), 3(38) and 3(16)

ERISA Fiduciary Terminology

Fiduciary status under 3(21)

- 3(21) An ERISA Section 3(21) fiduciary occurs by **actions**, not title
- This is what the **DOL tried to change**—and extend to IRAs. Section 3 of ERISA contains the definitions that apply to the statute and defines ERISA fiduciaries in three separate sections.
- Section 3(21) of ERISA generally defines an ERISA fiduciary as someone who exercises any **discretionary authority or control** regarding the management of an employee benefit plan or the disposition of its **assets**.
- A fiduciary under section 3(21) also refers to someone who renders **investment advice in exchange for compensation**.
- Finally, section 3(21) also defines a fiduciary as someone with discretion regarding the ability to **administer the plan**.

ERISA Fiduciary Terminology

Fiduciary status under 3(38)

- 3(38) An ERISA Section 3(38) fiduciary is an advisor who renders **discretionary investment advice** to an employee benefit plan
- An investment manager is one who has the power to manage, acquire, or dispose of any asset of the plan, and has **acknowledged in writing** that they are a fiduciary with respect to the plan.
- Thus, while a 3(21) investment fiduciary **recommends** investments and investment strategies to plan fiduciaries who either approve or reject them, an investment manager is authorized to implement those recommendations and strategies without the approval of other plan fiduciaries.

3(16)...
All Greek
To Me



**What exactly is a 3(16)
Plan Administrator?**

3(16) Plan Administrator

- (A) The term “administrator” means—
 - (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
 - (ii) if an administrator is not so designated, the plan sponsor; or
 - (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as Secretary may by regulation prescribe.

What are Plan Administrator Responsibilities?

What are Plan Administrator Responsibilities?

- A “Plan Administrator” must be named in the plan document.
- A “Plan Administrator” manages the plan’s Investment Menu.
 - (3(21) – Delegated
 - 3(38) – Delegated
 - Discretionary Trustee – Allocated

What are Plan Administrator Responsibilities?

- A “Plan Administrator” oversees the administration of the plan. This includes:
 - Maintain and interpret the plan document and oversees plan operations
 - Provide all required disclosures to plan participants (ie SPD, Summary of Material Modifications, SAR, Participant Fee Disclosure Notice, Safe Harbor Notice, QDIA Notice, and Automatic Enrollment Notice when due.) UTC or TPA send these to plan sponsor for distribution.
 - Provide benefit statements to participants
 - Comply with all required governmental reporting. (5500, 8955-SSA, selecting an audit firm, preparing and filling Forms 945, 1096 and 1099-R related to plan distributions.
 - Ensure timely deposits of contributions into participant accounts.
- A “Plan Administrator” engages service providers

**What exactly is a 3(16)
Services Provider?**

Buyer Beware!

- Not all 3(16) service offerings are the same.
 - (Some Plan Sponsors mistakenly believe that a provider calling themselves a “3(16) Fiduciary” will automatically assume all of the Plan Sponsor’s responsibilities.
 - 3(16) Fiduciary duties can be segregated by contract...”to the extent of”...providers are typically only accepting portions of the total fiduciary responsibility.
 - Contracts should be read carefully...what is the Plan Sponsor buying? Or not buying?



Risk Considerations

- Civil Actions (under ERISA)
- DOL Civil Penalty
 - 20% penalty of applicable recovery amount
- Excise Taxes



ERISA Fiduciary Terminology

3(16) Fiduciary status risks statutory monetary penalties

- Failure to file 5500 = **\$2,194** per day
- Failure to furnish of automatic contribution arrangement notice to defined contribution (DC) plan participants = **\$1,736** per day
- Failure to furnish employee benefit plan documents to DOL upon request (including plan and trust documents, summary plan description, summary of material modifications) = **\$156** per day
- Failure to furnish blackout notice or notice of right to divest employer securities to participants in DC plans = **\$139** per day per employee
- Prohibited payment from DB plan during period when plan has a liquidity shortfall = **\$16,915** per payment

Thanks, ERISA

- “Allocate” duties (meaning to carve out)
- “Delegate” duties (ask someone to do it for you)
- “3(16) fiduciary services” – can be both allocated or delegated



Outsourcing 3(16) Duties via Allocation



Allocation

The Plan document will determine how Named Fiduciary responsibilities are allocated.

