



TRANSFERRING INVESTMENT RESPONSIBILITY TO A § 3(38) INVESTMENT MANAGER*
Peace of Mind for Plan Sponsors & Trustees; Professional Management for Participants

The sponsor and trustees of a qualified retirement plan are “named fiduciaries” and, as such, are personally responsible and liable for selecting, monitoring, and replacing investment options. In addition, they are also responsible for determining how the plan assets are ultimately invested.

In practice, most trustees attempt to remove a portion of this liability by delegating investment decisions to individual plan participants. However, prominent industry studies clearly illustrate that leaving investment choice up to employees will result in sub-market returns for most participants, leaving them with lower account balances at retirement. There are many ways for a non-professional investor to consistently underperform investment markets while attempting to effectively manage a major retirement asset—trading on emotion, chasing hot funds, taking too much risk just before their retirement date, or not properly diversifying holdings in a volatile market.

Today, most sponsors and trustees hire non-fiduciaries and/or ERISA § 3(21) investment *advisors*. Non-fiduciaries are brokers who do not have a fiduciary duty to the plan or participants. Section 3(21) investment advisors are brokers, insurance agents, or most financial advisors and banks who only provide recommendations regarding plan investment options—mere fund menus—but do not actually have discretion to manage investments. This structure does not alleviate the fiduciary liability of the sponsor and trustees, and it burdens plan participants with having to successfully and continuously manage their own retirement investments.

We believe there is a better alternative. It is possible for plan sponsors and trustees to reduce their fiduciary liability for investment decisions *and* provide participants the benefit of professional money management. They can do this by hiring an ERISA § 3(38) investment manager. A § 3(38) investment manager, usually a registered investment advisor (“RIA”) regulated by the Investment Advisers Act of 1940, acts as the plan fiduciary for investment decisions, thereby removing investment liability—a clear and meaningful benefit to the named fiduciaries. At the same time, participants benefit from ongoing, professional investment management. The RIA relieves the employees of the responsibility (and worry) of trying to be an investment manager on top of their day jobs. (Note: sophisticated participants can still continue to manage their own portfolio through a self-directed brokerage account.)

ERISA § 3(38) investment managers are the only third parties to whom sponsors and trustees can legally transfer this investment liability. Section 3(38) investment managers are bound to act in the sole interest of, and for the exclusive purpose of benefitting, the participants and beneficiaries. They are prohibited from putting their economic interests ahead of the plan’s interests and must avoid conflicts of interest. Because legal liability is effectively transferred, most financial providers do not qualify (or want) to act as a § 3(38) investment manager. “Fee-only” RIAs are qualified to act as § 3(38) fiduciaries.

In summary, using a § 3(38) investment manager has the following effects:

Plan Investment Liabilities	<ul style="list-style-type: none"> Investing plan assets Selecting, monitoring, and replacing investment options 	Named fiduciaries can legally transfer and abdicate their ERISA investment liability to a § 3(38) investment manager, including the duties to select, monitor, replace, and allocate plan assets among investment options.
Non-Delegable Liabilities	<ul style="list-style-type: none"> Selecting and monitoring the § 3(38) investment manager 	Named fiduciaries will still be liable for selecting and monitoring the § 3(38) investment manager.
Who Benefits	<ul style="list-style-type: none"> Plan Sponsor Plan Trustee(s) Participants 	The plan sponsor and trustee(s) benefit from the relief of liability. The participants benefit from professional and experienced investment management.

* An investment manager defined by ERISA § 3(38), U.S. Code citation: 29 U.S.C. § 1002(38).