

So You Want to be an ERISA §3(38) Fiduciary?

By Ary Rosenbaum, Esq.

When I was in the second grade, my parents carpooled with another family who owned a struggling greeting cards store in Brooklyn. I enjoyed the carpool; where else could I get free packs of Superman and Moonraker trading cards? What I didn't know at the time was that this greeting card store started to add a new line of revenue in 1979, renting something called video tapes. My folks bought their first VCR from them, spending \$700 and getting a free lifetime membership to the video rental club (yes, in 1982, video rental stores charged for membership). Slowly, but surely, the greeting card store lost space to the video rental side of the business until they no longer sold greeting cards, that was 1985. After they had started their video rental business, they made a killing, and then everyone else came in to the point that there seemed to be a video rental store on every block. Then Blockbuster Video came and video tapes were priced for consumer sales killing the small video rental stores. Thankfully, this family cashed out before they would have been put out of business. The rule of business here is that the people first to the market make money and everyone who comes after usually gets killed.

One of the biggest crazes out there in the retirement plan financial advisor space is the ERISA §3(38) solution, where the advisor either serves as a §3(38) fiduciary or works in tandem with one. Many advisors are rushing into the space because they don't want to be like the folks who rushed into the video rental store business too late. So while the proliferation of the use of ERISA §3(38) fiduciaries is a positive step, there are many questions

regarding it and whether it's a true fit for both plan sponsors and financial advisors. The popularity of the ERISA §3(38) fiduciary solution does have one caveat, it will bring many financial advisors touting their role as an ERISA §3(38) fiduciary who don't have the background or experience in being one. This article will serve as an introduction to the role of an ERISA §3(38) fiduciary and whether it is a right fit for the financial advisor interested in becoming one.



(a) a bank, (b) an insurance company, or (c) a registered investment adviser (RIA) subject to the Investment Advisers Act of 1940. Stock brokers and broker-dealers can never be a §3(38).

Does the ERISA §3(38) fiduciary assume all fiduciary liability?

While the ERISA §3(38) fiduciary relieves the plan sponsor from the fiduciary liability for the investment selection and monitoring, the sponsor is, however, still liable for the prudent selection and monitoring of the ERISA §3(38) fiduciary.

So what does an ERISA §3(38) fiduciary do?

By standing in the shoes of the plan sponsor when it comes to the fiduciary process, the ERISA §3(38) assumes the decision making role. That means developing an investment policy statement (IPS), developing an investment option menu according to the IPS, and reviewing the investments against the IPS on a semi-annual basis. In addition, it's providing investment education to participants and/or offering investment advice either through the adviser or an outside third party like rj20.com or Smart 401(k). As an ERISA §3(38) fiduciary, it is important to memorialize everything through

minutes of the decision making process, as well as documenting any employee education seminars along with attendance lists. A good ERISA §3(38) fiduciary will not only protect the plan sponsor, but also protect themselves.

How does an ERISA §3(38) fiduciary minimize liability?

It's the same answer for plan sponsors, good practices. Keeping good records, following the fiduciary process by develop-

What is an ERISA §3(38) fiduciary?

An ERISA §3(38) fiduciary is an ERISA defined "investment manager" who is a fiduciary who has full discretion for investment selection and monitoring. The presence of an ERISA §3(38) fiduciary relieves the plan sponsor from the fiduciary liability for the investment selection and monitoring.

Who can be an ERISA §3(38) fiduciary?

An ERISA §3(38) fiduciary can only be

ing an IPS, pick and replace investment options based on the IPS, and offering investment education. In addition, most ERISA §3(38) fiduciaries minimize their liability by only using index investments whether they are index mutual funds or exchange traded funds. It's very hard for participants to sue for gains and losses in their account if the investment options replicate the stock indexes.

How does one become accredited to become an ERISA §3(38) fiduciary?

The scary thing: nothing. Any financial advisor could put a sign on their lawn or on their door and claim they are an ERISA §3(38) fiduciary. Certainly that's a problem with plan sponsors who have the fiduciary duty to evaluate an ERISA §3(38) fiduciary that they are going to hire as well as a problem for other fiduciaries in that space because inexperienced fiduciaries will certainly negatively impact the industry. While no accreditation is necessary to be an ERISA §3(38), an adviser in that space or interested in that space may seek accreditation from the Centre for Fiduciary Excellence (CEFEX) to stand out in the marketplace.

What other ways are there for ERISA §3(38) fiduciaries to minimize their liability?

While often overlooked, it's important that those seeking the §3(38) space should have the liability policies in order to protect their interest. That is why you should contact your property & casualty broker to make sure you are covered if you decide to become an ERISA §3(38) fiduciary. Most policies that I have seen have had that endorsement for firms engaged in a §3(38) practice. If you are seeking coverage, my property & casualty broker, Joe Caruso from Arc Excess & Surplus is one of the leading experts when it comes to adviser and fiduciary protection.

Do advisers charge more for offering ERISA §3(38) fiduciary services?

Advisers don't offer the service because they are such wonderful people; the assumption is that increased liability will net a much larger fee. However, the difference isn't as much as you may think.



Should all plans use an ERISA §3(38) fiduciary?

In the retirement plan industry, there is not one thing that is a good fit for everyone. So while some plans could use the services of a fiduciary, many plans do not. This is usually based on the plan sponsor's staff and whether they have the sophistication to run the fiduciary process of the plan. So it would be wise for the adviser to judge which prospect may be better served by using an ERISA §3(38) fiduciary and which are not. Remember, offering a §3(38) service is just one option you offer because not everyone needs that level of protection.

Who can help me as an ERISA §3(38) fiduciary?

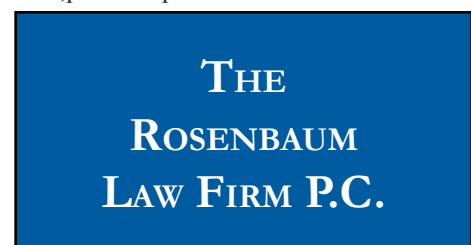
I always say you are only as good as your team. Find a couple of third party administration firms that you can rely on for assistance in prospecting clients, as well as a good ERISA attorney (cough, cough) who

can help you draft a service agreement and to help you steer clear of the liability waters.

Should I partner up with an ERISA §3(38) fiduciary or go it alone?

In Star Wars, you could only become a Jedi Knight if you were an apprentice. Perhaps the best way to develop your practice on your own is to partner up with an ERISA §3(38) fiduciary and learn best practices from a fiduciary master. Then when you learn enough, you can go out on your own. There are quite a few solid ERISA §3(38) fiduciaries that have built their practices by working with advisors seeking for their guidance. Fiduciaries such as James Holland from Millennium Investment & Retirement Advisors; Loring Ward, and Advisors Access are just a few that have developed a practice in working with advisors around the country who seek out a §3(38) for both

assistance and guidance. The worst thing you can do as an ERISA §3(38) fiduciary is to be ill-prepared to handle the role. So if you feel that you aren't up for the task, partner up with someone that is.



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The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557

<http://www.therosenbaumlawfirm.com>
Follow us on Twitter @rosenbaumlaw