Enriching Lives through
Smarter Investing

FIDUCIARY BRIEF

3(21) vs. 3(38): Who's Actually on the Hook for Your Plan's Investments?

Every plan sponsor is a fiduciary the moment they sign the plan document. The question isn't whether you carry liability — it's how much of it you're carrying alone.

WHY IT MATTERS NOW

ERISA fiduciary litigation shows no sign of slowing — 155 class actions were filed against plan sponsors in 2025 alone, with excessive-fee and imprudent-investment claims remaining the most common theories. Yet many sponsors still don't know whether their advisor relationship is actually reducing their personal liability, or just adding a layer of advice on top of it. The difference comes down to two ERISA sections: 3(21) and 3(38).

THE CORE DIFFERENCE

	3(21) Co-Fiduciary	3(38) Investment Manager
Authority	Recommends changes; sponsor approves and implements them	Full discretionary authority to select, monitor, and replace investments
Liability	Shared — sponsor retains responsibility for final decisions	Shifted — sponsor delegates investment-selection liability to the manager
Sponsor's role	Active: reviews and signs off on every recommendation	Oversight only: monitors that the manager is doing its job prudently
Best fit	Sponsors with an engaged committee who want to stay involved	Sponsors who want to minimize time and liability exposure

WHAT THIS MEANS FOR YOUR PLAN

- Neither designation fully eliminates your liability. Even with a 3(38) manager in place, you're still responsible for prudently selecting and monitoring that manager — and documenting how you did it.
- A 3(21) relationship keeps you in the decision chain on every investment change, which means your committee's meeting minutes and documentation matter more, not less.
- The right structure depends on your committee's bandwidth and expertise, not just your appetite for risk — a disengaged committee with a 3(21) advisor can be riskier than an engaged one with full discretion.

CWM'S TAKE

Most sponsors have never had someone walk through their actual advisor agreement and confirm, in writing, which fiduciary role is being served — or whether it's being served at all. That single question is often the most revealing part of a fiduciary review.

Not sure which role your current advisor plays? A complimentary CWM Fiduciary Benchmarking Study will confirm it.

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