WORKING WITH PLAN SPONSORS


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EDITOR'S NOTE: THIS ARTICLE WAS THE WINNING ENTRY IN ASPPA'S 2013 ED BURROWS AWARD CALL FOR PAPERS.

The Fiduciary Talk

Everything a plan sponsor needs to know about being a fiduciary — in 20 minutes.

BY JAKE LINNEY

Employers adopting a qualified plan have a fiduciary duty to the participants and beneficiaries of the plan. That is why it is so important for the individuals operating qualified plans to understand exactly what their responsibilities are. I give "the fiduciary talk" to clearly explain these duties and to empower an employer to make well-informed decisions. This paper outlines "the talk," which has three main parts:

- Part 1: Who is an ERISA Fiduciary?
- Part 2: The Significance of Being an ERISA Fiduciary and What to do About It
- Part 3: Structuring the Fiduciary Governance of the Plan

PART 1: WHO IS AN ERISA FIDUCIARY?

The ERISA definition of a fiduciary is found in ERISA Section 3(21)(A):

A person is a fiduciary with respect to a plan to the extent:

1. He exercises any discretionary authority or discretionary control respecting management of such plan or its assets.
2. He renders investment advice for a fee or other compensation.
3. He has any discretionary authority or discretionary responsibility in the administration of such plan.

The fiduciary definition is a functional definition, so an individual is a fiduciary when he or she acts in one of the three manners. Being a fiduciary is *not* all or nothing. A person is a fiduciary in respect to the part or parts of the plan for which the individual functionally acts as a fiduciary — no more, no less.

There are three main fiduciary functions in qualified plans:

- **Plan sponsor** – Responsible for appointing and monitoring the plan administrator and trustee.
- **Plan administrator** – Responsible for operating the plan in accordance with its legal documents and responsible for the overall administration of the plan.
- **Trustee** – Responsible for the control of plan assets.

All are fiduciaries under ERISA because each meets the functional definition by having discretion and

FIG. 1: DIVISION OF PLAN OPERATION DUTIES

Plan Administrator	TPA
Fiduciary (named in the plan documents; has discretion and control of plan operations)	Non-fiduciary (spelled out in service contract as not performing any fiduciary functions)
Determines eligibility	Performs ADP/ACP tests
Enrolls employees into the plan	Prepares enrollment forms
Files Form 5500	Prepares Form 5500
Provides all notices timely to plan participants	Drafts plan documents
Approves all distributions from the plan	Prepares distributions for processing
Maintains plan documents	Consults on plan provisions

control over certain aspects of the plan. Also, a person can act in more than one of these roles. For example, a plan sponsor who also acts as the plan administrator is responsible for both appointing the trustee and the overall administration of the plan.

We can apply this definition to two common roles in the retirement plan industry: directed trustee versus discretionary trustee, and plan administrator versus TPA.

Directed Trustee Versus Discretionary Trustee

With two exceptions, the trustee is named in the plan document (or trust agreement) as having control over plan assets. Usually individuals of a company are named as trustees and take on that control function. This is considered a *discretionary trustee.*

The first exception to the rule is when a plan document (or trust agreement) requires that the trustee is subject to direction from a separate named fiduciary (like the plan sponsor). In the industry, this is considered a directed trustee. Since an ERISA fiduciary is a functional definition, a *directed trustee* is only a fiduciary when he or she acts with discretion or provides investment advice for compensation. If the directed trustee does not act in either of these fashions, then he or she is not acting as an ERISA fiduciary.

The second exception to the rule is that a trustee can hire an investment manager — a bank, insurance company or registered investment advisor — to have control over some or all of the plan assets. The investment manager would then be the fiduciary responsible for managing that portion of the plan. The trustee (or responsible fiduciary) hiring the investment manager would be responsible for monitoring and overseeing the investment manager for that portion of the plan.

Plan Administrator Versus Third Party Administrator

Many qualified plan hire firms which act as third party administrators (TPAs) to ensure that the qualified plan meets various compliance and accounting requirements. The ways in which the typical relationship breaks out the plan operation duties between the plan administrator and TPA are illustrated in Fig. 1.

> "Being a fiduciary is *not* all or nothing. A person is a fiduciary in respect to the part or parts of the plan for which the individual functionally acts as a fiduciary — no more, no less."

PART 2: THE SIGNIFICANCE OF BEING A FIDUCIARY AND WHAT TO DO ABOUT IT

According to the Department of Labor's "Meeting Your Fiduciary Responsibilities" publication, fiduciaries are responsible for:

- Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them.
- Carrying out their duties prudently.
- Following the plan documents (unless inconsistent with ERISA).
- Diversifying plan investments.
- Paying only reasonable expenses

Fiduciaries who do not follow the basic standards of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of the plan's assets resulting from their actions.

