USI CONSULTING GROUP

INVESTMENT ADVISORY SERVICES

Understanding your fiduciary liability

Investment fiduciary solutions for your retirement plan

Employee Retirement Income Security Act of 1974 (ERISA) requires every plan to designate at least one fiduciary (a person or entity) named in the plan document. Depending on your desired level of involvement, USI Advisors, Inc. (USIA), an affiliate of USI Consulting Group and a privately owned SEC registered Investment Advisory Firm, can deliver ERISA fiduciary services based on the level of engagement that is suitable for the retirement plan sponsor.

ERISA 3(21) fiduciary is an investment advisor

If the plan sponsor prefers to be actively involved in managing the plan's assets, USIA will assume fiduciary liability in a joint role with the plan sponsor. The plan sponsor retains final decision-making authority but relies on the expertise of the investment consultant to provide advice and services in order to help the plan sponsor fulfill its fiduciary responsibilities under ERISA. USIA is responsible for:

Recommending and monitoring investments

Suggesting investment alternatives when applicable

Advising the plan sponsor to follow fiduciary process

ERISA 3(38) fiduciary is an investment manager

If the plan sponsor wants to reduce plan workload and delegate fiduciary responsibilities as it relates to investments, they can appoint USIA to act as an investment manager with discretion, authority and control of the plan's assets. USIA will acknowledge in writing the role as an asset manager in a discretionary capacity and will make all investment selection, monitoring and replacement decisions without seeking prior approval. As a result, USIA relieves the plan sponsor of fiduciary responsibility as it relates to investment decisions. However, the plan sponsor retains the liability for the selection, monitoring and benchmarking of the 3(38) manager — ensuring they are fulfilling their fiduciary obligations.

Key advantages and disadvantages of the two fiduciary approaches:

	Pros	Cons
3(21) Fiduciary	Flexibility in making investment decisions as recommendations are discussed with the committee Actively involved in managing the plan's investments	Increased fiduciary responsibility. Longer decision-making process, advisor presents findings, then committee has to make a decision
3(38) Fiduciary	Reduces some fiduciary liability by delegating fiduciary responsibility of making investment decision Timely execution of investment changes, no need for committee's approval Frees up time, allowing the client to focus on other priorities on benefits structure	Misconception of having delegated all fiduciary liability while the client is still responsible for monitoring the Investment Manager Committee gives up control and has no flexibility in investment decisions Popular investment options may not be utilized by 3(38) manager

There is considerable confusion in the marketplace regarding the fiduciary liability that accompanies retirement plan sponsors and trustees, and how that liability can be mitigated. In fact, many plan sponsors don't fully understand their fiduciary responsibilities and associated risks. If you're not sure, you're not alone. It's one of the most complex and misunderstood parts of administering a retirement plan. And not every plan sponsor has the time and resources to stay on top of it all.

In addition, there has been an increasing level of scrutiny placed on the fiduciary conduct of plan sponsors. As a result, a growing number of plan sponsors are reevaluating whether, and to what extent, they should delegate investment oversight to a third-party who serves the plan either as a 3(21) fiduciary or as a 3(38) fiduciary. In either case, the fiduciary's duty of loyalty is to the retirement plan participants and their beneficiaries according to the ERISA Section 404(a)(1)(A).

Impact

ERISA litigation has increased due to plan sponsors not receiving appropriate fiduciary support and failing to exercise appropriate fiduciary oversight, which can result in hundreds of thousands to multi-millions of dollars in litigation risk. Hiring either an outside 3(21) or a 3(38) fiduciary will reduce the operational intensity, liability, and overall long-term costs for the Plan sponsor. However, depending on resources and capabilities, a Plan sponsor may find a 3(21) or a 3(38) fiduciary more suitable. More importantly, the decision to have a 3(21) versus a 3(38) advisor will not have a significant impact on the participants' retirement outcome, as any suitable investment advisor is legally obligated to represent the best interests of participants in providing/recommending:

- Suitable investments including the Qualified Default Investment Alternative (QDIA)
- High quality and cost-competitive service providers
- Documentation (e.g., investment suitability, diversification, demographics and other participant level considerations)

For the Plan sponsor, 3(21) and 3(38) advisors are also alike in that they both generally focus on plan level service offerings, which typically includes the following:

- Adhering to the Investment Policy Statement
- Providing an initial investment selection
- Providing ongoing monitoring and replacement of investment managers
- Conducting reviews with the committee
- Documenting all actions and recording the meetings

ERISA requires every plan to designate at least one fiduciary (a person or entity) named in the plan document.

A fiduciary under ERISA Section 3(21) is anyone who exercises any discretionary authority or control over the management of the plan or the management of its assets; renders investment advice for a fee; or has any discretionary responsibility in the administration of the plan or is named in the plan documents.

Conclusion

A plan sponsor can reduce their fiduciary liability by engaging an experienced consultant to provide enhanced investment oversight and holistic plan governance services as an ERISA fiduciary. Regardless how a Plan sponsor delegates investment oversight of the Plan, the Plan sponsor cannot completely outsource its fiduciary liability to an outside provider. However, the Plan sponsor can determine whether it is more preferrable to evaluate the advisor's recommendations or if it is more suitable to evaluate the advisor's decision-making process and execution. So, if the Plan sponsor wishes to retain control of the investment selection process, a 3(21) advisor relationship would be appropriate, while if the Plan sponsor wishes to relinquish control to a third-party, then a 3(38) manager would be more suitable.

While it is important to make a reasoned decision concerning 3(21) versus 3(38) fiduciary support and to document the findings, the decision to hire a third-party consultant should take into consideration how the consultant can help create an investment infrastructure that is supportive of the plan's needs for a reasonable fee. USIA assumes, and fully acknowledges its 3(21) fiduciary role in our Investment Advisory Agreement and, therefore, has been priced into our costs accordingly.

How USIA Can Help

USIA has the expertise to help plan sponsors better understand their fiduciary responsibilities and mitigate their fiduciary risk. We provide clients with ongoing investment due diligence support, fiduciary training, plan operations and compliance oversight, periodic provider searches, fee benchmarking and plan design consulting services, whether they select an ERISA 3(21) or 3(38) service model.

To learn more, please reach out to us at **information@usicg.com**.

Connect with us today | **information@usicg.com** | 860.633.5283 | **usicg.com** |

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