

# 3(38) Investment Management

Are you Qualified?

3(21) vs. 3(38)

**James H Williams**  
President  
Financial Telesis  
jimwilliams@financialtelesisinc.com

**W. Michael Montgomery, AIF, CLU, CFS,  
TGPC**  
Managing Principal  
Montgomery Retirement Plan Advisors  
mmontgomery@m-rpa.com

**Michael J. Olah, J.D., LL.M.**  
Managing Principal  
Michael J. Olah & Associates, LLC  
mjolah@mjolahassociates.com

# 3(38) Investment Manager

- Section 3(38) does nothing but define “investment manager” as one:
  - (A) who has the power to manage plan assets; and,
  - (B) who is either a
    - (i) registered as an investment adviser under the ‘40 Act or appropriate state laws;
    - (ii) is a bank or
    - (iii) an insurance company; and
  - (C) has acknowledged in writing that he is a fiduciary with respect to the plan.

# Fiduciaries are fiduciaries are fiduciaries....

- ERISA defines fiduciaries by function –
  - Investment Advisors are fiduciaries by providing investment advice (for a fee) as defined in 3(21)(A)(ii);
  - Investment Managers are fiduciaries by providing investment advice (for a fee) as defined in 3(21)(A)(ii), OR by having discretion over the disposition of plan assets as defined in 3(21)(A)(i), OR by being a “named fiduciary” properly delegated responsibility for managing plan assets as provided for in 402(c)(3), OR all of the foregoing
- Regardless of why you are a fiduciary, the standards of conduct are the same – that of being a “prudent expert” as defined in 404(a)(1)(B)

## 3(38) vs 3(21) – Benefits to Plan Sponsor

- Proper delegation of responsibility to a 3(38) Investment Manager may limit the liability of the plan sponsor (405(d)(1)) for the proper actions of the Manager
  - Plan sponsor is still responsible for the prudent selection (and retention) of the IM
  - Plan sponsor interference in the activities of the IM creates fiduciary responsibility (405(d)(2))
- Engagement of an Investment Advisor creates co-fiduciary liability for the plan sponsor (405(a))
  - Plan sponsor is still responsible for the prudent selection (and retention) of the IA
  - Plan sponsor still is a fiduciary responsible for decisions

# Why Plan Sponsors Choose – 3(21) vs. 3(38)









- Some want assistance with their responsibilities
    - Control
    - Familiarity
  - Some want someone else to take care of their responsibilities for them
    - Time
    - Expertise
    - Fear
  - Risk management
-

# 3(21) & 3(38)

- Adviser practice
  - Experience, skill, and expertise?
  - Desire to take on potential liability?
  - Broker/dealer permit?
  - E&O insurance cover?
- Considerations for sponsor
  - Control
  - Risk mitigation vs. risk shifting
  - Time
  - Expense



# 3(21) & 3(38) Responsibilities

3(21)		3(38)
State in writing co-fiduciary status		State in writing co-fiduciary status
Assists in drafting IPS		Drafts IPS
Helps design initial fund menu		Builds initial fund menu
Provides monitoring		Monitors menu
Recommends changes		Makes changes
Recommends mapping strategies		Determines mapping strategies
Provides documentation		Provides documentation

# 3(21) & 3(38) Time Commitment - Client

3(21)

More time Required

- Prudently select adviser
- Understand information being presented – **education**
- Review materials – **meetings**
- Make decisions – **deliberation**
- Direct recordkeeper to make changes – **authority**
- Monitor adviser

3(38)

Less time Required

- Prudently select adviser
- Monitor adviser

# 3(21) & 3(38) Time Commitment - Adviser

## 3(21)

### More time Required

- Instruct client regarding analysis – **education**
- Research - **monitoring**
- Prepare materials – **meetings**
- Ensure decisions made – **potential follow up**
- Prepare documentation for client to make changes – **assist client**

## 3(38)

### Less time Required

- Research - **monitoring**
- Advise client of changes (if any) - **informational**
- Direct recordkeeper to make changes - **authority**

# What Kind of 3(38) Investment Manager?

---

- Plan level fund oversight
  - Participant level investment management
    - Managed accounts
    - Asset allocation models
  - Other investment manage roles
-

# Practical Considerations

---

- Does your RIA / Broker-Dealer permit you to be a 3(38) fiduciary?
  - Does your E&O insurance cover 3(38) fiduciary acts?
  - What are your E&O coverage limits?
  - What does the client need?
  - Which is the best fit for you, the advisor?
  - Will you serve as 3(38) for some clients and 3(21)(A) for others?
-

# Are you Qualified? Can you Prove it?

- CEFEX Certification
  - Other certification? Is it meaningful?
- CFA
- ERISA attorney
- Fiduciary training & certifications
- Experience
- Tools & processes

*When a regulator, litigator or competitor challenges your qualifications and 3(38) processes, what is your defense?*

---

# Sponsor Perspective: Why Should They Hire *You*?

- Develop your value proposition....in writing
  - Why *you* instead of Ibbotson, Morningstar or Mesirow?
  - When your clients conduct due diligence on your qualifications and deliverables, what can they document?
-

Questions?