Certain transactions involving the plan are prohibited. The plan cannot enter into transactions with plan fiduciaries, family members of plan fiduciaries and other parties that may cause a conflict of interest unless there is an exemption in ERISA or granted by the Department of Labor. For that reason, plan fiduciaries must carefully review what types of transactions

FIG. 2: PLAN SPONSORS' AND OUTSOURCED PLAN ADMINISTRATORS' ROLES

Plan Sponsor	Outsourced Plan Administrator
Prudently hire and monitor the plan administrator	Determine eligibility
Provide accurate data to the plan administrator	Enroll employees
Make timely contributions to the plan	Calculate plan contributions
	Provide all notices timely to participants
	Approve all distributions from the plan
	File annual Form 5500
	Maintain all plan documents and plan records

take place within the plan and who is involved in the transactions.

A sound way to meet the five requirements is to follow a documented process in decision making and act with expertise in both operating the plan and managing plan assets. Lacking expertise or a process, the fiduciaries can hire a knowledgeable expert to help. Here are three ways a fiduciary can hire help:

1. Hire a non-fiduciary consultant to help educate current fiduciaries and help develop processes.
2. Hire a fiduciary consultant who acts as a fiduciary to the plan along with the current fiduciaries when the consultant functionally takes on fiduciary responsibilities.
3. Outsource fiduciary responsibility to a professional fiduciary.

For example, if the plan sponsor hires out an outside fiduciary to act as plan administrator, the plan sponsor will still be responsible for at least monitoring and prudently hiring the plan administrator. In reality, the breakdown of roles may be distributed as illustrated in Fig. 2.

All three ways are means to manage the fiduciary responsibilities of the plan. The best way will depend on the particular circumstances of the employer and the complexity and size of the plan.

PART 3: STRUCTURING THE FIDUCIARY GOVERNANCE OF THE PLAN

Once the plan sponsor understands the basics, the current fiduciary governance structure of their plan is illustrated. For a new plan, I draw a blank chart, using a three-line box format. An example is provided in Fig. 3.

There are countless ways this can look. The important thing is that once you understand Parts 1 and 2, you can always draw out the

