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I'm a 3(16) Fiduciary … Now What??
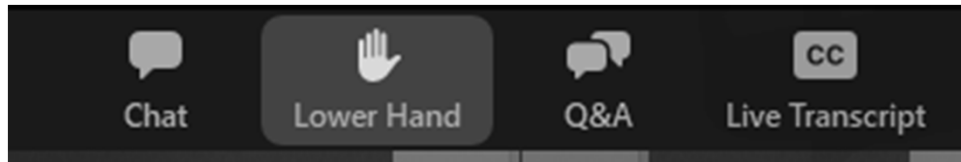
Presented by
Ilene H. Ferenczy, Esq.

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Your Co-Hosts

• Joanne Pecina

• Maureen Pesek

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Your Presenter Today

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Agenda

- The 3(16) Concept
- Handling the 3(16) Responsibilities
- What Should You Do?
- Mistakes and Pitfalls
- Final thoughts and Recommendations ...

The 3(16) Concept – What Does it Mean?

"Normal" Plan Operations

- The plan administrator is responsible for the plan's operations (as opposed to the investment fiduciary, who is responsible for the money side)
- Plan administrators get operational advice from TPAs in the same way that investment fiduciaries get investment advice from financial advisers

ERISA and the Plan Administrator

- ERISA does not provide a comprehensive list of Plan Administrator duties
- ERISA and regs do assign some responsibilities to the Plan Administrator

Furnishing the SPD and SMMs to participants	Notifying DB Ps of funding-based distribution limitations	Hiring actuary, qualified public accountant
Filing Forms 5500	Providing 204(h) notices to Ps	Acting as agent for service of legal process for the plan
Administering QDROs	Providing QACA notices to Ps	Notifying Ps of change in investment options
Providing DB annual funding notices, DC SARs	Notifying DOL/Ps re transfer of excess pension assets to health benefit accounts	Dealing with the PBGC in re DB plan terminations
Providing participants with blackout notices	Providing Ps with notice of right to divest from ER securities	Advising PBGC of reportable events
Maintaining plan records	Suing on behalf of the plan	Responding to P requests

What About the Internal Revenue Code?

- Code §414 defines the "plan administrator" to be:
  - 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)
- However, the Code does provide in various sections that the Plan Administrator is responsible for:

- Administering QDROs
- Filing Forms 1099R
- Filing Forms 5500

- Providing 402(f) notices re rollovers
- Doing mandatory rollovers

- Filing actuarial report with IRS
- Withholding taxes from distributions

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The Real List: The Plan Document

- Key issue: authorization to interpret plan provisions (Firestone v. Bruch authority) ... AND, for example:

- Determine answers to admin-related questions
- Determine eligibility for participation/benefits
- Authorize discretionary disbursements
- Determine liquidity needs and coordinate with trustee
- Furnish disclosure information to participants
- Act as named fiduciary

- Establish rules and procedures
- Handle claims
- Maintain records
- Provide notices to participants
- Determine QDRO validity

- Correct defects
- Determine amounts of benefits
- Enter into contracts for the plan
- Assist participants
- Appoint other advisors

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The Law Anticipates Delegation of Fiduciary Duties

- 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."

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Professional
3(16) Plan Administration

- The plan sponsor delegates to the 3(16) TPA the fiduciary administrative responsibilities that are outside his/her ken
  – Analogous to hiring an investment manager for investment fiduciary duties
  – For those responsibilities, the Plan sponsor's job goes from full fiduciary obligations to prudently hiring and monitoring the TPA in its fulfillment of the delegated responsibilities

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What Is the Structure for
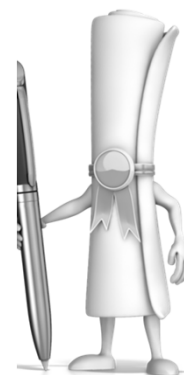## TPA-Provided 3(16) Administration?

PLAN SPONSOR OR COMMITTEE REMAINS THE NAMED PLAN ADMINISTRATOR	TPA BECOMES THE NAMED PLAN ADMINISTRATOR

• "Normal" P.A. remains primarily liable
  – Must prudently delegate and monitor
• Some fiduciary duties are delegated to TPA
  – Must perform services prudently with proper fiduciary care
	• TPA takes on <u>all</u> administrative fiduciary responsibility (and liability)
	• TPA delegates back to "normal" P.A. or someone else those things it will not do
	  – Must prudently delegate and monitor
	  – **WHY WOULD YOU DO THAT?**

15

15

If "Normal" P.A. Delegates to TPA

- Need delegation document
  - Can be "woven into" services agreement
  - Should be very specific, thereby forestalling liability for items not delegated
- This document is where the TPA:
  - Takes on what it wants to take on
  - Avoids anything it wants nothing to do with
  - Moderates its liability to the extent permitted by ERISA

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What Do You Think 3(16) Is?

- All or nothing … you are the P.A. or you're not!

- 'Taint necessarily so … the P.A. may delegate a lot or a little to the 3(16) … and retain the rest!

