GREAT GRAY
TRUST COMPANY

PRIMER

The 3(21) and 3(38) Roles

Choosing the Right Fiduciary, Confidently



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INTRODUCTION

How a plan sponsor delegates investment fiduciary responsibility shapes its workload, where liability sits and how the advisor relationship works day to day. Making that decision prudently starts with understanding the options ERISA provides. For investment advisors, these options are generally covered under ERISA Sections 3(21) and 3(38). As ERISA litigation reaches plans of all sizes, more plan sponsors are asking their investment advisors to explain the practical difference between the two roles, and which better fits their needs. This primer explains each role, which responsibilities shift to the investment advisor, and which remain with the plan sponsor, and how the growing use of collective investment trusts (CITs) is shaping the conversation.



The Two Fiduciary Roles

1. 3(21) Investment Advisor: Plan Sponsor Decides

Under ERISA Section 3(21), the investment advisor ("advisor") serves as a fiduciary with the plan sponsor. The main responsibilities are recommending investment options, performing investment research and monitoring, and providing periodic investment portfolio reporting (performance, benchmark comparisons, etc.) to the retirement plan committee on a periodic basis. The plan sponsor or retirement plan committee reviews each recommendation and retains final authority to accept, reject or modify. The 3(21) advisor does not have any discretionary control over investment decisions.

BENEFITS

Keeps the plan sponsor directly involved in every decision, preserves internal control over the investment lineup, and gives the advisor a recurring, visible seat in the plan's investment decision-making process.

CONSIDERATIONS

The plan sponsor retains a greater share of liability for the decisions it makes and should maintain a documented process in place to support those decisions.

2. 3(38) Investment Manager: Manager Decides

Under ERISA Section 3(38), the investment manager ("manager") accepts discretionary authority to select, monitor and replace plan investments. The manager, not the plan sponsor, makes and implements the decision, and assumes fiduciary responsibility for plan investment decisions.

BENEFITS

Shifts a defined, substantial share of fiduciary liability for fund selection and monitoring from the plan sponsor to the manager.

CONSIDERATIONS

Delegation of discretionary authority does not eliminate the plan sponsor's fiduciary duty to prudently select and monitor the 3(38) manager.

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THE STANDARD THAT DOESN'T CHANGE

Regardless of which investment fiduciary role is selected by the plan sponsor, the investment advisor is subject to the same ERISA prudency standards. Serving as a 3(38) manager may require different credentials than serving as a 3(21) advisor: the distinction is in who has discretionary authority over the retirement plan investment decisions. The specifics of how the investment advisor meets their fiduciary duties should be clearly outlined within the Investment Policy Statement.

3(21) vs. 3(38) at a glance

	3(21) INVESTMENT ADVISOR	3(38) INVESTMENT MANAGER
DISCRETIONARY AUTHORITY	Provides recommendations; plan sponsor/committee makes the final decision. No discretionary authority.	Makes all discretionary decisions regarding retirement plan investments.
FIDUCIARY LIABILITY	Shared; Advisor is responsible for the prudence of its advice; plan sponsor remains responsible for the investment decision it makes.	Assumes liability for fund selection; plan sponsor retains liability for selecting and monitoring the manager.
SPONSOR INVOLVEMENT	Reviews and decides on each recommendation; selects and monitors the advisor.	Selects and monitors the manager; makes no individual investment decisions.
OVERSIGHT STANDARD	ERISA prudent-expert standard.	ERISA prudent-expert standard.
QUALIFICATION	Fiduciary status arises from providing investment advice to the plan for a fee.	May be an RIA, bank or insurance company, and acknowledge fiduciary status in writing.
DOCUMENTATION	Plan sponsor documents its rationale for accepting or rejecting advisor recommendations and its monitoring of the investment and advisor.	Plan sponsor documents its process for selecting and monitoring the manager.
TYPICAL MOTIVATION	Plan sponsor retains investment decision-making discretion and control; ongoing advisory support for investment monitoring.	May reduce fiduciary liability exposure for investment decisions; professional discretionary plan investment management.

