3(21) vs. 3(38) Fiduciary

A retirement plan adviser can serve in either a 3(21) or 3(38) fiduciary capacity, and in some cases, both capacities. The needs and desires of the plan sponsor typically dictate the specific arrangement, which is predicated upon the subject of risk mitigation versus risk avoidance. Some plan sponsors want assistance with their fiduciary responsibilities but want to maintain discretion and control of their plan's investment menus. Others want to shift the fiduciary responsibilities to a third party due to their lack of expertise, and ultimately, fear of exposure to liability.

DIFFERENCES

Any individual is a fiduciary under **Section 3(21)** if he or she exercises any authority or control over the management of the plan or the management or disposition of its assets; if he or she renders investment advice for a fee (or has any authority or responsibility to do so); or if he or she has any discretionary responsibility in the administration of the retirement plan.

Section 3(38) defines "investment manager" as a fiduciary due to their responsibility to manage the plan's assets. ERISA provides that a plan sponsor can delegate the responsibility (and thus, likely the liability) of selecting, monitoring and replacing investments to a 3(38) investment manager/fiduciary. A 3(38) fiduciary may only be a bank, an insurance company, or a registered investment adviser (RIA) subject to the Investment Advisers Act of 1940.

3(21)	↔	3(38)
State in writing co-fiduciary status	↔	State in writing co-fiduciary status
Assists in drafting IPS	↔	Drafts IPS
Helps design initial fund menu	↔	Builds initial fund menu
Provides monitoring	↔	Monitors menu
Recommends changes	↔	Makes changes
Recommends mapping strategies	↔	Determines mapping strategies
Provides documentation	↔	Provides documentation

SIMILARITIES

Both 3(21) and 3(38) advisers accept fiduciary responsibility and adhere to ERISA §404(a)'s duty to serve solely in the interest of plan participants and both have to meet the "prudent man" standard of care. Plan sponsors retain the responsibility to select and monitor the adviser, regardless of their adviser's fiduciary status.

Plan sponsors should consider the adviser's experience, skill and level of expertise, in addition to their desire to take on exposure to potential liability. Additionally, the adviser's broker-dealer permissions should be taken under consideration as well as the adviser's Errors & Omissions liability coverage.

Remember, anyone can call themselves a fiduciary, but a fiduciary is determined by actions, not by title.
For more information on this topic, contact Don Spicer at 405-603-4444.

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