

3(21) vs. 3(38) Fiduciary Services: Which is Better for Your Retirement Plan?

Employer retirement plan sponsors really need to know the roles that their investment adviser may play so that they can choose the fiduciary service that works best for them and their employees. Service options generally fall into two categories, referred to in the retirement plan industry as 3(21) and 3(38). These names refer to the sections of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Section 3(21) of ERISA is the general definition of a fiduciary, while Section 3(38) describes the functions of a discretionary investment management. Therefore, 3(38) is typically used to refer to discretionary investment management of retirement plan assets, while 3(21) can refer to a variety of non-discretionary advisory roles. The basic difference between 3(21) and 3(38) services is the level of responsibility that the plan sponsor holds for investment decisions.

3(21) Investment Consultant - "Help Me"

- There is a shared responsibility between the plan sponsor and the 3(21) Investment Consultant for the selection and monitoring of the investment options offered by the plan.
- The 3(21) Investment Consultant recommends the selection and potential replacement of investment options for the plan, but the plan sponsor must approve the investments and any changes.
- A 3(21) arrangement may be best for plan sponsors that have an investment committee and are comfortable with reviewing recommendations and making their own decisions. It is also good for plan sponsors that want input into what investment options are being offered by the plan.

3(38) Investment Manager - "Do It For Me"

- The majority of the investment selection and monitoring responsibilities are lifted from the plan sponsor and delegated to the 3(38) Investment Manager.
- The 3(38) Investment Manager is responsible for the investment selection, monitoring and replacement of all of the investment options offered by the plan. The Investment Manager will inform the plan sponsor of any changes before they are made, but they do not need to be approved.
- A 3(38) Investment Manager may be best for plan sponsors that don't have time, effort, or energy to be responsible for the plan's investment options. This may be especially true for small businesses.
- There is usually an extra cost for the 3(38) services that typically ranges between .03% to .05% annually.
- While the 3(38) arrangement allows a plan sponsor to outsource some of their fiduciary responsibilities, they still must approve the 3(38) Investment Manager and properly document the process that they used in doing so. They must also regularly review the 3(38) Investment Manager to make sure that they continue to be the best option for their plan.

It makes sense for Retirement plan sponsors to carefully examine their investment fiduciary options and to have a good understanding of what the differences are so that they can pick the solution that is best for them and their employees. They are accountable to their employees who may question the proper investment fund line-up or investment changes. Therefore, they need to understand the logic of offering a certain investment fund option and be able to explain that to their employees.

	3(21) Services	3(38) Services
Role	Investment Consultant	Investment Manager
Risk Protection	Makes recommendations in the best interest of the participants, but the final decision and legal responsibility still fall to the plan sponsor.	Makes the actual investment decisions and selections. Do not need approval from the plan sponsor. Plan sponsor is responsible for choosing the 3(38) Investment Manager and monitoring their performance. May reduce some of your fiduciary liability.
Investment Responsibilities	Act in the best interest of the plan participants. Research and conduct analysis to determine the best investment fund line-up. Monitor ongoing investment performance and fees to make recommendations to the plan sponsor. Meet with company fiduciary (owner, committee, or board) to make recommendations and discuss rationale. Provide additional support and services to participants (enrollment, education, financial wellness).	Act in the best interest of the plan participants. Research and conduct analysis to determine the best investment fund line-up. Monitor ongoing investment performance and fees and make changes as needed. Meet with company fiduciary (owner, committee, or board) to discuss rationale, actions, and performance. Provide additional support and services to participants (enrollment, education, financial wellness).

Through our Klaas 401k Retirement Plan Consulting Services, we offer 3(21) investment consulting support to plan sponsors of qualified retirement plans. We can help you analyze the universe of investment fund options available to your plan, and make recommendations for investments to be made available to your participants. We will also assist you with the development of an Investment Policy Statement, and monitor and review the investments in the plan to ensure conformance with the IPS. In addition, we can provide educational services to the participants in the plan, to help them understand their plan features and benefits of enrollment in the plan.

If you decide that 3(38) services are more appropriate for your plan, we can assist you with selecting a third-party service provider to provide 3(38) discretionary investment management for your plan and coordinate our services with those of the investment manager. The investment manager is responsible for the investment selection and monitoring, while we focus our services on participant education and providing administrative support to the plan sponsor as necessary.

Sources for further information:

- Evan Ross, June 6, 2019, *3(21) vs. 3(38) Fiduciary: An ERISA Attorney Defines the Difference*, 401(k) Providers, <https://blog.forusall.com/3-21-fiduciary-vs-3-38/>
- Robert C. Lawton, November 6, 2020 *Which Fiduciary Should Retirement plan sponsors Hire: 3(21) or 3(38)?*, Plan Sponsor Insights, <https://lawtonrpc.com/which-fiduciary/>
- John Sullivan, June 14, 2019, *ERISA 3(38) and 3(21) - What is the Difference?*, Your 401(k) News, <https://401kspecialistmag.com/erisa-338-and-321-whats-the-difference/>