FIG. 3: ROLE, RESPONSIBILITY AND FIDUCIARY STATUS

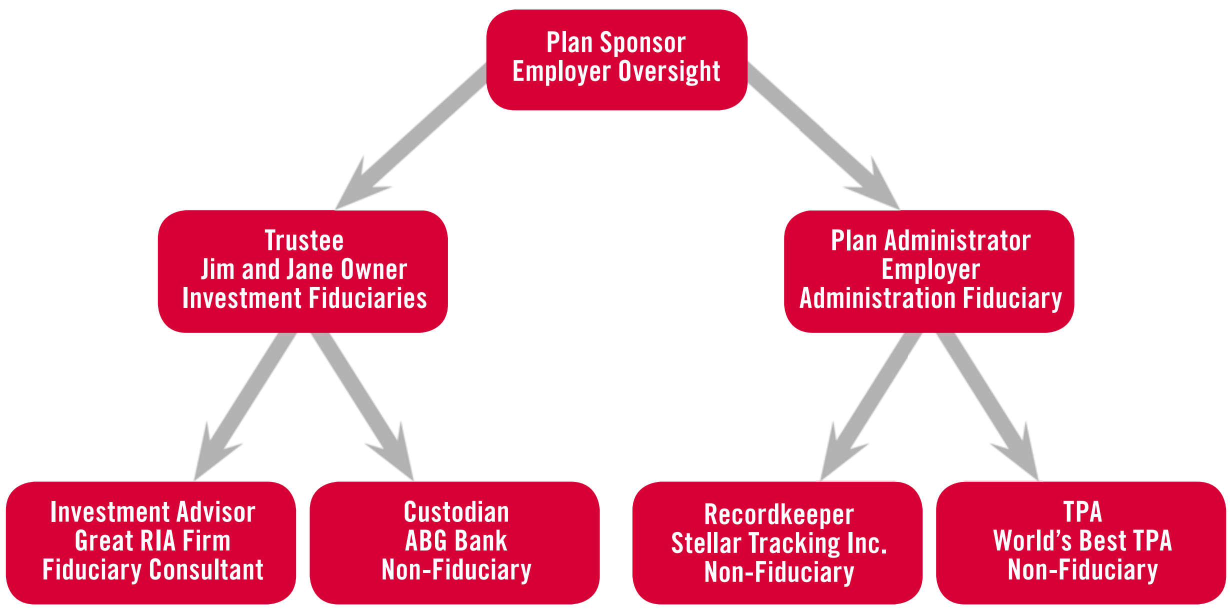
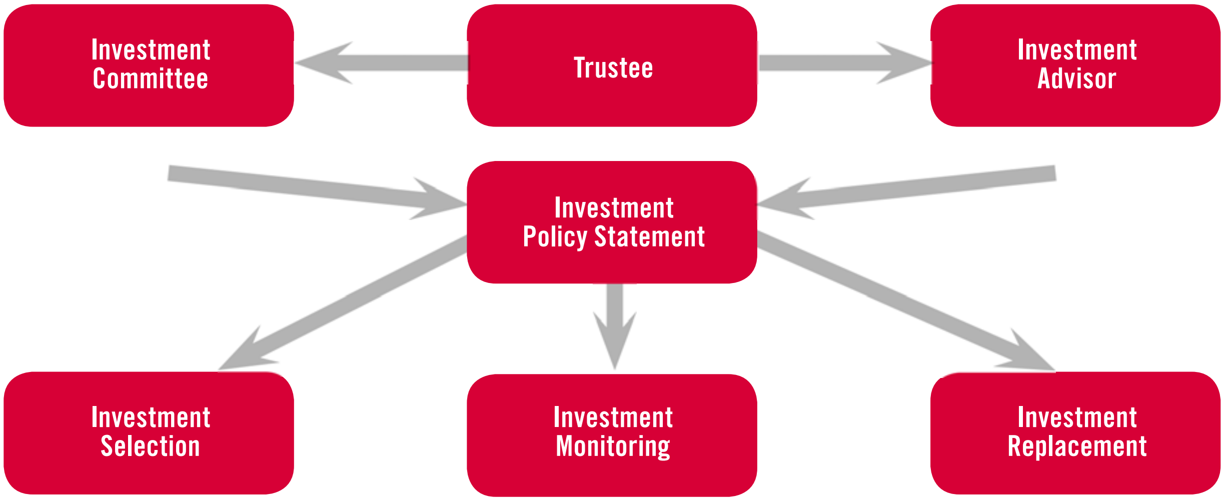
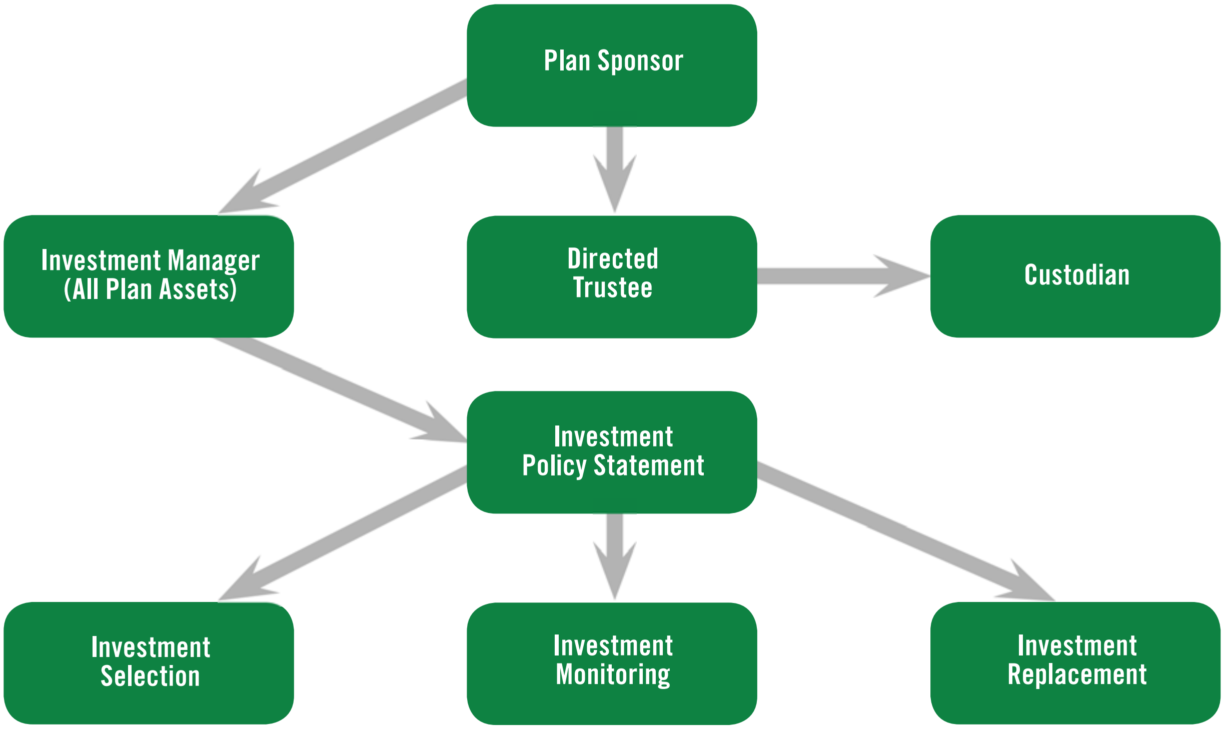


FIG.4: DUTIES AND RESPONSIBILITIES IN MAKING INVESTMENT DECISIONS



OUTSOURCED INVESTMENT MANAGER



governance structure of a plan no matter what it looks like. Once it is drawn out, the plan sponsor can see what they are responsible for and the discussion can begin on who should be responsible for what, where help should be hired and which functions should be outsourced.

Once the overall governance structure is decided, particular duties and responsibilities can be discussed. Fig. 4 provides two examples of how investment decisions can be made in a plan.

CONCLUSION

Once the employer understands the basics of ERISA fiduciaries, they are able to make informed decisions to structure the fiduciary governance of their plans. Naturally, plans will run better when all parties clearly understand what their responsibilities are. PC

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