Plan Sponsor will retain certain duties:

- ✓ Authority to amend the plan document
- ✓ Responsibility for hiring & monitoring
- ✓ Assets/Investments

Outsourcing 3(16) Duties via Delegation

Delegation

01

A fiduciary is able to delegate responsibilities.

02

The delegator remains responsible, which differs from an allocation of duties.

**Do “3(16) Services” cut
the Gordian knot?**

~~Yes~~ ~~No~~ Maybe

☑ If the service provider formally accepts the 3(16) Plan Administrator role via designation through the plan document (allocation) – then “yes” ...key duties for reporting/disclosure and plan management/operation are transferred.

☑ This allocation of duties...must be prudent



The “Delegated” Role

- Some Plan Administrator responsibilities are transferred (ex: loan/distribution approval, participant notice delivery, etc.) via delegation
- The term “delegated administrative fiduciary” is even used in some service agreements
- Not a carve out of duties, **so oversight responsibilities remain – monitoring!**
- As Plan Administrator, there is a fiduciary obligation to oversee the provider
- “But employer cannot eliminate all fiduciary oversight responsibilities”¹
- Remains liable for monitoring duties and should review performance at reasonable intervals on an ongoing basis

1. “The Different Roles and Responsibilities of 3(16), 3(21) and 3(38) Fiduciaries” – Marcia S. Wagner, Esq.

What do 3(16) Service Providers Do?

Firms offering 3(16) services “claim” to accept responsibility for one or more of the above described “Plan Administrator” duties for a fee.

Of course, there are as many Plan Administrator
duties as there are colors in the Crayola universe.



Service Providers Responsibilities

Very few firms offering 3(16) services will actually go as far as being named the Plan Administrator in the plan document, which means that they are limited to taking on 3(16) responsibility only for the areas that are indicated in their contracts, and the employer retains responsibility for all other functions, plus monitoring the prudence of the 3(16) selection.



What do 3(16) Service Providers Do?

Some combination of these services

- To determine eligibility of employees to participate in the plan
- File 5500/8955-SSA
- Procure fidelity bonds
- Provide documents to participants
- Distribute SPD and SMM to plan participants
- Provide participants notices including tax notices, enrollment kits, SARs, fee disclosure notices, Joint and Survivor notices

.....continued

What do 3(16) Service Providers Do?

Some combination of these services

- Review and approve financial reports, investment reviews and other reports
- Establish a funding policy
- Construing and resolving questions of plan interpretation
- Making findings of fact
- Review and render decisions regarding participant claims
- Fix plan operational errors

.....continued

What do 3(16) Service Providers Do?

Some combination of these services

- Determine if a purported QDRO is actually a QDRO
- Provide participant statements
- Approve/Disapprove Loans and/or Ordinary Distributions
- Adjudicate hardship distributions
- Etc.....

ERISA Fiduciary Terminology

Fiduciary status under 3(16)

- A third party administrator ('TPA') may be retained by the plan or the plan administrator, but a TPA is typically neither the 3(16) administrator nor a fiduciary.....unless they
- Accept appointment as a 3(16) fiduciary in their contract, BUT
- Generally, the TPA is not intending to act as a 3(16) administrator unless they are specifically *allocated* that role by being *designated* as such in the plan document

ERISA Fiduciary Terminology

3(16) Fiduciary status risks statutory monetary penalties

- Failure to file 5500 = **\$2,140** per day
- Failure to furnish of automatic contribution arrangement notice to defined contribution (DC) plan participants = **\$1,632** per day
- Failure to furnish employee benefit plan documents to DOL upon request (including plan and trust documents, summary plan description, summary of material modifications) = **\$147** per day
- Failure to furnish blackout notice or notice of right to divest employer securities to participants in DC plans = **\$131** per day per employee
- Prohibited payment from DB plan during period when plan has a liquidity shortfall = **\$15,909** per payment

Advisor Value Add:

**Monitoring the Prudence
of the 3(16) Selection?**

Monitoring the Prudence of the 3(16) Selection

- Qualification of the service provider
- The quality of the services provided
- A list of what is and isn't a fiduciary service
- The potential conflicts of interest between the 3(16) provider and any other outsourced plan service providers
- The reasonableness of the provider's fee in light of the services provided
- Any caveats to the 3(16) contract that limit the fiduciary responsibility of the service provider
- The provider's capacity to pay any possible legal claims made by the employer or its participants in connection with any breaches of 3(16) duties of the plan

New Flavor of Outsourced Fiduciary for Retirement Plans Hits the Market

“...and not all 3(16) fiduciary services are built equally.

