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# A Perspective on 401(k) Issues and Pitfalls in 2013

## Marcia S. Wagner – Managing Director

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**WAGNER LAW GROUP**  
A PROFESSIONAL CORPORATION

***MARCIA S. WAGNER** is a specialist in pension and employee benefits law, and is the principal of The Wagner Law Group, one of the nation's largest boutique law firms, specializing in ERISA, employee benefits and executive compensation matters, which she founded over 16 years ago. A summa cum laude and Phi Beta Kappa graduate of Cornell University and a graduate of Harvard Law School, she has practiced law for over twenty-six years. Ms. Wagner is recognized as an expert in a variety of employee benefits issues and executive compensation matters, including qualified and non-qualified retirement plans, all forms of deferred compensation, and welfare benefit arrangements.*

*Ms. Wagner was appointed to the IRS Tax Exempt & Government Entities Advisory Committee, ended her three-year term as the Chair of its Employee Plans subcommittee, and received the IRS' Commissioner's Award. Ms. Wagner has also been inducted as a Fellow of the American College of Employee Benefits Counsel. For the past five years, 401k Wire has listed Ms. Wagner as one of its 100 Most Influential Persons in the 401(k) industry, and she has received the Top Women of Law Award in Massachusetts and is listed among the Top 25 Attorneys in New England by Boston Business Journal. Ms. Wagner has written hundreds of articles and 13 books about retirement and benefit plans. Ms. Wagner is widely quoted in such publications as The Wall Street Journal, Financial Times, Pension & Investments, and more, as well as being a frequent guest on FOX Business, CNN, Bloomberg, NBC and other televised media outlets.*

*She resides in Massachusetts with her husband, Craig, and their four wonderful children.*

## Greg Klein, CPA - Partner

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*During his 25 years of experience in public accounting, Gregory Klein has developed a specialty in financial statement audits, tax planning, and consulting and advisory services for clients across a wide array of industries including Employee Benefit Plans, Entertainment, Technology, and Nonprofit Organizations. Greg serves as one of Miller Kaplan's primary 401(k) plan audit partners, helping clients comply with their annual benefit plan audit requirements and assisting with navigating the technical complexities of operating a qualified plan.*

## Brad M. Barrett – VP, Wealth Management & Director of Retirement Plan Solutions

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*Mr. Barrett is the Vice President of Wealth Management and Director of Retirement Plan Solutions at One Capital Management, LLC. He oversees OCM's Retirement Plan Solutions which provides essential research, analysis, and strategy recommendations for high-end business and corporate clients on their retirement plans. His financial planning knowledge encompasses a holistic, hands-on approach with respect to each of his clients' goals and objectives.*

*Mr. Barrett earned an Economics and Political Science degree from Arizona State University. He is currently working towards his Masters in Financial Planning from California Lutheran University.*

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## Overview of ERISA

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- *Tax-Qualification Requirements*
  - *Title II enforced by IRS*
  - *Fiduciary Rules for Plan Sponsors and Advisors*
  - *Title I enforced by DOL*
- *Highly Technical Area of Law*

## Recent Developments in ERISA

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- *408(b)(2) Fee Disclosures*
  - *Effective July 1, 2012*
  - *Covered Service Providers*
- *Participant-Level Fee Disclosures*
  - *Effective August 30, 2012 for CY Plans*
  - *Annual and Quarterly Disclosures*

## Overview of Advisors

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- *Non-Fiduciary Advisors*
  - *Brokers subject to suitability standards*
- *3(21) Fiduciary*
  - *Investment Advice Fiduciary*
- *3(38) Fiduciary*
  - *Investment Manager*
  - *Advantages for Plan Sponsor*

## Plan Operational Issues – Transmittals of Pt Contributions

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- *DOL 15-day (“safe harbor”) rule*
  - *General rule*
  - *“Reasonably segregated” date*
  - *Late transmittals are “prohibited transactions”*
  - *Funds should be remitted as soon as feasible*
  - *DOL considerations*
  - *Audit implications*



## Reconciliations

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- *Payroll adjustments*
- *Remote or multiple locations*
- *Employer match differences*
- *Non-discrimination differences*

## Plan Operational Issues – Consistency with the SPD/Plan Document

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- *Hardship withdrawals*
  - *Proof of financial need and exhaustion of other resources*
  - *Internal control procedures*
  - *Plan document should specify requirements*
  - *Plan management is responsible*
  - *No EE contributions for six months*

