

# The Word On What 401(k) Plan Sponsors May Need

By Ary Rosenbaum, Esq.

The greatest thing about the Internet is the distribution of information that people used to have to rely on an Encyclopedia or other reference materials to find out information on a specific topic. This is so true of retirement plans and plan sponsors finally understand their role as plan fiduciaries thanks to information on the Web and in articles like these are eye-openers for plan sponsors in managing their plan. Thanks to the web and through great materials by plan providers, plans sponsors are finally understanding what they need to manage their 401(k) plan. Too many don't, so this article is talking about things that 401(k) plan sponsors want or may need in running their plan.

## They're all talking about it

I adore my wife and one of the funniest things she says is "they're all talking about it". That usually means that she has found people on Facebook talking about a specific product that everyone is raving about it. Word of mouth is a very big thing and is one of the most effective ways of advertising. 401(k) plan sponsors are finding what would be some great ways to effectively manage their plan. Thanks to litigation against plan sponsors, effective plan provider marketing, and media coverage, they're all talking about the effective ways a plan sponsor can do to limit their liability as a plan sponsor.

## The need for a financial advisor

There are so many 401(k) plans out there that still don't have a financial advisor on their plan. It's hard to believe, but it's true.

While individuals can certainly invest on their own and maybe don't need a financial advisor if they have some knowledge on how markets work, but a plan sponsor with employees in their plan can't afford to do that. Plan sponsors can be reckless with their own money, but they can't afford to be reckless with the money of their employees. That's because they also serve as a plan fiduciary and exercise with the highest duty of care. So it makes no sense for plan sponsors with a limited background in investments

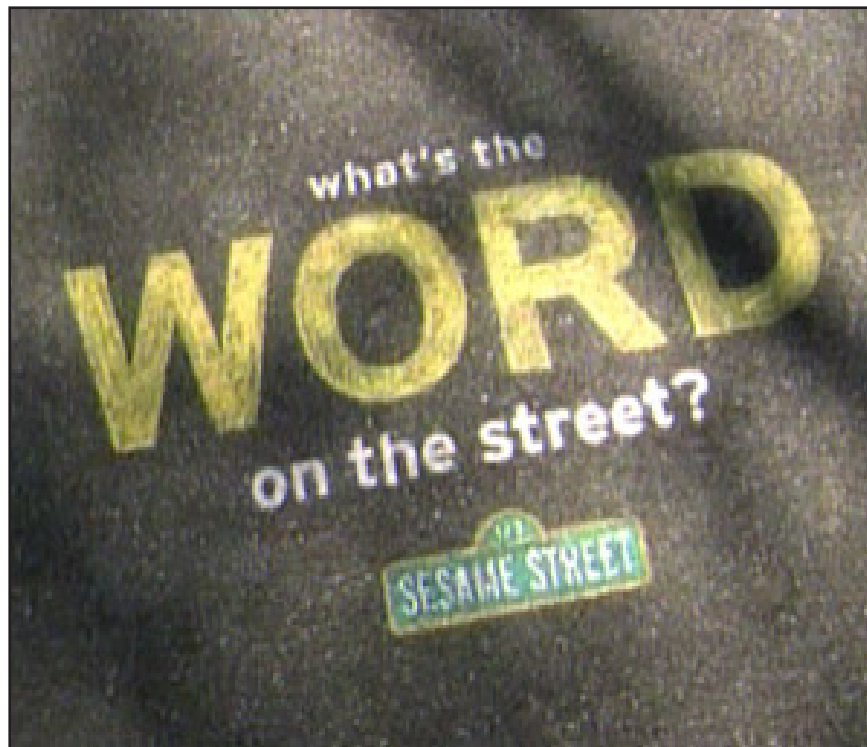
brokers will at least serve in a co-fiduciary capacity which makes they have to make decisions that are in the best interest of the plan participants and may make them partially liable for anything they advise or recommend in terms of investment selections and managing the fiduciary process of the plan. The reason I recommend hiring a plan advisor that serves in a fiduciary capacity isn't about liability, it's about picking an advisor that puts the needs of the plan participants first and their payment a distant second or third.

When a plan sponsor picks an advisor that is a fiduciary, you know the investments selected are in the best interest of the plan participants and not because they give an advisor a bigger trail/fee.

## The need for an advisor who does more than selects investments

There are so many financial advisors out there that tout their capability of selecting plan investments and managing the fiduciary process of the plan. They'll talk a lot about how they help plan sponsors by helping develop an investment policy statement

(IPS). While these good fiduciary practices are important, they are just a small piece of where a plan sponsor's liability can be exposed. Quite honestly, plan sponsors of small to medium-sized plans aren't going to be targeted for class action lawsuits or a lawsuit because the plan didn't have an IPS, they are likely more prone to liability under a government audit for plan compliance issues. Plan sponsors need a financial advisor that understands how



to handle the investment side of their plan.

