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3(16) ERISA Fiduciary Definition

Recently there has been an emergence of entities offering to provide ERISA Section 3(16) services. Plan sponsors may be interested in divesting themselves of Section 3(16) plan administrator responsibilities, and there are questions regarding this concept and its perceived desirability. The unfortunate reality is that the advertisements, marketing material and articles (often written by interested parties who sell these services) are often quite misleading and contain a substantial disconnect between the scope of services required versus those actually covered.

ERISA Section 3(16) states the definition for "plan administrator" as responsible for the daily operation of the plan. A plan administrator under ERISA 3(16) is identified in the plan document, and if the plan document is not specific, the plan sponsor is considered to be the 3(16) fiduciary.

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ERISA 3(16) fiduciary responsibilities include:

- Interpretation of the plan document; required reporting and disclosures (i.e., Form 5500); and selection, evaluation and monitoring of other plan fiduciaries, service providers, plan investments, any investment advisor to the plan and reasonableness of all plan fees and contracts.

- Distribution of summary plan description/summary of material modifications, participant fee disclosure, benefit statements, qualified default investment alternative notices and other required participant disclosures, distribution of benefits, administration of Qualified Domestic Relations Orders (procedures and process) and administration of loans.

Approach organizations offering 3(16) services with caution, as the strength of the purported offloading of fiduciary responsibility is untested to date. In addition, plan sponsors should review any such offerings in extreme detail, as few, if any, organizations truly accept a full 3(16) scope. Most organizations agree to serve in a 3(16) capacity limited to the service being provided (loan processing, hardship approval, etc.). It is highly unlikely that a plan sponsor can hope to avoid or transfer fiduciary responsibility merely by engaging an organization as a 3(16) plan administrator, because even that selection (unless included in the plan document) carries fiduciary implications, and thus ongoing monitoring of the selected 3(16) is likely warranted. Therefore the plan sponsor retains potential fiduciary responsibilities and thus liability exposure. Finally, when considering engaging a 3(16) advisor, keep in mind: 1) few, if any, advisors have the experience, let alone the proper infrastructure, to take on the administration of the plan — this is best left to third-party administrators and record keepers; and 2) no advisor will be capable of possessing all the knowledge, data and authority necessary to act in a full scope 3(16) capacity. This is because human resources, payroll, etc., are still not managed by the advisor.

It is important to remember that the same procedurally prudent process that accompanies any ERISA fiduciary decision certainly should apply when considering an external ERISA 3(16) fiduciary as well.

Power of Peer Influence: From Inertia to Action

This article was originally published by T. Rowe Price, May 2013.

For many, saving money for retirement can be as challenging as losing weight. Both require sustained effort and new habits. Just as weight loss programs use group meetings and Internet forums to create a culture of personal responsibility, the defined contribution industry is finding that peer influence can be highly effective at fighting procrastination — and encouraging long-term savings habits.

Peer influence is gaining momentum. The digital world is accentuating the power of peer influence. Social recommendations, customer advocacy, and word-of-mouth marketing are among today's most powerful marketing tools. Consider:

- "Friends" influence buying – Nearly 68% of Facebook users say a Facebook friend's recommendation would make them more likely to buy a product or visit a retailer.[1]

- Gen Y/Millennials lead brand advocacy trend – Research finds that a third of those age 18 to 34 are making proactive recommendations.[2]

- Look at your own experience – How often do you read the peer reviews before buying online? How often do you select a restaurant based on a friend's recommendation? Consider the popularity of *Consumer Reports* or Angie's List.

DC Implications: Peer marketing techniques are efficient and cost-effective

While individual guidance and advice remain critical, DC plan providers and sponsors may be able to enhance participant outcomes by deploying successful peer marketing techniques.

- At 51%, financial services is among the top 12 categories for positive word-of-mouth conversations among U.S. internet users.[3]

- Experts are conducting new studies to evaluate the impact of peer information and groups on savings behavior.

- More avenues for sharing peer recommendations and implementing cost-effective advocacy programs are opening up. Key reasons: Digital services are playing an increasingly important role in participant communications, and plans are considering social media for engagement.

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Strategies and Tactics: Connect participants, improve outcomes

Consider how peer marketing techniques can be leveraged to create more successful DC plans.

Short-term tactics

1. Create a network of plan “brand advocates”— it starts at the top

Success ultimately depends on a sponsor’s top-down support and advocacy efforts. Start by crafting effective, shared messaging in cooperation with the sponsor. Then, engage them in identifying the influencers in their organizations who can serve as powerful word-of-mouth advocates.

