

## Considerations When Choosing an ERISA 3(16) Plan Administrator

Since the ERISA 3(16) service has come onto the market, many advisors will ask me, “What is the difference between ERISA Wise, LLC and a third-party administrator (“TPA”) who offers 3(16) service?” To answer this question, I use the adage – the devil is in the details.

The first concept to understand is fiduciary lite versus full-scope service. I first heard this term used by C. Fredrick Reish, ERISA Attorney and Partner at Drinker Biddle. Fiduciary “lite” for 3(16) includes taking on the transactional burdens from the client who may not have the expertise to execute adequately. This may mean overseeing distributions, loans and hardship withdrawals. According Mr. Reish, “Most providers agree to serve in this 3(16) limited capacity.” Full-scope 3(16) fiduciary services include administration, management of the plan, decision making and interpreting ERISA, rather than merely lightening the administrative load for the employer’s staff — i.e., signing off on distributions and loans. Full-scope 3(16) fiduciary services ensure that all benefits, rights, and features are followed and maintained so that Plan’s tax-qualified status with the IRS remains intact. <sup>1</sup>

Many TPA’s offering 3(16) services are doing so under limited conditions. Although the plan document will detail the roles and responsibilities of the Plan Administrator, a limited scope provider will cherry pick the roles and responsibilities they are comfortable in executing – many of which are based on the ministerial functions already provided in the normal course of business as a third-party administrator.

Ministerial functions can include (but are not limited to):

- Application of rules determining eligibility for participation or benefits.
- Calculation of services and compensation credits for benefits.
- Preparation of employee communications material.
- Maintenance of participants' service and employment records.
- Preparation of reports and filings required by government agencies.
- Collecting and/or applying contributions, accounting and reconciling data.
- Processing fiduciary approved claims and loans for distribution.
- Orientation of participants and providing plan information.

A good rule of thumb: if a provider is taking direction or following a process to execute a transaction, they are performing a ministerial function. If a provider has discretion and gives direction as to the process used in executing a transaction, they are performing a fiduciary function. This is especially important when comparing contracts between a limited scope fiduciary versus a full scope fiduciary. Discretion and fiduciary responsibility must be appointed by the plan sponsor and accepted by the provider in writing. If language in a contract suggests taking direction or following a process under the discretion of the plan sponsor, the fiduciary responsibility is not mitigated.

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<sup>1</sup> Mercado, D. (April 2, 2014). Investment News, April 2, 2014: “New flavor of outsourced fiduciary for retirement plans hits the market.” *Investment News*

Over the last year I began working with a newly engaged client who was undergoing a conversion to a different bundled provider. Often I will be introduced by an advisor to a potential client during a conversion. As I was reviewing the plan's new governing documents, I noticed that ERISA Wise, LLC was not named as the ERISA 3(16) Plan Administrator. I thought someone simply overlooked this item. When I pointed out the error to the conversion team, I was told that the provider did not allow their clients to name an outsourced ERISA 3(16) Plan Administrator in the plan's governing documents. This was troubling to me since it is a fiduciary responsibility to ensure that the appointed ERISA 3(16) Plan Administrator is properly named in these documents. When I questioned the sales team and its management as to why they do this, I was told it was a "business decision". To boot, I was told I would have signing privileges to process loans and distributions... "just like the other ERISA 3(16) Plan Administrators" with whom they partner. If the appointed ERISA 3(16) Plan Administrator is not named in the governing plan documents, all administrative fiduciary responsibility is held by the plan sponsor.

Even though the provider's governing documents supported naming an outsourced ERISA 3(16) Plan Administrator, they require their clients retain the full fiduciary responsibility of an ERISA 3(16) Plan Administrator. Of course, the provider didn't let us know this important fact until after the client already announced the conversion to their large workforce and was less than one month away from enrollment. This was clearly an intentional move on the part of the provider. (Is that brimstone I smell?)

Since it was now my business decision, I did not take the limited scope 3(16) role. I respectfully walked away from the engagement with the client on a friendly basis. I found it odd that this service provider wanted so much control over the client. Weren't they confident enough in their staff and internal processes to collaborate with a full scope 3(16) provider?

A separation of duties with built-in checks and balances are a reoccurring theme in our industry. Separation of duties with a second set of eyes for oversight can be easily achieved within a partnership between the full scope ERISA 3(16) and TPA/RK. The TPA/RK can focus on the ministerial duties followed by the full scope ERISA 3(16) reviewing the work performed. The same can be achieved in going the opposite direction. The TPA/RK and full scope ERISA 3(16) should complement each other for the benefit of the mutual client and plan sponsor's participants and beneficiaries.

The intent of this paper is not to beat up on the TPA who offers a limited scope 3(16) service. There are many TPA's with integrity and knowledgeable staff with whom I collaborate daily. Some offer limited scope 3(16) service to non-mutual clients. However, when offering any ERISA service for a fee, we all need to be clear with our partners and clients as to what services we will or will not perform - and its meaning from a fiduciary standpoint. After all, this is supposed to be an industry of full transparency.

ERISA Wise, LLC is a full scope ERISA 3(16) fiduciary service.

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