## Compensation

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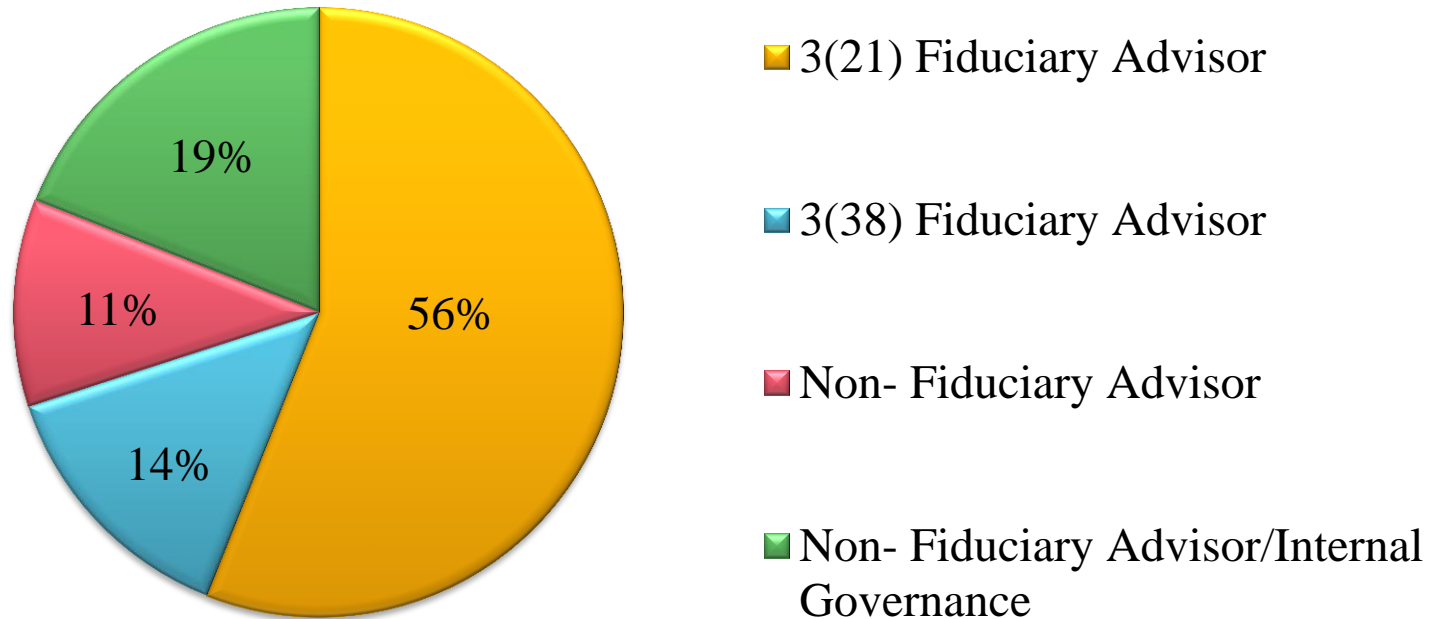
- *Incorrect definition of “compensation”*
- *Can result in ineligible (or shortfall in) deferrals*

## How Best to Oversee Your Retirement Plan's Assets

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- *Non-Fiduciary Advisor vs. 3(21) Fiduciary vs. 3(38) Fiduciary*
  - *Which is most suitable for my plan?*

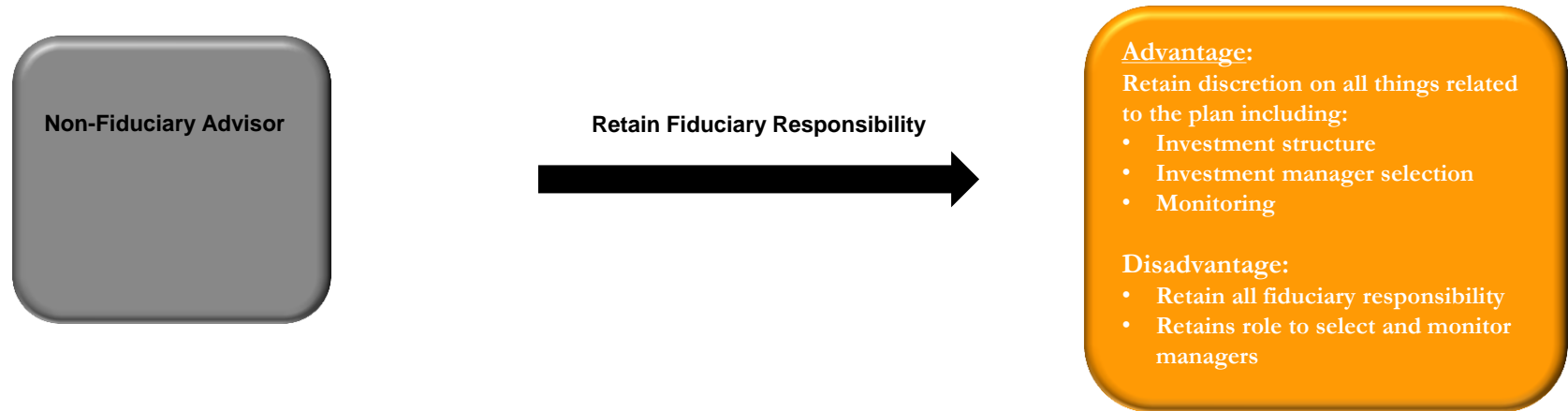
### Plan Sponsor Study



Source: "Trends and Insights Focusing on the Fiduciary Agenda," Retirement Plan Survey 2011, Grant Thornton, Drinker Biddle & Reath, and PlanSponsor Advisors, March 2011, page 5.

