Assigning Fiduciary Responsibilities
Facts to understand when considering a “cofiduciary” arrangement.

Can an investment manager or other provider relieve you of part of your fiduciary responsibility? “Cofiduciary” is an approach to fiduciary responsibility that some may consider. But what does it really mean, and is there reason for caution?

All employee benefit plans subject to ERISA must have one or more named fiduciaries. These individuals have both the authority and the responsibility to control and manage the operation and administration of the plan. And the law does allow a named fiduciary to formally delegate well-defined aspects of that authority—such as the selection and monitoring of plan investments.

With regard to the selection and monitoring of plan investment options, named fiduciaries have always had the option of doing it themselves or hiring another person to take on that fiduciary responsibility. Lately, a number of service providers are making “fiduciary” offers in the context of assisting plan sponsors in the selection and monitoring of investment options. These offers may include the service provider agreeing to serve as a cofiduciary or accepting full fiduciary responsibility for prudently selecting the fund lineup.

At Fidelity we take assisting our clients with their fiduciary responsibility seriously. We’re committed to providing you with the tools, resources, and information you need to help make sound decisions and take informed action on behalf of your retirement plan and participants. And so, we’ve outlined some of the questions you should be asking when considering a possible cofiduciary arrangement.

Q. How do you determine whether someone is an ERISA fiduciary?
A. There are a number of ways to become a fiduciary under ERISA. For instance, Section 403(a) requires plan assets to be held in trust by one or more trustees, who must either be named in the plan or be appointed by a named fiduciary. Because these trustees have exclusive authority to manage and control the assets of the plan, they are always, by definition, “fiduciaries” under ERISA.

In addition, the plan may provide for named fiduciaries to designate other individuals as fiduciaries and delegate to them the authority to control and manage the operation and administration of the plan.

Finally, ERISA provides that any individual who functions as a fiduciary is considered a fiduciary—even if he or she hasn’t been named as one. Under ERISA Section 3(21), individuals
will be considered to be functioning as a fiduciary if they:

- Exercise any discretionary authority or discretionary control respecting management of such plan, or exercise any authority or control respecting management or disposition of its assets;
- Render investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or have any authority or responsibility to do so; or
- Have any discretionary authority or discretionary responsibility in the administration of such plan.

Q. Are “investment managers” ERISA fiduciaries?

A. Yes. Under ERISA Section 3(38), an investment manager is defined as any fiduciary (other than a named fiduciary or trustee) who has the power to manage, acquire, or dispose of any asset of a plan, and (i) is registered as an investment adviser under the Investment Advisers Act of 1940 or under state law, or (ii) is a bank defined under the Investment Advisers Act of 1940, or (iii) is an insurance company qualified to perform services described above under the laws of more than one state. Investment advisers must acknowledge in writing that they are fiduciaries with respect to the plan.

Q. Are “broker-dealers” ERISA fiduciaries?

A. Whether a broker-dealer is an ERISA fiduciary depends on the role the individual or firm plays with respect to plan assets.

Under securities law, financial advisers or financial consultants who are supervised by the broker-dealer are generally considered salespeople and may provide investment advice that is “incidental” to the securities they are selling. Generally, a broker-dealer is only required to recommend products that are “suitable,” based on a customer’s financial situation, needs, and other security holdings.

This requirement has been construed to impose a duty of inquiry on broker-dealers to obtain relevant information from customers relating to their financial situations and to keep such information current. That duty is a lesser duty than the duty of an ERISA fiduciary.

On the other hand, a broker-dealer may be considered an ERISA fiduciary if he or she offers “individualized” advice to the plan or plan participants as defined under ERISA regulation Section 2510.3-21(c).

Whether advice considered “incidental” under securities law may nevertheless be considered “individualized” advice under ERISA has been the focus of a number of lawsuits. The Dodd-Frank Wall Street Reform and Consumer Protection Act, the financial services reform bill passed in July 2010, instructs the Securities and Exchange Commission (“SEC”) to address the issue of whether broker-dealers should be held to the same fiduciary standard as investment advisers. If the SEC harmonizes the standard for broker-dealers and investment advisers, it could change how broker-dealers relate to 401(k) plans by bringing their duties more in line with those of ERISA fiduciaries.

