

Outsourcing the Fiduciary Supply Chain

The duties of persons and entities called *fiduciaries* are assigned to three general categories in the Employee Retirement Income Security Act of 1974 (“ERISA”). The categories are commonly referred to by the section numbers in ERISA where they are defined and are described briefly below.

The 3(16) Fiduciary

This category occupies the top position in the chain of command and bears the greatest exposure to legal risk because it is responsible for the entire operation of a retirement plan including the actions of all other fiduciaries. Plan sponsors become 3(16) Fiduciaries at their plan’s adoption, usually assigning the role of Plan Administrator to a senior level person under their employ. Plan Administrators may subsequently outsource their duties to a qualified firm that specializes in the 3(16) *Plan Administrator* role.

The 3(21) Fiduciary

A person or a business may acquire the status of a 3(21) Fiduciary either intentionally or not. This category is often referred to as the “functional fiduciary” because assumption of ERISA status is based solely on the actual activities it performs. ERISA puts it this way...an individual or business automatically inherits 3(21) Fiduciary status if it:

1. has discretionary authority or control with respect to management of the plan or disposition of plan assets; or
2. renders investment advice for a fee or has discretionary authority or responsibility for the administration of the plan.

For example, directors, chief financial officers, and human resource managers would be deemed 3(21) Fiduciaries if they perform an ERISA fiduciary act.

Some investment advisors acknowledge their 3(21) Fiduciary status for ERISA clients, although Plan Administrators remain accountable for all investment related decisions. Plan Administrators are required to prudently select and monitor 3(21) Fiduciaries.

The 3(38) Fiduciary

In ERISA Section 3(38) an individual is said to be an “investment manager fiduciary” if he, she, or it agrees in writing to perform in that role, having the power to manage, acquire or dispose of any assets of the plan. Plan Administrators that delegate the steps of management, acquisition, and disposition of their plan’s assets to a 3(38) Fiduciary are not responsible for performing such steps. Plan Administrators are required, however, to manage 3(38) Fiduciaries.

Outsourcing is an Essential Solution

The U.S. Department of Labor has cautioned plan sponsors recently about a critical advantage that vendors of fiduciary and non-fiduciary services possess over them. The DOL calls it the “information gap.”

A solution for the consequences and legal risks caused by the information gap is outsourcing all or parts of the Plan Administrator’s role to a professional 3(16) firm.

Here are some guidelines:

1. Outsourcing solves the fiduciary expertise puzzle. ERISA is complex. Most plan sponsors simply do not know how to fully satisfy its fiduciary rules. A qualified 3(16) Plan Administrator knows how.
2. A 3(16) Plan Administrator must not offer any other services that it may select or manage on behalf of an ERISA plan. Its separation from such services is essential in order for a plan to avoid a violation of ERISA’s independence rules.
3. Verify that the 3(16) Plan Sponsor does not earn any compensation from any source for investment or administration related services.

Roland | Criss is heavily experienced in the role of a 3(16) Plan Administrator. Our clients say that *Roland | Criss ensures retirement plan safety.*

Roland | Criss does not offer investment advice, does not sell investment products, or offer administration services.

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