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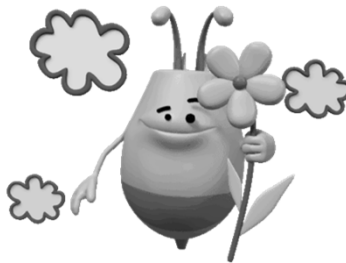ERISA

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Beee Specific

- Do not use language in your delegation document that leaves the breadth of your responsibilities open to interpretation

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Handling the 3(16) Responsibilities

19

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Change in Structure of Relationship

- You cannot have the same "hands off" relationship with your client
- You share a fiduciary relationship with your client
- You owe a duty to the plan participants
- Therefore, you have "skin in the game" of whether the plan is well-run

20

20

Company Structure

- Will you set up a separate company to do 3(16) work?
  - Reasoning: want to restrict potential liability to only 3(16) entity, so that balance of firm is not in jeopardy
  - If so, is this just company structure or will it really be separate?
    - Legal formalities
    - Personnel
    - Computers and data
    - Clientele
    - Office space
  - Reasons why or why not …
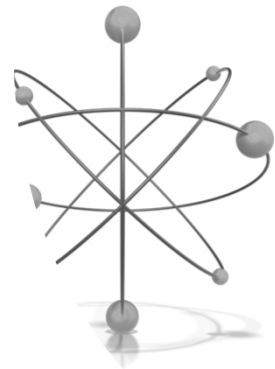
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Procedures and Systems

- You are now "in charge" of certain functions …
- Are you going to change anything about the way you do your work?
  - More oversight and quality control?
  - Stricter, more detailed procedures?
  - Different personnel?
- Real service? Liability nightmare?

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Overarching Concerns

- A 3(16) TPA is a cofiduciary
  - You are also liable for losses caused by the breach of duty of another fiduciary if you:
    - Participated or covered up the breach
    - Facilitated the breach by breaching your duties
    - Knew about the breach and did nothing to remediate

Being Prudent and Responsible

- Do you have procedures that identify how you will approach your 3(16) duties differently than your regular TPA duties?
- Do you have any sense of "danger zones" that require some sounding of an alarm to someone?
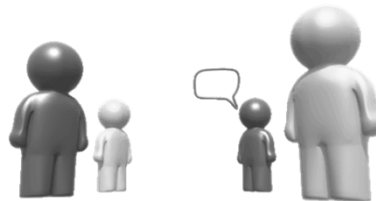- Do you have any duty if something crosses your path that would raise fiduciary concerns?

Make Sure Your Staff Understands What Being a 3(16) Administrator Means

- Particularly important if administrative and 3(16) workers are different
- Is knowledge imputed to the person doing the 3(16) work?
  - Can you avoid that if you have separate companies?

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Other Liability Limitation Techniques

- Only liability for fiduciary breach cannot be limited
  - You can limit liability for non-fiduciary duties
  - So, make sure your service agreement delineates:
    - What you are performing in a fiduciary capacity and what is ministerial
    - And have liability limitations for the ministerial services
- You can provide a contractual statute of limitations
  - May or may not be acceptable for fiduciary breach, but can time-limit liability for other items

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WHAT SHOULD YOU DO?

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What Should You Do? – Situation #1

- Wedoitall TPA Services, Inc. is the 3(16) TPA for ABC Company's 401(k) Plan.
- You do the nonfiduciary TPA work for ABC (although you know that Wedoitall is the 3(16) TPA).
  - In doing your work, you see that a distribution was made to someone who has never been a participant.
  - You should:
    a) Call ABC and ask who this person is.
    b) Assume that the client knows what it's doing and charge it off as a plan expense.
    c) Ask your co-worker what to do

28

What Should You Do? – Situation #2

- ABC sends in a distribution request from a participant's former spouse. You are doing the 3(16) work at Wedoitall. You have never seen a QDRO on the case.
- You should:
  a) Assume a QDRO has been approved by ABC.
  b) Call ABC and say, "I need to make sure the QDRO is valid; please send it over for me to review."
  c) Call ABC and confirm it determined that the former spouse was eligible for a distribution.
  d) Other?

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What Should You Do? – Situation #3

- Wedoitall is the 3(16) for a client, but you are doing only the nonfiduciary TPA work.
  - The client's office manager (with whom you have an excellent relationship) confides that the salary deferrals have not been deposited for two months because "money is tight."
  - You should:
    a) Keep your mouth shut. It was a personal confidence.
    b) Immediately tell the client this is a problem and tell her to deposit the deferrals.
    c) Other?

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Mistakes and Pitfalls

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Pitfall #1

- Improper documentation of the relationship, creating disagreement with the client and liability where it wasn't intended
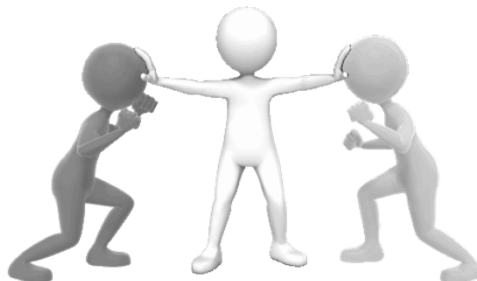
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Pitfall #2

Not creating systems to control
quality and limit liability

33

33

Pitfall #3

Not educating your staff about what being a 3(16)
administrator is and the liabilities that you are taking on

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Pitfall #4

Not being committed
to doing it … but
doing it anyway

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Final Thoughts And
Recommendations

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Things to Keep in Mind

- As a fiduciary, people expect more of you.
- As a fiduciary, people have a legal right to expect more of you.
- As a fiduciary, you are more vulnerable to lawsuits by participants and plan sponsors.
- A good employee should be on the lookout for things that can be problematic and take action to nip them in the bud, to the extent possible.

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Questions

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