Unified Trust as a Discretionary Trustee

Unified Trust Company, serving as the discretionary trustee provides the highest level of fiduciary protection.

Today many plan sponsors are aware they need help with the sections of ERISA dealing with fiduciary responsibility. However, many vendors continue to avoid providing any meaningful fiduciary services but instead use the word "fiduciary" or "co-fiduciary" only as a marketing term. An unfortunate side effect of this trend is the wide disparity in fiduciary services. In other words, some vendors sell themselves as ERISA fiduciary "experts," when really they are better portrayed as expert fiduciary "marketers." Even among genuine experts, there are many who lack the basic understanding of the true responsibilities and nuances that distinguish the roles.

ERISA §403(a) clearly specifies who has the responsibility to manage plan assets. The primary responsibility falls to the plan sponsor and the plan trustee. ERISA envisioned that the plan sponsor would hire the trustee to make prudent decisions. Since the trustee was empowered to make decisions, they were always a discretionary trustee, and would take over day to day plan management.

Under ERISA, the discretionary trustee "shall have exclusive authority and discretion to manage and control the assets of the plan."

Today, most plan corporate trustees do not make decisions but instead are directed by the plan sponsor's retirement committee. The directed trustee is synonymous with passive trustee or custodial trustee.

The custodial function is to safeguard or hold plan assets and to do what the plan sponsor instructs, although ensuring that only directions from the plan sponsor that are consistent with ERISA and the plan document are executed. Most, if not all, directed trustees disavow fiduciary status in their contracts. They do not give advice to the other plan fiduciaries regarding the assets in their custody, nor do they have discretion to make investment decisions.

Two relatively new fiduciary services are emerging. They are the ERISA §3(21) fiduciary and the ERISA §3(38) investment manager. Both provide more oversight than a directed trustee, but much less than the discretionary trustee. The differences between the various groups and a discretionary trustee are shown in the chart on the next page.

The plan sponsor and its directors must still prudently hire a discretionary trustee fiduciary to have exclusive authority and discretion to manage and control the assets of the plan. But when the plan sponsor limits its role to naming the oversight fiduciary, the sponsor and its directors are no longer responsible for selecting, directing and coordinating of the persons who will actually manage and operate the plan.

It is important to restate this important distinction in determining whether an appointing fiduciary has breached its fiduciary duty. If the directors of a plan sponsor's board appoint a named fiduciary committee that in turn appoints the actual discretionary trustee, then the breach is limited to the prudence of the oversight appointment, and does not extend to the prudence of investment management or other plan activity.

Comparison of Fiduciary Plan Services

	Unified Trust Discretionary Trustee	Erisa 3(38) Manager	Erisa 3(21) Fiduciary	Directed Trustee	Fiduciary Warranty	Due Diligence Support
Named Plan Fiduciary Under ERISA 402(a)?	✓	Generally No	✗	✗	✗	✗
Allocated or Delegated Duties	Allocated	Delegated	Delegated	Delegated	Delegated	Delegated
Has "Exclusive Authority to Manage and Control the Assets of the Plan" Under ERISA 403(a)?	✓	✗	✗	✗	✗	✗
Acknowledges Fiduciary Status in Writing	✓	✓	✓	✗	✗	✗
Broad or Narrow Fiduciary Responsibility?	Broad	Narrow	Narrow	N/A	N/A	N/A
Provides Participant Direction Choices Under ERISA 404(c)	✓	✓	✓	✗	✓	✗
Responsible for ERISA 404(c) Compliance and Notices	✓	✗	✗	✗	✗	✗
Has Full Responsibility for Selecting Plan Investments	✓	✓	✗	✗	✗	✗
Has Full Responsibility for Monitoring Plan Investments	✓	✓	✗	✗	✗	✗
Has Full Responsibility for Replacing Plan Investments	✓	Sometimes	✗	✗	✗	✗
Able to Provide Personalized Goal Management Solution	✓	✗	✗	✗	✗	✗
Responsible for ERISA 404(a) "Prudent Man Rule"	✓	✓	✓	✗	✗	✗
Responsible for Prudent Management of Participant Model Portfolios	✓	Sometimes	✗	✗	✗	✗
Responsible for Determining if Plan Fees are Reasonable for Their Services	✓	✗	✗	✗	✗	✗
Oversight Structure Allows Plan to be Eligible for Limited Scope Audit	✓	✗	✗	✓	✗	✗
Plan Oversight-Missing Contributions and Jurisdiction of US Courts	✓	✗	✗	✗	✗	✗
Able to Complete a full fi360 SAFE™ Fiduciary Assessment for the Plan	✓	✗	Sometimes	✗	✗	✗
Duty to Avoid Prohibited Transactions and Also Monitor Full Plan for Them	✓	✗	✗	✗	✗	✗
Responsible for ACA, EACA, and QACA Participant Notices	Sometimes	✗	✗	✗	✗	✗
Preperation of Signature Ready Participant Loans, Hardship Withdrawals and QDROs	✓	✗	✗	✗	✗	✗
Approval of Participant Loans, Hardship Withdrawals, and QDROs	Sometimes	✗	✗	✗	✗	✗
CEFEX® Certified for Fiduciary Best Practices	✓	Generally No	Generally No	✗	✗	✗

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