An ERISA Section 3(38) Fiduciary

ERISA provides that a plan sponsor can delegate the significant responsibility (and therefore significant liability) of the selection/monitoring/replacing functions to an ERISA section 3(38)-defined "investment manager" who, upon delegation, then becomes an ERISA section 405(d)(1)-defined "independent fiduciary." An ERISA section 3(38) fiduciary can only be (a) a bank, (b) an insurance company or (c) a registered investment adviser (RIA) subject to the Investment Advisers Act of 1940. This means that a stand-alone broker-dealer, for example, cannot be an ERISA section 3(38) fiduciary. If a broker-dealer has dual registration (that is, as a broker-dealer and an RIA), however, the RIA wing of this entity has the ability to become an ERISA section 3(38) fiduciary.

An ERISA 3(38) fiduciary has ERISA legally defined "discretion" that makes it a decision-maker. This means that a 3(38) fiduciary actually makes decisions for which it is legally culpable (and for which the plan sponsor is no longer legally culpable). An ERISA 3(38) fiduciary decides what investment options such as stand-alone mutual funds or model portfolios should be placed on a plan's menu, whether to remove them from the menu and, if it does remove them, what investment options will replace them.