

AN INTERVIEW WITH INDEPENDENT FIDUCIARY, MATTHEW D. HUTCHESON

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The friendship between Matthew Hutcheson and Fi360 goes way back. He was one of the first AIFA® designees (2003) and we've maintained that friendship ever since. Hutcheson has been very busy with his participant advocacy work in Washington D.C. and with his independent fiduciary practice. We caught up with each other at the most recent Fi360 conference and had an opportunity to find out what he was up to and learn more about

his practice. Matt specializes in acting as an independent fiduciary, and we wanted him to share information on his unique practice, and how fellow designees might benefit from learning about

a new potential source of professional fee revenue.

Fi360: You have a unique practice. Could you clarify for us exactly what you do as an independent fiduciary?

Hutcheson: Of course. ERISA identifies four primary types of "named" fiduciaries. The first one is described under ERISA section 3(16). A 3(16) fiduciary (click on ERISA 3) is the "Plan Administrator." The Plan Administrator is different than a third party administrator, the latter not being a fiduciary, but rather a professional service provider. ERISA section 3(21) describes a named fiduciary with discretion over the disposition of plan assets, plan operations, appointment of other fiduciaries, and hiring/firing of service providers. A 3(21) fiduciary (click on ERISA 3) with full discretionary authority is the principal – or "chief" – fiduciary over a plan.

That is the position I am appointed to serve on many plans.

Fi360: As a 3(21) fiduciary, how do you interact with the plan sponsor's management (CEO, CFO, Investment Committee Chairperson).

Hutcheson: In my case, company executives have arrived at the conclusion that they don't want to be the chief fiduciary over their plan, so they ask their legal counsel to find a qualified independent replacement. That's how I receive most of my appointments. I also receive independent fiduciary appointments by Federal Courts from time-to-time.

Fi360: Federal Courts? Why do they appoint you?

Hutcheson: Usually it's because a company has filed for bankruptcy, and the bankruptcy trustee wants someone else to handle the affairs of the plan, so they petition the Court to appoint an independent fiduciary. The Department of Labor may also petition a Court to appoint an independent fiduciary in the case of abandoned plans or plans that are in trouble for some reason.

Fi360: Are you only appointed as a 3(21) fiduciary?

Hutcheson: Usually, but I also have been appointed to serve in a 3(16) capacity before. That's not uncommon in situations involving litigation between the Department of Labor and a troubled retirement plan.

Fi360: You mentioned four types of ERISA fiduciaries earlier and have specifically discussed the 3(16) and 3(21) fiduciary roles. Please describe the other two types.

Hutcheson: There's the ERISA 3(38) (click on ERISA 3) investment manager, and then the Trustee described under ERISA section

403(a) (click on ERISA 403). There could be other fiduciaries that receive a specific delegation or assignment from one of the four specific fiduciaries mentioned, but for purposes of this discussion, those are the four primary fiduciaries.

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Fi360: Since you most often assume the 3(21) fiduciary role, please describe that in more detail.

Hutcheson: Every plan has to have a primary decision maker. That decision maker has the authority necessary to manage the plan, soup to nuts. I am usually appointed by a plan sponsor by formal resolution, and my name is added to all plan documentation, including the plan document itself, the summary plan description, etc. Also, all service providers are notified of my appointment, and they are instructed to report directly to me.

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Fi360: What role does the fiduciary fill that was immediately serving as named fiduciary prior to your appointment?

Hutcheson: Usually each named fiduciary resigns in writing. I then appoint and delegate responsibility to new fiduciaries as appropriate and prudent. There is a special protocol for accomplishing this, so the proper execution is important. The idea is to let company executives go on their way so they can focus on running a profitable business, and do so without residual fiduciary risk following them around for the next few years. When a Federal Court appoints me at the request of the Department of Labor, there could be language enjoining the previous fiduciaries from serving in that capacity in the future if something has gone wrong.

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Fi360: Most of our designees are not assuming this 3(21) fiduciary role. Can you share how they might fit into this model?

Hutcheson: Fi360 designees who are registered investment advisors are already fiduciaries, and they may even be a 3(38) fiduciary if they have been given full discretion to manage the portfolios of the trust. As a side note, I personally believe it's impossible to serve as an advisor to a 401(k) plan and not be a fiduciary. With respect to those registered investment advisors that serve as a 3(38) investment manager, those are the investment fiduciaries I will appoint to manage the assets of the plan after I am given 3(21) fiduciary authority.