## The need for an advisor to act in a fiduciary capacity

I'm an ERISA attorney and I can't make heads or tails about what the Department of Labor (DOL) is doing with the fiduciary rule, but all I will explain is that plan sponsors should select a financial advisor who will serve in a fiduciary capacity. Registered investment advisors and some

401(k) plans work and/or find the right people who do. Plan investments are just a small part of what makes a 401(k) plan work or not work. They don't need advisors who are just financial advisors, they need advisors that will also serve as plan consultants. Plan sponsors hiring an investment advisor that just concentrates on the plan investments is like hiring a car mechanic that just checks under the hood. Like everything under the hood, there are more working components to a 401(k) plan that just focuses on investments. So plan sponsors don't need an advisor who just checks



under the hood, they need an advisor that offers a bumper-to-bumper protection level of service to plan sponsors. What does bumper-to-bumper protection? Offering a service that helps plan sponsors manage all aspects of the plan which would include vetting the other plan providers, reviewing the work of other plan providers, educating plan participants, and getting other plan providers such as an ERISA attorney when the situation warrants it. Most plan advisors aren't just financial advisors, they are like an ombudsman, Rabbi and Priest wrapped together. Plan sponsors need an advisor who will act as the guardian of their plan and be able to cover all of the bases.

**Determining whether a 3(38) fiduciary is something they need**

One of the growing parts of the business is financial advisors offering an ERISA §3(38) fiduciary service. The §3(38) designation is from a section of ERISA where the advisor is considered a defined investment manager. Under the ERISA §3(38) model, the financial advisor has full discretionary control over the fiduciary process of the plan. That means that the advisor takes control over all the aspects of the fiduciary process of the plan that includes developing an IPS, picking investment options, and providing investment education or advice to plan participants. By assuming the control, the §3(38) fiduciary also assumes the liability that goes with it. While the ERISA §3(38) fiduciary does assume

the liability connected with the fiduciary process, the plan sponsor can still be liable if they hire an incompetent fiduciary, especially one with the financial scruples of Bernie Madoff. For many plan sponsors, allowing an advisor to serve in a §3(38) capacity is a welcome relief because it takes work off their plate along with the liability that comes with it. However, for many plan sponsors, they may be so on top of their duties as a plan fiduciary, they don't need that extra level of service and protection that a §3(38) fiduciary provides. Plan sponsors should consider whether an ERISA §3(38) fiduciary is the right fit for them.

**Determining whether a 3(16) administrator is something they need**

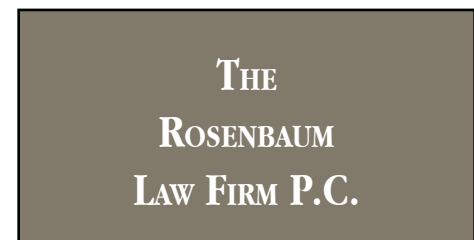
Not wanting for advisors to have a monopoly on ERISA fiduciary services, third-party administrators (TPAs) have decided to enter the fiduciary market too. What many plan sponsors don't realize, most plan headaches come from the incompetent work of inferior TPAs. What they also don't realize is that despite that it's the inferior TPAs that make mistakes; it's the plan sponsor that is on the hook for liability for fixing these errors. So how does a plan sponsor get out of the liability in dealing with the day to day administration? They can hire an ERISA §3(16) plan administrator that becomes the named plan administrator and assumes the liability that goes with it. The §3(16) administrator can be a TPA or another provider (for example, I'm one) and can be an effective way to mini-

mize liability because the plan sponsor is hiring experts to review the administration and compliance end of the plan. Like with the §3(38) fiduciary, a §3(16) administrator isn't something that every plan sponsor needs because the extra service certainly comes with an extra fee. Plan sponsors should consider whether an ERISA §3(16) administrator is the right fit for them.

**Realize a TPA is more than just a fee**

Finding the wrong TPA is what causes most of the legal and compliance headaches that a small to medium-sized

plan sponsor might face. So it's important for plan sponsors to understand that finding the right TPA to competently handle the administration and compliance components of the plan are necessary to keep the plan out of trouble. So plan sponsors need to stop thinking of a TPA as just a fee and just finding the cheapest TPA they can find. So a plan sponsor needs to find the right TPA and they need to remember that picking the cheapest TPA isn't required, they just have to make sure the fee being charged is reasonable. Plan sponsors need to realize the role of the TPA and finding a competent one, they are more than just a price point.



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