

Title 12 of the Delaware Code

§ 3313 Advisers

- (a) Where 1 or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority provided, however, that the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity.
- (b) If a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.
- (c) If a governing instrument provides that a fiduciary is to make decisions with the consent of an adviser, then except in cases of wilful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser's objection to such act or failure to provide such consent after having been requested to do so by the fiduciary.
- (d) For purposes of this section, unless the terms of the governing instrument provide otherwise, "investment decision" means with respect to all of the trust's investments (or, if applicable, to investments specified in the governing instrument), the retention, purchase, sale, exchange, tender or other transaction or decision affecting the ownership thereof or rights therein (including the powers to borrow and lend for investment purposes), all management, control and voting powers related directly or indirectly to such investments (including, without limitation, nonpublicly traded investments), the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investments advisers, managers or other investment providers, and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.
- (e) Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary or shall not take specified actions except at the direction of an adviser, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:
- (1) Monitor the conduct of the adviser;
 - (2) Provide advice to the adviser or consult with the adviser; or
 - (3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser.
- Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority.

(f) For purposes of this section, the term "adviser" shall include a "protector" who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:

- (1) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;
- (2) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and
- (3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument.

§ 3322 Fiduciary agency contracts; delegation [For application of this section, see 79 Del. Laws, c. 352, § 6]

(a) A fiduciary acting under a governing instrument which neither affirmatively permits the fiduciary to hire agents, nor expressly prohibits the fiduciary from hiring agents, may employ agents and pay them from the fiduciary fund in accordance with this section. Such agents may be hired to assist in the performance of such fiduciary's administrative duties, whether discretionary or ministerial, or to render investment advice, if the fiduciary reasonably believes in the exercise of its discretion that such an arrangement is in the best interests of all interested persons. The agent must observe the same standard of care required of the fiduciary with respect to each responsibility so delegated, and neither the establishment of such agency relationship nor the performance of such agent shall diminish, increase or otherwise affect the standard by which the performance of the fiduciary is governed. In any suit or proceeding involving an evaluation of fiduciary performance, the fiduciary shall be liable for abusing its discretion in hiring such agent, for negligently hiring such agent, or for negligently continuing the agency relationship, but shall not otherwise be liable for the conduct of such agent.

(b) A fiduciary may delegate investment functions to any person including a cofiduciary subject to the standard of care required of the fiduciary in making investment decisions of the type so delegated with respect to the fiduciary fund. A fiduciary may delegate management functions to any person including a cofiduciary subject to the standard of care required of the fiduciary in making management decisions of the type so delegated with respect to the fiduciary fund.

(c) A fiduciary shall not be responsible for the decisions or actions of any agent to which functions are delegated pursuant to this section if the fiduciary exercises the standard of care required of the fiduciary in making such decisions when selecting the agent, when establishing the scope and specific terms of the delegation and when reviewing periodically the agent's actions in order to monitor the agent's performance and compliance with the scope and specific terms of the delegation.

(d) The agent shall comply with the scope and terms of the delegation and shall exercise the delegated function subject to the standard of care required of the fiduciary and shall be liable to the trust for failure to do so.

(e) An agent who accepts the delegation of a fiduciary's function from a fiduciary who is subject to the jurisdiction of a court of this State shall be deemed to have submitted to the jurisdiction of that court even if the delegation agreement provides for a different jurisdiction or venue.

(65 Del. Laws, c. 422, § 6; 73 Del. Laws, c. 47, § 1; 74 Del. Laws, c. 82, § 7; 75 Del. Laws, c. 300, § 1; 79 Del. Laws, c. 352, § 3.)