Fi360: So in other words, you are appointed by a plan sponsor or a Federal Court to be the primary fiduciary – or “chief fiduciary” as you call it – and once you are in that principal role, you then utilize that authority to appoint an investment advisor to take over the investments?

Hutcheson: Exactly.

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Fi360: And you always delegate 3(38) authority to that investment advisor?

Hutcheson: That is my objective. I have made a few appointments of lesser scope. However, in an independent fiduciary environment, all of the fiduciaries need to be expert full discretionary fiduciaries. So, although I appoint them, and monitor them, and perhaps fire them, those 3(38) fiduciaries know that they actually work for the plan, and are loyal to the participants no matter what. That's the benefit of having a team of independent fiduciaries working on a plan. It's virtually headache free for the plan sponsor, and there's little chance of a conflict of interest if the delegations are correctly made right from the beginning.

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Fi360: Would you ever appoint someone to help with a plan that was not a registered investment advisor?

Hutcheson: Perhaps, for a limited scope assignment. However, the major investment delegation will be given to an expert 3(38) fiduciary.

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Fi360: Do you recommend that AIF® and AIFA® designees become independent fiduciaries?

Hutcheson: I absolutely encourage that. And they should seriously consider serving in either primary role; that of 3(21) or 3(38). I am currently contemplating delivering a two-day training session for those that want to learn the details of how to serve in either of those independent roles. After the conference I received over two dozen emails about that very topic.

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Just one more thing, I think society should demand an independent fiduciary professional for qualified retirement plans. Plan participants could use greater expertise, more objectivity, and dedicated attention to their retirement plans right now. We don't do our own surgery. We don't represent ourselves in legal matters – or shouldn't. Why then does our conventional retirement plan system place such a heavy burden on

participants or lay fiduciaries? In my opinion, retirement plans should be managed by independent fiduciaries with a clear duty and alignment of loyalty to the participants coupled with burden and liability relief for plan sponsors. It should be the prevailing standard, with licensing just like attorneys, accountants, surgeons, etc.

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Fi360: As you know, we at fi360 are advocating one fiduciary standard for all financial service professionals that are providing investment advice. Do you think that will become a reality?

Hutcheson: I'm not sure. But when plan sponsors finally have that epiphany moment and realize they can sponsor the plan without having to manage it, they are thrilled. I'm not sure what the psychological barrier has been up to this point, but I can say that hundreds of employers contact me every year about this, most wanting to gain a better understanding of how it might work for their organization. That's a very good sign, but only scratching the surface.

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Fi360: You have been very busy in Washington D.C. and with other advocacy work. Can you share more about that with us?

Hutcheson: I've always cared deeply about the financial security of America's workforce after they retire. Congress is very aware of the need to address certain factors or issues that are impediments to building a secure retirement. There isn't just one impediment; there are many. I'm very optimistic about the prospect of change and progress, and applaud the work Congress has done to address these issues.

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Fi360: One of the issues you've worked tirelessly on is full disclosure and transparency in Defined Contribution plans. What do you expect to see happen there?

Hutcheson: I expect one of two things to happen. Legislation developed by Chairman George Miller (D-CA) or Herb Kohl (D-WI) to be passed into law, or the Department of Labor will develop regulations consistent with Chairman Miller's legislation. I support House Bill 1984, and I'd like to see that legislation become law.

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Fi360: What other initiatives are underway in D.C.?

Hutcheson: Well, there are several. Robert Andrews (D-NJ) has proposed legislation that would require those that work on 401(k) or other defined contribution plans to be indepen-

dent investment advisers – fiduciaries. I like that. It kind of goes without saying in my world, but since so many try to avoid the fiduciary duty of loyalty, it is a necessary piece of legislation. I like it and applaud Representative Andrews and all those that have worked so hard with him to help bring forth that Bill.

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Fi360: You have significant influence in the retirement plan industry; with the media, with Policy Makers, Federal Courts, and others. How did that happen?

Hutcheson: It happened gradually, through many years of building trust and honoring that trust. It may appear to some that it happened over night, but it didn't. I've been in the industry for 18 years, and have written many papers, done much research, and have made decisions affecting hundreds of thousands of plan participants. Most of all, there are probably fewer than one hundred independent 3(21) fiduciaries in the United States. There could be fewer than twenty five. I personally know of a half dozen. Such individuals have unique experience and insight and that experience puts an independent 3(21) fiduciary in high demand.