2. Establish forums for sharing successful strategies and encouraging accountability

Include a participant testimonial portion within seminars and webinars conducted by plan providers. Hearing the ease with which their peers have successfully saved can be a game changer for attendees. Supplement these sessions with employee-driven, sponsor-supported forums where participants can share successful saving strategies.

3. Provide peer benchmarks

Consider showing plan participants how others within a similar demographic are doing in terms of saving and investing for retirement. Take care, however, to emphasize the importance of continual improvement over time.

Longer-term considerations

1. How can you fully develop an online community for your clients’ plans?

Enhance plan websites and digital services to allow participants to share tips and tactics for saving and investing. Even your clients’ own intranet or social media tools could be leveraged to champion the plan.

2. In what ways can you provide reminders to plan participants to strengthen accountability?

Use ongoing, automated e-mail and text messages to remind employees of saving commitments they’ve made to themselves (and perhaps shared as part of a participant forum). For example, if a participant’s situation doesn’t allow them to enroll upon their eligibility date, have them set up an automatic e-mail or calendar reminder to revisit the possibility six months or a year later.

[1]Morpace Omnibus Report, Morpace, April 2010.
[2]PostRelease survey conducted by Synovate, January 2010.
[3]Keller Fay Group, “Unleashing the Power of Word of Mouth,” August 2010.

Pass or Fail? Corrective Actions to Remedy Your Test Results

Each year you receive a “pass” or “fail” from your service provider regarding required nondiscrimination testing (the Actual Deferral Percentage test and the Actual Contribution Percentage test). The ADP/ACP tests govern the amounts of deferrals and/or matching contributions that highly compensated employees (HCEs) are allowed to make or receive in relation to those of non-highly compensated employees (NHCEs).

If you received a “fail,” do not panic. As long as an IRS-prescribed corrective action is undertaken, the plan’s health is not in jeopardy. Correction can be made by:

1. Refunds of excess contributions (plus earnings thereon) to HCEs.

2. Employer-qualified non-elective contributions (QNECs) or qualified matching contributions (QMACs) to NHCEs under the plan.

3. Recharacterizing excess contributions. The most common corrective method is the refund of excess contributions to HCEs following IRS procedures.

Refunds must be distributed within two and a half months (or six months in the event the plan has an Eligible Automatic Enrollment Arrangement design) following the end of the plan’s test year (March 15 for calendar-year plans) to avoid an excise tax. Contact your plan consultant for more information.

Going the Extra Mile: A Deeper Look at the Scorecard

The Scorecard is a great tool in monitoring the investment choices available in your retirement plan. There are instances, however, when you have to make that extra effort to understand the underlying issues of what the Scorecard is telling you.

As a review of the Scorecard, a fund is acceptable if it scores in the 7 to 10 range. A fund that scores a 5 or 6 is struggling and should be put on a watchlist for continued monitoring and reviewed for signs of improvement. A fund that scores less than a 5 is deemed unacceptable on many fronts and is more than likely a candidate for removal.

That is the "black and white" of the Scorecard. However, there are often times when the situation is not so clear. Here are two examples where the Scorecard was not followed to the letter. (As a side note, the beauty of the Investment Policy Statement is that it is written to allow this kind of flexibility.)

The first example is from a fund that was scoring a consistent 10 for many quarters. The entire investment management team left the fund and was replaced by a new manager. In the next quarter, the fund scored an 8, losing two points for manager tenure in the qualitative section of the Scorecard. A deeper dive was needed to look at the incoming manager. A review was conducted on the performance of a fund that the new manager had previously managed. Ultimately, there was little confidence in the new manager's previous track record, and it was decided that the fund should be replaced despite the fact that it still scored a relatively strong 8.

The second example came from a struggling fund that was scoring a 4 for a few quarters. The fund was losing two points for manager tenure. However, the deduction was from a manager addition (the fund's assets were being split between the existing manager and the new manager). This manager addition was actually viewed as a positive change. Additionally, a few of the other statistics were improving and close to passing. It was recommended that the plan keep the fund on a watchlist for review over the course of a few more quarters. The fund is now scoring a 9.

This shows that going the extra mile when it comes to investment due diligence can often lead to uncovering compelling information on the Scorecard.

Communication Corner: Explore Your Options

This month's employee memo is titled, "Explore Your Options." This memo reminds participants of the various benefits they may receive by contributing to their retirement plans.

Call or email your plan consultant if you have questions or need assistance.

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