IP [PLAN ADVISORS]

Choosing the Right Type of Investment Assistance-
To Have or Not to Have Fiduciary Advice

By Kimberly Shaw Elliott, JD, LLM, MBA
President and ERISA Counsel

Plan sponsors often need help selecting the investment options for a plan so they may wish to engage professional assistance. Choosing what type of help may seem like a confusing task. A quality service provider may bring extra value to a relationship by educating a plan sponsor about what types of guidance are available and what impact each type may have on the sponsor's own fiduciary liability.

There are three traditional models for delivering investments options to retirement plans: registered representatives, investment advisors and investment managers. Each arrangement offers a different level of service and protection to plan fiduciaries and different compensation rules apply to each model.

Registered Representative

A registered representative of a broker dealer provides investment education that assists the plan sponsor to make the investment choices for the plan. The plan sponsor retains full discretionary authority to select the plan investments and uses information gained from the registered representative to guide his or her own decisions. Since no investment advice is given and no investment authority is granted, the registered representative is not a plan fiduciary and is not held to a fiduciary standard of care. He or she is not bound to avoid conflicts of interest.

Since a registered representative is not a fiduciary, he or she may receive commissions and other charges assessed against each transaction, whether a buy or a sell. These commissions may vary, based upon the investment choices actually made. Revenue sharing is permissible and is a means to compensate the registered representative for continuing to service an account after the original commissions have been earned.

Investment Advisor

An investment advisor representative ("IAR") delivers services on behalf of a registered investment advisor. As we learned last month, an IAR gives investment advice and is a fiduciary as defined in Section 3(21) of ERISA and under the Investment Advisers Act. When using a 3(21) investment advisor, the plan sponsor retains investment authority but uses the recommendations made by the advisor when selecting the investments. The plan sponsor and the advisor therefore share the fiduciary responsibility with the sponsor.

An Investment advisor receives an annualized fee, based upon the value of the assets in the program. This level fee is payable each period, regardless of the number of transactions actually processed. Because advisors give investment advice, they are fiduciaries to the plans. As such, their compensation cannot vary with the investments selected because it would be considered a conflict o f interest to use a fiduciary position to influence one's own compensation. The conflict is removed if the compensation remains level, regardless of what investment is selected.

Investment Manager

Finally, plan sponsors might also select an investment advisor and grant that advisor discretionary authority to make the plan investments him/herself. If a plan sponsor properly appoints and monitors the activity of an investment manager, as defined in Section 3(38) of ERISA, the sponsor can be relieved of fiduciary responsibility for the investment choices made by the manager. The properly appointed investment manager bears the fiduciary responsibility alone.

Since a 3(38) investment manager exercises investment discretion, it is a fiduciary and follows the same level compensation scheme as a 3(21) investment advisor, described above.

How to choose?

A plan sponsor, in considering what type of assistance to seek, must assess his or her own comfort level and skills and select the distribution model that best fits his or her own needs.

Registered Representative
Choose this delivery method if the sponsor is confident about making all the investment decisions, with the help of information from a professional, and having sole responsibility for those decisions.

Investment Advisor
This is a good choice for the sponsor who wants to retain the decision making authority but needs some guidance and specific investment recommendations. The sponsor may want someone else to bear part of the investment responsibility. He or she must be prepared to pay a fee each and every year, regardless of how the investments perform.

Investment Manager
This option provides the most protection to the plan sponsor because it also involves the most relinquishment of control. This is not for the do-it-yourselfer.

Here is a summary of the attributes of each model:

Attributes of Three Models to Deliver Investments to Retirement Plans

	Registered Representative	Investment Advisor	Investment Manager
Fiduciary Status	Is not a fiduciary	Becomes fiduciary by actions, such as providing advice; discloses fiduciary status in writing	Appointed by plan fiduciary in writing; discloses fiduciary status in writing
Standard of Care	May only provide information about products that are suitable to the plan and plan participants	Must put the best interest of the plan and plan participants ahead of his/her own	Must put the best interest of the plan and plan participants ahead of his/her own
Status of Liability	Has no responsibility to make- or advise about- plan investments	Shares investment responsibility with the plan fiduciary	Shifts investment authority from the plan fiduciary to him/herself
Compensation	Commissions and transaction based fees that can vary with the investment selected	Typically annualized fee, based upon assets under advisement. Cannot receive additional compensation such as revenue sharing.	Typically annualized fee, based upon assets under advisement. Cannot receive additional compensation such as revenue sharing.

About the author:

Kim Shaw Elliott is President of IFP Plan Advisors, a division of Independent Financial Partners ("IFP"), a registered investment advisor. Kim helps investment advisors and their plan sponsor clients successfully navigate the complex rules founded in ERISA/employee benefits, securities law, broker dealer regulation and tax. She defines IFPs risk management strategies for retirement programs, provides thought leadership and training, and delivers solutions-based guidance to support IFP's advisory business. She also serves as the firm's ERISA counsel.

A three-time graduate of Washington University in St. Louis, Kim earned her JD, LLM, and executive MBA there. Her bachelor's degree in Mass Communication- Radio Television was awarded by Southern Illinois University at Edwardsville. She holds the Fellow, Life Management Institute and Associate- Customer Service designations. Kim is a frequent speaker on employee benefits and securities-related topics.