Session will advise advisers on marketing their services as a 3(38) fiduciary including legal and insurance considerations.

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Professional Liability Insurance

Impact Analysis of New Regulations

- Increased DOL enforcement
- Disclosures create a roadmap for regulators and potential plaintiffs
- Unless an exemption applies, potentially conflicted advisers (unlevel 12(b) fees, broker-dealer revenue sharing, affiliated funds, etc.) will have to limit investment-related functions to monitoring and education, and plan sponsors will be on notice of such limitations
- Bottom-up pressure on fees and services from participants
- Potential issues with solicitor programs and TPAM revenue sharing under proposed definition
- Potential prohibited transaction exposure for fiduciaries who cross-sell and capture IRA rollovers

Cross-Selling and Prohibited Transactions

	Most Protection*	Proceed with Caution*	Most Risk
Is the Adviser rendering investment advice to the Plan Sponsor?	No. Individualized advice is not provided to the plan; the adviser provides only education and non-fiduciary support.	Yes. Individualized advice is provided to the plan sponsor.	
Is the Adviser rendering investment advice to Plan Participants?	No. Adviser's role is limited to investment education and standardized materials are used. * For maximum protection, consider "outsourcing" advice to a third party.	No. Adviser's role is limited to investment education and standardized materials are used. * For maximum protection, consider "outsourcing" advice to a third party.	Yes. The adviser should refrain from capturing rollovers or engaging in other cross-selling activity and existing arrangements should be examined for compliance.

Filling the Advice "Gap"

- ERISA 402(c)(3) allows Plan Fiduciaries to delegate responsibility for managing, acquiring and disposing of plan assets (e.g., the plan's DIAs) to an "investment manager" that meets the requirements of Section 3(38) of ERISA.

  The term "investment manager" means any fiduciary (other than a trustee or named fiduciary) that has the power to manage, acquire, or dispose of any asset of a plan; is registered as an investment adviser, bank or certain types of insurance companies; and has acknowledged in writing that he is a fiduciary with respect to the plan.

- ERISA 405(d)(1) provides that if an investment manager is properly appointed, then "no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager."

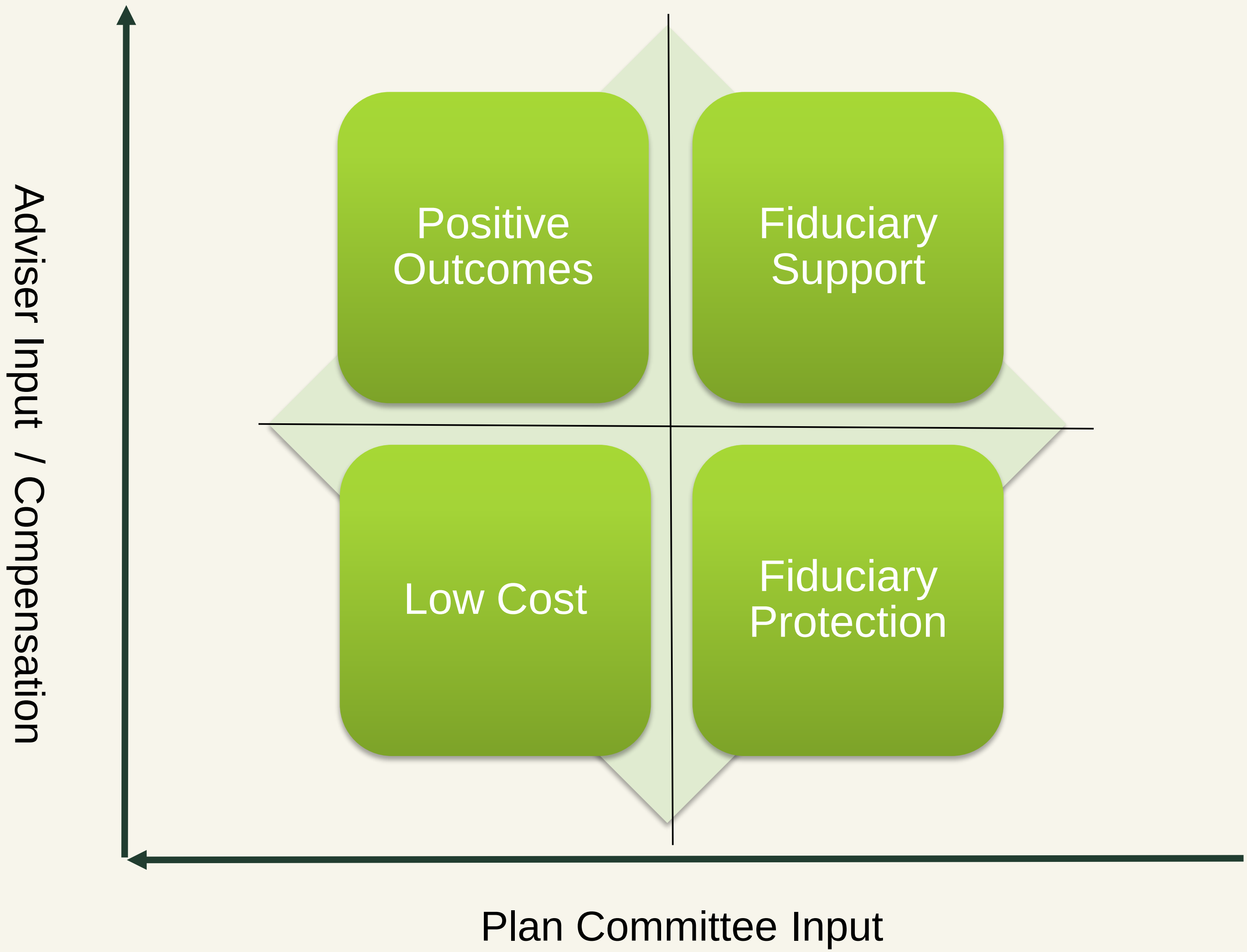
  In other words, so long as the plan fiduciaries prudently select and monitor a 3(38) manager, they are not liable for any losses in investments that are managed by the 3(38) manager.