## Non-Fiduciary Advisor (Internal Governance)

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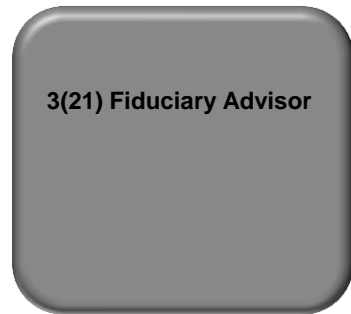


### *Statistics on Plans/Funds Managing their Own Assets*

- *6.6% of Corporate Plans*
- *17.5% of Public Funds*
- *23.4% of State Funds*
- *11.4% of Endowments and Foundations*
- *Average Size of Staff is 7-15 People*

## 3(21) Fiduciary

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Employer Share in Responsibility



Advantage:

Retain Discretion on Investment Structure, Investment Manager Selection, Monitoring

Disadvantage:

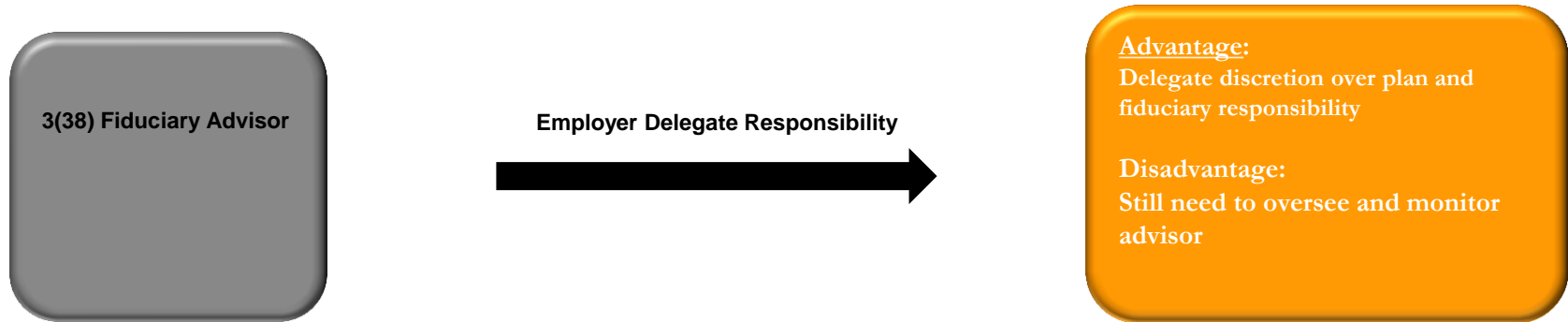
- Retain all fiduciary responsibility
- Still needs to oversee advisor

*Statistics on Plans/Funds using a 3(21) Fiduciary:*

- 83% of Corporate Plans
- 84% of Public Plans
- 85% of Endowments and Foundations

## 3(38) Fiduciary Advisor

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*What does the market place think?*

- *90% of CFO's say "partnering" on non-core functions increases shareholder value*
- *Predicted 13% compound annualized growth rate for "partnering" in the US institutional market through 2015*
  - *In Defined Contribution space, this gain has not been seen to-date*

***Only 7% of Corporate Plans and 3% of Public Plans, Endowments or Foundations are utilizing a 3(21) Fiduciary AND 3(38) Investment Manager***

# Benchmark

Benchmark your plan based on Investment Return, Menu Diversification, Participation, Utilization and overall Efficiency.

[www.onecapital.com/millerkaplan/benchmark/](http://www.onecapital.com/millerkaplan/benchmark/)

The screenshot shows a web browser window with the URL <http://www.onecapital.com/millerkaplan/benchmark/>. The browser's address bar shows the URL, and the page content includes logos for THE WAGNER LAW GROUP, ONECAPITAL MANAGEMENT, LLC, and MKA MILLER KAPLAN ARASE LLP. The main text of the page reads: "We would like to offer a complimentary benchmark study for attending our webinar 'A Perspective on 401(k) Issues and Pitfalls for 2013' on January, 30th at 11:00 AM PST. Please take a moment and fill in the information below. We will have your benchmark to you within 3 days." Below this text is a disclaimer: "There are many companies performing benchmarking services. You are not obligated to use our provider going forward; this is just an example for illustration purposes only. In no way should this be deemed legal advice or consultation." The form contains the following fields: "Company Name:" with an input box; "Plan Name or EIN Number:" with an input box; "Contact Person:" with a sub-label "(Person to send Benchmark Study to)" and an input box; "Telephone Number:" with an input box; "Email Address:" with an input box; "Plan Information:" with a sub-label "Summary of plan investment options or 408(b)(2) report" and a "Browse..." button; and a "Submit" button at the bottom.