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Fi360: You told us once that your greatest challenge is dealing with the lack of understanding by those already in the investment or 401(k) industry. Can you share some experiences?

Hutcheson: I think there is, to a large extent, herd mentality in the 401(k) industry. The large vendors set the tenor for the most part, and those that sell 401(k) plans follow along without asking too many critical questions. Then, there are also those that ask too many questions of the wrong kind. Because they may not be familiar with what I do, they feel threatened by it and make passive-aggressive comments that border on being rude or accusatory. Because my practice is best understood by cutting edge legal counsel, or the EBSA, there is lots of opportunity for misunderstanding by those that are unfamiliar with me or what I do.

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Fi360: Misunderstanding how?

Hutcheson: For example, RIAs are accustomed to being in charge of the client relationship. When they are appointed by me, I am their client. They report to me. I authorize their invoices. I check them out, monitor them, evaluate them, etc. That takes some getting used to on their part. Some don't like it. However, those RIAs that understand how easy it is

to be appointed by an expert that already understands their business and expertise; well then, that's a different story. No more embarrassing dog-and-pony shows. An appointment from a 3(21) is probably the best thing that can happen to an RIA appointed to be a 3(38). It's fast, efficient, and lacks the nonsense that 3(38) fiduciaries are required to endure when they follow traditional business development models.

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Fi360: So when you appoint a registered investment advisor, it usually happens quickly?

Hutcheson: Usually, especially if I have done business with them in the past. In any case, I can perform the necessary due diligence on an RIA – meaning a 3(38) fiduciary in that context – in two days, and appoint them on the third. It's usually that clean and fast.

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Fi360: Do you use the fi360 Prudent Practices in your day-to-day work?

Hutcheson: Yes, absolutely. Fiduciaries must employ appropriate methods for ensuring plans are operated correctly and in line with the interests of the participants and beneficiaries. That is exactly what the handbooks provide; an appropriate method. I value the Prudent Practices for Investment Fiduciaries more than you know, and have defended them as an expert in Court.

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Fi360: You offer an endorsement to investment advisors. Can you share more about that with us?

Hutcheson: Certainly. The endorsement is given to 3(38) investment fiduciaries that meet a level of scrutiny I would ordinarily require if I were to appoint that 3(38) myself. So, it is intended to be a differentiator to assist the 3(38) convey to prospective clients why they are different from a competitor who, for example, could be a sales person masquerading as a 3(38). In other words, plan sponsors may not be able to discern the differences between two individuals competing for its 401(k) business. I want to help plan sponsors discern the difference; to help them find and identify the real-deal investment fiduciary that can demonstrate to me that I could hire any one of them tomorrow without reservation.

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Fi360: What credentials do you have to have to be a 3(21) fiduciary?

Hutcheson: Where does a young 21-year-old, aspiring to be an independent fiduciary, go to school? Nowhere. There is no place to go, even today. You have to learn it by doing it. Hopefully I'll be able to change that after I finish my Doctorates. Perhaps I can establish a training program at a University. Until then, there are three primary credentials that I think are particularly relevant. The first is the Certified Pension Consultant designation offered by ASPPA. The second, of course, is the AIFA® designation from fi360. The third is the ERPA, an enrollment license to practice before the Internal Revenue Service with respect to certain retirement plan matters. I will have all three; I was just notified that I passed both inaugural ERPA exams administered last January. I have other training and credentials, but those are the primary credentials I would recommend any independent 3(21) fiduciary have prior to getting serious about serving in that capacity.

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Fi360: What credentials do you need to have to serve as a 3(38) investment fiduciary?

Hutcheson: To serve as a 3(38), one only need to be a Registered Investment Advisor, be eligible under ERISA 411 to serve in a fiduciary capacity, and have the capacity to exercise full discretionary authority over the portfolios. I recommend that 3(38)'s also obtain the AIFA designation.

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Fi360: Thank you for sharing these thought and explaining what you do. We're happy when our designees enjoy success. How can our AIF and AIFA designees learn more about what you do?

Hutcheson: Perhaps the best explanation I have seen is Scott's Simon's recent Morningstar Advisor column. That would be the recommended starting place for anyone that wants to understand how a true independent fiduciary practice works, and of course I always encourage those with interest to email me at matt@erisa-fiduciary.com. I would love it if there were ten thousand more independent fiduciaries out there.

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Fi360: Thanks, Matt. We look forward to seeing you again soon.

