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## Delegation for Plan Sponsors (Part 2)

by W. Scott Simon | 05-07-09

In last month's column, I noted that sponsors of qualified retirement plans such as 401(k) plans can delegate their day-to-day administrative and investment fiduciary responsibilities (and associated liabilities) to others. This has been allowed by the Employee Retirement Income Security Act since its inception in 1974.

As I also noted in last month's column, the law of ERISA has always provided that qualified retirement plans such as 401(k) plans should ideally be run by professional fiduciaries, not by plan sponsor executives with little (or no) experience (much less time or interest) in such matters. Many sections of ERISA that grant fiduciary delegating authority, in fact, attest to this, as does case law.

Plan sponsors that choose to delegate their responsibilities and liabilities to a professional named fiduciary can, in effect, get out of the retirement plan business and be free to concentrate fully on their business so they can stay in business during these troubled times instead of worrying about fiduciary risks they are neither prepared nor trained to manage. Sponsors never need worry about somehow "losing control" of their plan, since ERISA requires them to always retain the residual fiduciary responsibility to ensure that those to whom they have delegated authority are--and remain--prudent delegates. In short, plan sponsors always have the power to "pull the plug" on such delegates.

### **Delegation of Duties Involving a Menu of Investment Options**

I have discussed in a number of these columns over the years how plan sponsors can, in accordance with the provisions of ERISA section 3(38), delegate their duties to select, monitor and (if necessary) replace a plan's investment options to a bank, registered investment advisor or insurance company. The off-loading of such fiduciary duties from the shoulders of plan sponsor executives and their transfer onto the shoulders of such entities is significant and provides immense value to such executives.

Yet this kind of delegation is rarely undertaken because the non-fiduciary business model followed by so much of America's retirement plan industry doesn't provide for plan sponsors to become informed about it. If plan sponsors were informed fully about the option of making such a valuable delegation, then the vast number of those participating in the industry--not fiduciaries in any way, shape, or form--might have to change their business model and actually become fiduciaries.

Since that won't happen (short of government fiat), these non-fiduciaries are content to sit back and whisper sweet nothings to plan sponsors, something like: we will be glad to provide you with "tools" (from a "toolbox!") and "products" and "information" to "help" and "assist" you manage your 401(k) plan. The problem is that this kind of soothing marketing copy ("Come to papa, I'll take care of everything for you") has consequences and those consequences play out in the underlying message of the legal documents that actually govern retirement plans ("Yeah, we'll help you pick mutual fund options for your plan until the cows come home but the sole fiduciary responsibility for doing so still rests with you, Jack, and we'll make clear in any ensuing litigation in which plan participants sue both of us that you're entirely on your own in facing them").

### **Delegation of Duties Involving a Specific Investment Option**

Distinct from the ERISA section 3(38) situation that I've just described, where a plan sponsor delegates selection and monitoring of a plan's entire menu of investment options to, say, a registered investment advisor, is the situation where a plan sponsor (typically a large company) delegates responsibility and liability for a particular plan investment option. For example, the U.S. First Circuit Court of Appeals in the recent case of *Bunch v. W.R. Grace & Co.* affirmed that the conduct of the named independent fiduciary appointed by the plan sponsor to determine whether the company's

stock should be retained in the company 401(k) plan "unquestionably" met the prudent man standard set forth in ERISA section 404(a).

What's most important for our discussion, though, is the court's finding that the company's conduct in delegating duties to a named independent fiduciary was "eminently correct." The company had a conflict of interest whether it retained or sold the company stock given its dual roles as employer (with fiduciary duties to company stockholders) and plan sponsor (with fiduciary duties to plan participants). The solution devised by the company, and blessed by the court, was to appoint a named independent fiduciary to make that hold/sell decision which allowed the company to legally wall off itself from liability for such decision.

#### **Delegation of All Day-to-Day Investment and Administrative Duties**

While delegation of investment duties in the ERISA section 3(38) scenario is invaluable to plan sponsor executives who wish to take advantage of this option, such executives have the authority and power under ERISA to delegate operational and administrative responsibilities and liabilities as well. The net result, when this is done prudently, is to insulate plan executives from virtually all day-to-day fiduciary investment and operational/administrative risk to which they would otherwise be subject for running a qualified retirement plan. (That, without a doubt, is some result.)

Qualified retirement plans such as 401(k) plans are complicated beasts with a lot of moving parts. There are any number of ways by which company executives at plan sponsors who are named or functional fiduciaries can become ensnared legally in the thickets of ERISA (such executives, as noted in last month's column, are subject to personal liability for plan losses). In fact, many plan sponsors are now (seemingly) under siege from a variety of tormentors, one of which is the plaintiffs' bar. Not only is it expensive to defend against litigation but it can be enormously distracting to company executives, many of whom must comb through thousands of pages of company documents in preparation for their (inevitable) depositions.

The way that plan sponsors can avoid this as well as the many other headaches associated with running a qualified retirement plan is to, for all practical purposes, simply get out of the retirement plan business. This doesn't mean terminating the plan; it means, rather, to "sponsor" the plan not "manage" it. Here is what I mean by that.

ERISA contemplates that a qualified retirement plan must first be adopted. This act is undertaken by the sponsor of the plan and resides exclusively with it (or more particularly, in most cases, with the board of directors created for that specific purpose). After adoption, the plan must be operated which requires the appointment of a fiduciary (or fiduciaries). The plan sponsor can anoint any person or organization to be a fiduciary. If this appointment is made prudently--that is, made in writing, accepted in writing, and all authorities, responsibilities, discretions, obligations, expectations, etc. clearly defined in writing--then the plan sponsor can, so to speak, legally disconnect its umbilical cord from the plan, and simply sponsor the plan not manage it.

Such fiduciary duties, of course, are almost always assigned and delegated to a company's in-house personnel. There's nothing in ERISA, however, that prohibits company executives from delegating all investment and operational/administrative duties to outside independent third parties, provided that such acts are done in a prudent manner. It should go without saying that these parties must be experts and, as such, should be expected to deliver superior quality service and produce superior results, and with less liability to boot. What's important here, though, is not whether the entity delegated a particular duty is in-house or an outside third party. The salient issue, rather, is that the entity accepting the delegation must maintain the high standard of care required by the fundamental, underlying requirements of ERISA section 404(a).

Fiduciary responsibility, within the context of ERISA, pertains to decision-making that requires discretion and judgment with respect to a qualified retirement plan such as a 401(k) plan. Two good examples of this are the investment of a plan's assets, and selecting and monitoring service providers to the plan as long as this is done in accordance with the prudence required by ERISA. In fact, anything can be delegated by a plan sponsor except for the on-going sponsorship of the plan as well as the oversight responsibility for prudently delegating duties and monitoring such delegation. These

responsibilities always reside exclusively with the sponsor until the sponsor terminates the retirement plan or merges it with another plan.

In next month's column, I'll lay out in certain detail how it's possible--based on allowances in ERISA--to insulate plan executives from virtually all day-to-day fiduciary investment and operational/administrative risk to which they would otherwise be subject for running a qualified retirement plan. I'll also answer the question raised by a plan sponsor at a conference that I attended last week--a question tinged with doubt that such insulation is achievable--"Why haven't I ever heard of this before?"

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