Defining ERISA Plan Fiduciaries

Section 1: Overview

When a retirement plan is established, there must be at least one fiduciary named to oversee and control the plan’s operation. Depending on the fiduciary arrangement, one fiduciary may be liable for the acts and omissions of other fiduciaries. There has been significant debate over ways to reduce a fiduciary’s liability.

For purposes of this handout, we will discuss three types of fiduciaries: ERISA 3(21), 3(38), and 408(g) fiduciaries. In addition, we will review how fiduciaries can absolve themselves from liability associated with fiduciary breaches committed by other parties.

Section 2: Defining ERISA 3(21), ERISA 3(38) Fiduciaries, and 408(g) Fiduciaries

- **ERISA 3(21) fiduciary** – (i.e. general fiduciary) any person/entity having discretion over the administration and management of the plan, controlling the assets of the plan, or providing investment advice to the plan in exchange for a fee or other compensation (ERISA Sec.3(21)(A)).
- **ERISA 3(38) fiduciary** – a registered investment manager (other than a fiduciary specifically named in the plan document or identified as a fiduciary pursuant to a procedure identified in the plan) appointed to manage the assets of the plan.
- **ERISA 408(g) fiduciary** – (i.e. fiduciary adviser) a fiduciary of the plan because they provide investment advice to participants/beneficiaries for a fee. It is prohibited for any fiduciary to use their authority to profit from the use of plan assets.

Section 3: Minimizing Liability

Fiduciaries are responsible for maintaining the integrity of the plan and may be held personally liable for losses incurred by the plan. A plan administrator reduces his/her liability by naming other fiduciaries to oversee certain aspects of the plan such as appointing a trustee, hiring a service provider, or appointing a registered investment manager. Care needs to be exercised when allocating responsibility to named fiduciaries because the plan administrator my be liable for the acts and omissions of those they appoint.

Co-Fiduciary Liability
According to Section 405 of ERISA, a fiduciary will be liable for a breach committed by another fiduciary if

- he knowingly participates in another fiduciary’s breach of responsibility, or
- by failing to follow the prudent man standard in appointing named fiduciaries, other fiduciary breaches are enabled, or
- he has knowledge that a breach has been committed by does not report it.

Fiduciaries named in the plan have the ability to delegate their fiduciary responsibility to other parties. Named fiduciaries will not be liable for the breaches committed by those they have appointed if the plan procedures for delegating fiduciary responsibility are followed and the fiduciaries were appointed following the prudent person standard.

When the 3(38) fiduciary is appointed, a written agreement must be executed acknowledging responsibility for the asset management of the plan. ERISA 3(38) fiduciaries are “contracted” to fulfill certain duties and are only responsible for those duties and not the duties of other fiduciaries. Therefore, regardless of breaches committed by other fiduciaries, each registered investment manager is only responsible for his or her own omissions with respect to managing the plan’s assets.

