

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 arrangements, 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.

3(21)



3(38)

State in writing co-fiduciary status

Assists in drafting IPS

Helps design initial fund menu

Provides monitoring

Recommends changes

Recommends mapping strategies

Provides documentation

State in writing co-fiduciary status

Drafts IPS Builds initial fund menu

Monitors menu Makes changes

Determines mapping strategies

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.

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.

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