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CITs and the growth of 3(38) platforms

The growth of CITs has coincided with the rise in fiduciary outsourcing. Today, 77% of defined contribution (DC) plans offer CITs, up from 48% in 2012. CIT assets have grown to $8.1 trillion, outpacing the broader DC market.[1,2] In target date strategies, CITs hold nearly half (49.6%) of assets, surpassing mutual funds as the leading vehicle. This trend parallels broader adoption of outsourced fiduciary services, as more plan sponsors turn to 3(38) investment managers to select, implement and monitor CIT-based strategies and target date solutions.

Why CITs Fit the 3(38) Model

Many advisors who adopt discretionary management standardize the investment options they use across plans. CITs fit that model well:

- **Built for retirement.** CITs are designed for the institutional retirement market.
- **Lower costs.** A 3(38) manager implementing a common lineup across many plans may benefit from CITs' typically lower administrative and distribution costs relative to mutual funds.
- **Easier to evaluate.** CIT trustees have also made CITs easier to evaluate across multiple plans. Ticker symbols, fund fact sheets, and standardized disclosures reduce the due diligence lift for a manager overseeing multiple plans.

What's Driving CIT Adoption

Practitioners point to more than one driver:

- **Cost.** CITs typically carry lower fees than mutual funds of similar composition and pricing can often be negotiated.
- **Flexibility.** CITs can be customized, including target date series and offer broader asset class access.
- **Efficiency.** A 3(38) manager implementing a standardized, CIT-based lineup across many plans may act faster and more consistently than one negotiating recommendations plan by plan.
- **Governance.** As ERISA litigation has extended beyond the largest plans, sponsors and their advisors are scrutinizing the cost and governance of every vehicle in the lineup. Because CITs are not registered investment products, a prudent, documented selection and monitoring process matters as much as it does for any other vehicle.

How Advisors Can Position Either Approach

The most effective advisor conversations frame 3(21) and 3(38) as different governance models, not a hierarchy:

- **3(21) Advisor:** The plan sponsor retains investment decision-making authority, with the advisor's support.
- **3(38) Manager:** delegates that responsibility to a discretionary fiduciary and frees the advisor to focus on plan design, participant outcomes, and governance education.

As demand for outsourced fiduciary services continues to grow, advisors can help plan sponsors evaluate which approach best aligns with their governance structures, resources and desired level of involvement. Regardless of structure, success depends on maintaining a prudent, well-documented fiduciary process.

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CONCLUSION

Neither 3(21) nor 3(38) is inherently the right answer; the right structure depends on an individual plan sponsor's needs, plan complexity and risk profile, participant size, plan asset level, existence and level of involvement of any fiduciary committees. What matters most is that the choice is made prudently, documented clearly, and revisited periodically. As CITs become a larger part of the 3(38) conversation, advisors who can speak fluently to both the fiduciary mechanics and the underlying investment vehicles will be best positioned to guide that decision.

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Why Great Gray Trust Company?

At Great Gray, we believe in — and are driven by — growth. As trustee, Great Gray maintains ultimate fiduciary authority over the CIT funds it oversees, bringing the same discipline and transparency that 3(38) managers and 3(21) advisors alike rely on in fulfilling their fiduciary duty for their clients.

Always listening, learning, and innovating on top of a long-standing reputation for fiduciary strength and expertise. Creating what's next — for CITs and beyond — from a critical foundation of discipline and trust. Empowering our industry, clients, and ourselves to grow confidently.

DISCLOSURES

This material is for informational purposes only and does not constitute investment, legal, or ERISA advice, and does not make a recommendation as to any specific fiduciary structure, investment manager, or investment vehicle. Plan sponsors and advisors should consult their own legal counsel regarding the selection of a 3(21) or 3(38) arrangement and their respective obligations under ERISA.

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Sources:

1. Cerulli Associates, *The Cerulli Report: U.S. Defined Contribution Distribution 2026*
2. Callan Institute's 2026 Defined Contribution Survey of plan sponsors.

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