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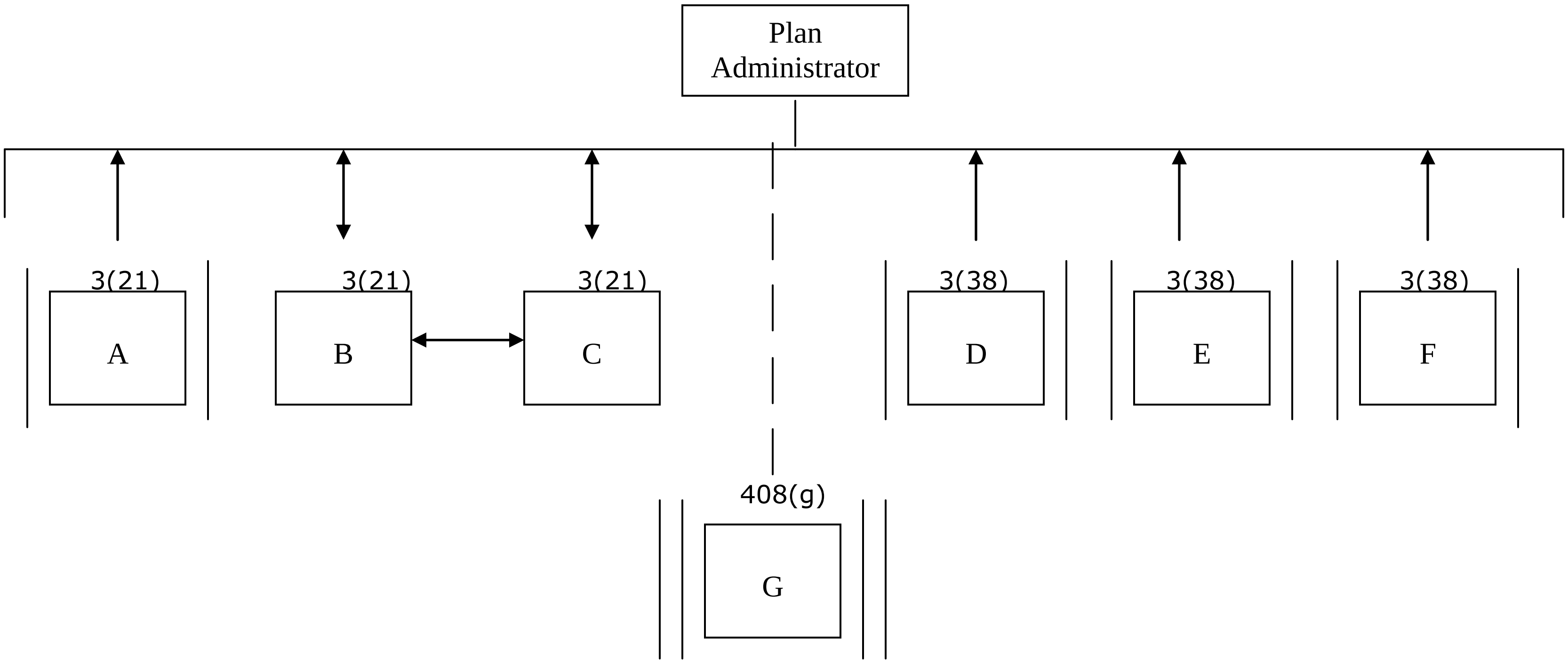
One way plan sponsors can reduce their fiduciary liability, and financial advisors can avoid prohibited transactions related to the provision of investment advice to plan participants, is by following the prohibited transaction exemption under ERISA 408(g) for "fiduciary advisers." A fiduciary adviser must use an "eligible investment advice arrangement" that is either "level-fee," (i.e., fees for advice do not vary by investment selections) or based on an approved computer model that meets the requirements of Section 408(g)(3) If these requirements are met, plan sponsors will not be liable for the advice given by the fiduciary adviser.

While all plans must have a procedure in place for allocating plan operation and administrative responsibilities, there is no requirement to have a written agreement between 3(21) fiduciaries. The lack of a written arrangement often times is what leads to increased liability among named fiduciaries because there is no documentation clearly outlining their responsibilities. That is why it's important to have a written agreement in place to identify the named fiduciaries and what their responsibilities are. This would be similar to the written agreement required for ERISA 3(38) fiduciaries.

Section 4: Summary

ERISA Fiduciary	Roles and Responsibilities
3(16) Plan administrator	Generally, the plan sponsor or one appointed by the plan sponsor to assume plan administrative functions
3(21) Full-scope	Generally, hires and monitors plan service providers (e.g., full-service or discretionary trustee)
3(21) Limited-scope	Entity that provides plan services (for example, a financial advisor who gives plan-level investment advice for a fee); scope of fiduciary liability limited through a written agreement outlining responsibilities; provides counsel and guidance; does not have discretion (e.g., financial advisor, RIA, broker-dealer)
3(38) Registered investment manager	Appointed by plan sponsor; responsible for selecting, monitoring and replacing plan investment options; full discretion regarding investment management process (e.g., RIA, bank or insurance company)
408(g) Fiduciary Adviser	Authorized by the plan sponsor to provide investment advice to participants; uses an eligible investment advice arrangement that is either a level-fee arrangement, computer model arrangement or combination of both (e.g., RIA, broker/dealer, bank trust department



- Arrows represent flow of liability
- A, D, E, and F – Fiduciary agreement in place – They are not generally liable for fiduciary breaches committed by other fiduciaries or by the plan administrator, but the plan administrator could be liable for their breaches.
- B and C – No fiduciary agreement in place – They may be liable for the breaches of other and the plan administrator. In addition plan administrator may be liable for their breaches.
- G – Has ultimate protection – only responsible for own breaches