Fiduciary “lite” for 3(16) includes taking transactional burdens off of the plan sponsor and acting as the quarterback. This means overseeing distributions, loans and any other activity that will alleviate the pressure on the employer's office manager, according to C. Frederick Reish, a partner at Drinker Biddle & Reath's employee benefits and executive compensation practice group.

Full-scope 3(16) fiduciary services include decision making, rather than merely lightening the administrative load — for instance, determining whether a domestic relation order is qualified. They also may ensure that elective deferrals are made in a timely manner and ensure that the plan retains its tax-qualified status with the IRS.

“Read the fine print,” Mr. Reish said, referring to the services outlined by a provider of these services. “If they're a 3(16) for less than seven or eight things, then they're 3(16) 'lite,'” he added. “3(16) for everything else would include a robust list of 20 to 30 duties.”

So far, the realm of 3(16) is looking more like the domain for third-party administrators, rather than financial advisers. But advisers working with retirement plans play a key role in screening potential candidates for these outsourced services.”

How Can You Help Limit Your Client's Fiduciary Liability?



Create Good Plan Governance



Review Your ERISA Fiduciary and D&O Policies



Provide Fiduciary Training



Document Everything!

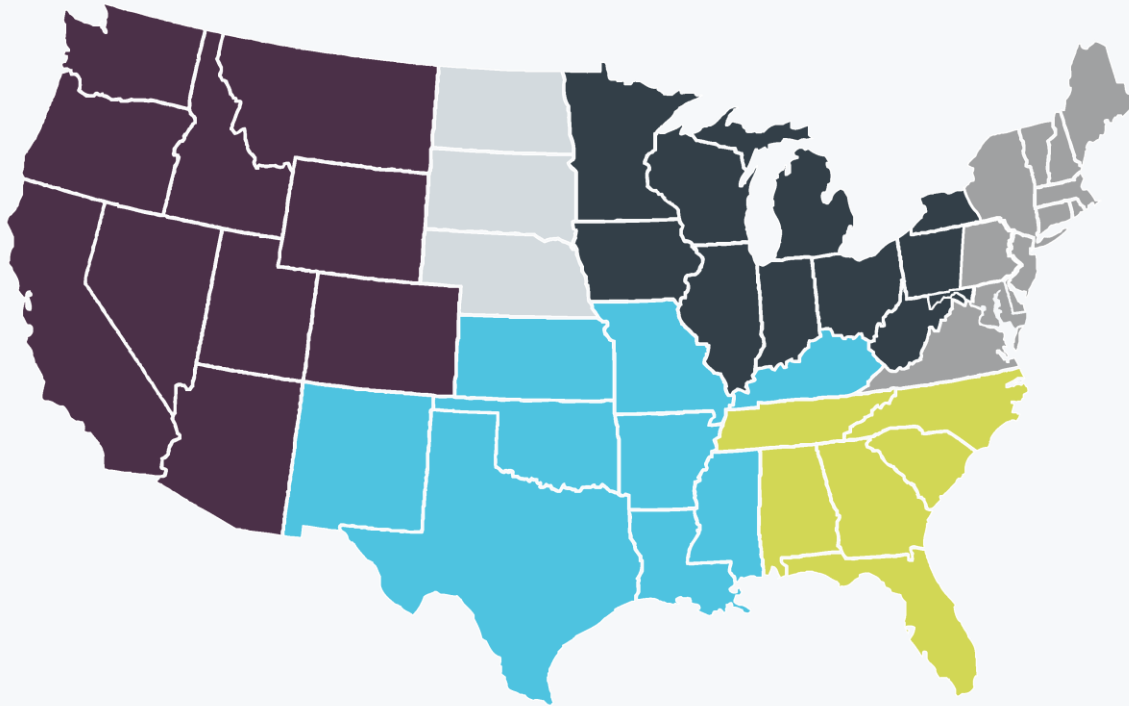


Undertake a Fiduciary Audit



Allocate or Delegate Fiduciary Duties

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Thanks for Joining Us!

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