Q. Can an individual be a fiduciary for some purposes and not others?

A. Yes. Different fiduciaries may be responsible for different aspects of plan administration. For example, the named fiduciary may appoint an investment manager to manage the assets of the plan. A different fiduciary may be responsible for benefits processing and claims and appeals. When a plan has multiple fiduciaries, it’s important that the responsibilities of each fiduciary be clearly delineated.

When service providers agree to be a fiduciary, they do so for specific services only. If the service provider offers a number of services to the plan, it’s important to make sure the provider identifies in writing those services for which it will serve as a fiduciary.
Q. Is there a difference between a service provider agreeing to be a cofiduciary rather than a fiduciary?

A. ERISA doesn’t contain a separate definition of cofiduciary. Under the law, all of a plan’s fiduciaries are considered cofiduciaries with one another.

Of course, there’s a difference between a service provider agreeing to accept exclusive fiduciary responsibility for a particular aspect of plan administration and agreeing to be a cofiduciary with regard to that same aspect of plan administration.

For example, a named fiduciary may delegate to another ERISA fiduciary exclusive fiduciary responsibility for selecting and monitoring plan investments. Unless a service provider agrees to be an exclusive fiduciary with regard to the selection and monitoring of plan investments, rather than a cofiduciary, the named fiduciary retains full responsibility for selecting and monitoring investments. A service provider merely agreeing to be a cofiduciary does not shift fiduciary responsibility from the named fiduciary to the service provider.

Q. If a service provider doesn’t accept exclusive responsibility as a fiduciary, what advantage is it to the named fiduciary to have the service provider agree to be a cofiduciary?

A. Hiring a cofiduciary for selecting and monitoring plan investments, like obtaining up-to-date information and financial analysis on plan investments, may be helpful to plan fiduciaries as they make investment option decisions, but it doesn’t eliminate their fiduciary responsibility for prudently selecting plan investments.

Q. Are fiduciaries liable for the breach of another plan fiduciary?

A. As a general rule, fiduciaries aren’t responsible for the breach of another fiduciary unless:
- They participate knowingly in, or knowingly undertake to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
- Their failure to be prudent in the administration of their own fiduciary responsibilities enables the other fiduciary to commit a breach; or
- They have knowledge of a breach by such other fiduciary, and don’t make reasonable efforts under the circumstances to remedy the breach.

When service providers agree to serve only as a cofiduciary with regard to a particular aspect of plan administration, it is very unlikely they will be responsible for any breach by another plan fiduciary.

Q. Will Fidelity agree to serve as a fiduciary under ERISA?

A. Strategic Advisers, Inc., a registered investment adviser and Fidelity Investments company, does take on ERISA fiduciary responsibility for the investment of participant accounts within Fidelity® Portfolio Advisory Service at Work, our discretionary investment management service. Participants and plan sponsors who want a fiduciary level service from Fidelity can obtain that through Portfolio Advisory Service at Work.

With regard to the selection and monitoring of a plan’s investment options, Fidelity does not serve as a fiduciary. We do, however, provide information and consultation to plan fiduciaries as they undertake selecting and monitoring the plan’s investment options. This includes providing a sample Investment Policy Statement that fiduciaries can use to provide the proper framework for selecting an investment fund offering. Additionally, we provide educational resources to plan sponsor fiduciaries to help them carry out their fiduciary responsibility.
Fiduciary responsibility: Which approach is the right one?

There are a number of questions a named fiduciary should ask when deciding whether to hire another fiduciary to assist with the selection and monitoring of plan investment options.

- Does the named fiduciary already have a structure in place to receive timely, high-quality information regarding the plan’s investment options?
- What level of accountability will the fiduciary take on for the selection and monitoring of plan investments if they are hired?
- What is the expense of appointing a fiduciary?
- Will the appointed fiduciary have the financial strength to respond to claims of fiduciary breach?

Make sure to consult with your own legal counsel to determine the best approach and strategy for your organization.

Turn to Fidelity for direction with the risks you face every day. For more information on this topic, contact your Fidelity managing director. And be sure to visit Fidelity’s Fiduciary Resource to learn more about fiduciary responsibilities and the tools and resources to manage them.