ERISA 3(21) and 3(38) Fiduciary Services for Retirement Plans

Business owners have a lot of responsibilities. One of the most nebulous may be their fiduciary responsibility for the selection of investment options within their company's qualified retirement plan. While the Employee Retirement Income Security Act of 1974 (ERISA) guidelines identify two different types of investment fiduciaries in sections 3(21) and 3(38), it is often difficult for plan sponsors to determine which option is the best fit for their unique situation.

Many business owners find that it is in their best interests to partner with a retirement professional who can provide assistance with a variety of plan- and participant-related activities, including administration, education and general consultative services. Some plan sponsors feel confident enough to make fiduciary investment decisions without assistance. But it is not uncommon for a sponsor to feel uncomfortable with bearing these responsibilities alone, and to wish to transfer some or all of the related liability to a qualified investment professional. However, it is important to first understand the differences between the 3(21) and 3(38) fiduciary assistance that is available from financial professionals.

Below are three common fiduciary roles as they relate to investment selection. As listed, they progressively lower plan sponsor involvement and responsibility, while increasing the level of engagement of the financial professional.

- **No Assistance** – In this scenario, the plan sponsor makes the selection of investment options to include in the plan without outside help. The plan sponsor acts as sole 3(21) investment fiduciary to the plan and takes on full liability for the investment options chosen.

- **3(21) Co-fiduciary** – A business owner may choose to hire a registered investment adviser (RIA) to provide plan investment advice (among other potential plan services). In this type of arrangement, the adviser shares fiduciary responsibility with the plan sponsor, and may provide investment analysis, assistance with the development of an investment policy statement or other means of selecting appropriate investment options. However, it is ultimately the plan sponsor's decision as to which investment options to include in the plan. It is important to note that this type of arrangement does not remove a plan sponsor's fiduciary responsibility or liability for the selection and monitoring of investment options.

- **3(38) Investment Manager** – The business owner may opt to hire an RIA to act as a 3(38)-investment manager. This gives the adviser the authority to select and replace investment options in the plan at their discretion, with or without consulting with or receiving the approval of the plan sponsor. With this type of agreement, the plan sponsor transfers responsibility and accountability for the selection of the plan investment options to the RIA, but the plan sponsor retains responsibility for selecting and monitoring the 3(38)-investment manager.

The role of the plan sponsor is critical to a retirement plan's success. Selection of the investment options is very important, both in its relation to participants' ultimate ability to properly prepare for their retirement, and because it helps employers manage their liability. It is paramount that business owners recognize the significant differences between the above roles. Your BQS Advisors financial professional stands ready to discuss your situation, address your concerns and help you choose the right solution for your retirement plan needs.

About RPAG

RPAG™ is an exclusive alliance of independent retirement financial professionals and institutions inspired to create successful outcomes by protecting plan fiduciaries and engaging plan participants. RPAG supports thousands of financial professionals across the U.S., who collectively serve over 65,000 plan sponsors, \$700+ billion in assets under influence, and more than 6 million plan participants.

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