

## 3(21) VS. 3(38) FIDUCIARY SERVICES Q&As

### *Helping You Manage Plan Investment Responsibilities*

If you are responsible for managing the investments for your company's 401(k) plan, this Q&A may help you understand more about your risks and responsibilities. For the specifics on how this may apply to your situation, please consult your legal or financial advisers.

#### **Am I a fiduciary?**

It may seem obvious that the decisions made about a company retirement plan should be made with the participants' best interests in mind, but the law makes clear who is acting as a "fiduciary" and legally responsible for these things. You are a fiduciary to a retirement plan if you:

- Have any discretionary authority or responsibility in the administration of the plan;
- Exercise any discretionary authority or control over the management of the plan's assets; or
- Render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or have any authority or responsibility to do so.

Please keep in mind that fiduciary status is generally determined based on a person's function or duties as opposed to his or her title.

#### **Am I personally liable for the plan's investment decisions?**

If you meet the definition of a fiduciary and have authority or control over the investment decisions of the plan, you are responsible for creating and maintaining a documented, prudent process to select, monitor and update investments that are appropriate for the plan. If you fail to do this, you may be personally liable for losses due to a breach of fiduciary responsibilities. The expected level of knowledge is that of a professional who has experience doing this kind of work. That's why it is difficult for many plan sponsors to safely accomplish this on their own.

#### **What is ERISA?**

ERISA stands for the Employee Retirement Income Security Act. It sets standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans. ERISA section 3(21) defines the term "fiduciary" and section 3(38) sets forth the requirements for serving as an "Investment Manager" to a qualified retirement plan.

## **Can I delegate my fiduciary responsibilities for the plan's investments to a 3(38) Investment Manager?**

Yes. Under ERISA, you may delegate certain duties related to the selection, monitoring and updating of plan investments to an Investment Manager that accepts fiduciary status and exercises discretion over plan investments. Of course, you still have the general responsibility of prudently selecting an experienced 3(38) Investment Manager and periodically reviewing their performance.

## **What is a 3(21) Investment Advisor?**

A 3(21) Investment Advisor works with you to recommend the investment lineup for your plan, but does not have discretion over plan investments. If you prefer to maintain discretion and control of your plan's investments, you may choose to hire a 3(21) Investment Advisor to select investment funds to make available to your employees. It's up to you to approve the fund lineup as well as any recommended changes over time.

## **Can a 3(21) Investment Advisor act in a fiduciary capacity?**

Yes, a 3(21) Investment Advisor can act in a "co-fiduciary" capacity. Under this arrangement, the 3(21) Investment Advisor delivers value, but is limited to making recommendations. You would continue to have the liability for selection, monitoring and updating of the plan's investments.

## **What is a 3(38) Investment Manager?**

If your goal is to minimize your fiduciary liability to the fullest extent, you should consider hiring a 3(38) Investment Manager to whom you delegate full authority to make decisions about the investment lineup. The 3(38) Investment Manager will have discretion, authority and control to manage the fund lineup. They will acknowledge their fiduciary status in writing. By delegating the job of managing the investment lineup to the 3(38) Investment Manager, your liability is limited to prudently selecting and monitoring the 3(38) Investment Manager and benchmarking the reasonableness of their fees.

## **If I hire a 3(21) Investment Advisor or 3(38) Investment Manager, will I still have personal liability for the plan's investment decisions?**

It depends. If you hire a 3(21) Investment Advisor to recommend investments only, then you may still be held personally liable because you have the final say over investment-related decisions. If you hire a 3(38) Investment Manager to whom you delegate full authority and discretion over the plan's investment lineup, then you will not have personal liability for those decisions so long as you can demonstrate that you acted prudently with respect to hiring the 3(38) Investment Manager.

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## What's the main difference between a 3(21) Investment Advisor and a 3(38) Investment Manager?

A 3(21) Investment Advisor makes investment recommendations, but leaves the ultimate decision and liability to you. A 3(38) Investment Manager takes on the full responsibility of managing the investment lineup and has discretion to make necessary changes. In doing so, the 3(38) Investment Manager takes on the primary fiduciary responsibility for investment decisions.

## Is a 3(21) Investment Advisor or 3(38) Investment Manager right for me?

Both provide fiduciary services to help you define and maintain a professional process to select, monitor and update investments for your plan. The key difference is whether you are hiring them to help you do it or do it for you.

- A 3(21) Investment Advisor **helps you** do it. While a 3(21) Investment Advisor may serve in a "co-fiduciary" capacity, the primary fiduciary liability for investment decisions remains yours.
- An ERISA 3(38) Investment Manager **does it** for you. The primary fiduciary liability for the investments is assumed by the 3(38) Investment Manager.

Either way, you still have the responsibility to prudently select and periodically monitor the 3(21) Investment Advisor or the 3(38) Investment Manager.

## What should I consider when hiring a 3(21) Investment Advisor or a 3(38) Investment Manager?

It's wise to consider the skill and experience of a potential 3(21) Investment Advisor or 3(38) Investment Manager as you contemplate the right balance for you between exercising control and your desire to limit potential liability. It's important to work with a professional who acknowledges their fiduciary status in writing and demonstrates a prudent, repeatable process to the selection, monitoring and updating of your plan's investments.

**To learn more, call us at 866-607-5156  
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