Fiduciary v. Non-Fiduciary Services

Examples of Fiduciary Services	Examples of Non-Fiduciary Services

• Investment advice to plan sponsors
  • Discretionary
  • Non-discretionary
• Investment advice to participants
  • Discretionary
  • Non-discretionary
	• Investment education to plan sponsor;
	• Committee support to assist plan sponsors in understanding their duties;
	• Assistance with selection and monitoring of service providers;
	• Vendor benchmarking and RFP support;
	• Investment education and enrollment support to plan participants;
	• Fund research; and
	• Monitoring services.

Value vs. Cost Analysis



Opportunities to Differentiate

PRI Non-Fiduciary Services

- Disclosure Support – assisting sponsors with selection and monitoring of service providers through education, process, benchmarking, and vendor coordination;
- Participant Inquiry Support – risk management through education and process;
- Committee Support – assist in the formation of effective committees beyond investment (only through education,) process and document retention;
- Outcome-orientated Education – driving and reporting on participant successes through education, retirement income planning, monitoring, and reporting; and
- Exam Readiness Support – introduction of exam ready approach to fiduciary file maintenance through education, process and mock exams.

Additional Resources

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ERISA 3(38)

- **How does the definition of “Fiduciary” impact my insurance coverage and client contracts as defined by ERISA 3(38) ?**

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ERISA 3(38)

- Your Professional Liability policy may address fiduciary coverage in one of four ways:
- Excluded
- Silent
- Limited
- Affirmative

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ERISA 3(38)

- (This policy does not apply to) The liability of others assumed by any of you (the advisor) under any contract or agreements unless the liability would have attached to you “the advisor” even in the absence of such contract or agreement.

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ERISA 3(38)

- The liability of others assumed by any of you (the advisor) under contract or agreement except for any written fiduciary agreements or contracts given to clients other than you :the advisor" for a fee unless such liability would have attached to you 'the advisor" even in the absence of such agreement or contract

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Mr. Sutherland is a regular presenter on risk management and insurance for Investment Advisors and other Financial Professionals. He speaks annually at conferences for The Center for Due Diligence and fi360, both nationally recognized associations for Investment professionals. He has further served on several national panel discussions regarding best practices, claim mitigation and understanding E&O insurance for Investment professionals.

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