

FIDUCIARY HOT TOPICS

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Caesars Case Highlights the Value of Retaining a 3(38) Investment Manager

A recent federal court decision involving the Caesars Entertainment 401(k) plan underscores the practical benefits a plan sponsor or other employer plan fiduciary obtain when they hire a third-party, 3(38), discretionary investment manager with day-to-day responsibility to select, monitor, and replace investments in the plan lineup.

In *Wanek et al. v Russell Investments Trust Company*, plan participants brought fiduciary breach claims under ERISA against the employer plan fiduciary (a committee of plan sponsor employees), the plan sponsor, and the plan's 3(38) discretionary investment manager that the committee had retained. In a decision on summary judgment, the court allowed claims against the investment manager to proceed, finding that there were factual questions about whether investment decisions were influenced by business interests rather than participant outcomes. However, the court granted summary judgment in favor of the plan sponsor and committee, citing documentation of a **prudent process** for appointing and monitoring the investment manager, including evidence of a robust RFP process to identify select the investment manager and quarterly meetings to supervise the manager.

Why This Matters for Employer Plan Fiduciaries & Advisors

The ruling reinforces that plan sponsors and other employer plan fiduciaries can mitigate liability when they:

- Retain, via a prudent selection process, a third-party 3(38) investment manager with day-to-day discretion over the plan investment lineup, and
- Prudently monitor and supervise the investment manager on an ongoing basis.

For plan advisors, the ruling illustrates how offering 3(38) discretionary investment services can be a differentiator. It also demonstrates the importance of regular engagement with plan clients to help clients fulfill their supervisory

responsibilities over the 3(38) investment manager.

<https://law.justia.com/cases/federal/district-courts/nevada/nvdce/2:2021cv00961/150273/242/>

<https://www.dol.gov/general/topic/retirement/fiduciaryresp?>

403(b) Plans and CIT Access: What to Watch as Legislation Moves to the Senate

In December 2025, the U.S. House of Representatives passed, as part of the INVEST Act, bipartisan legislation that would allow 403(b) retirement plans to have the same access to collective investment trusts (CITs), as virtually all other workplace retirement plans, including 401(k)s, governmental 457(b) plans, and the Federal Thrift Savings Plan. While the bill has advanced out of the House, it must still be passed by the Senate before becoming law.

Why This Matters for 403(b) Plan Decisionmakers and Advisors

If enacted, the legislation would:

- Reduce structural disparities between 403(b) plans and other workplace retirement plans, and
- Expand access to investment vehicles that may offer lower fees and ERISA-level oversight.

Advisors that serve 403(b) plans should monitor legislative developments and may want to prepare now for CIT access by learning more about this investment vehicle.

<https://www.callan.com/blog/2024-dc-survey/>

<https://www.kiplinger.com/retirement/collective-investment-trusts-should-your-401-k-hold-them/>

<https://greatgray.com/cits-in-403b-plans-back-on-the-table/>

<https://www.asppa-net.org/news/2025/2/polar-express-not-for-private-db-plans/legislation-to-allow-cits-in-403b-plans-reintroduced/>

Private Markets and ESG: Legal Boundaries Remain Unchanged

Private market exposure in defined contribution plan investments and environmental, social, and governance (ESG) considerations continue to be retirement industry hot topics. However, with increased focus in the media, politicization, evolving market practices, and regulatory discussion, it is important for advisors to understand that the underlying fiduciary standard governing these and all other ERISA plan investments has not changed/remains the same.

Under ERISA, fiduciaries must base investment decisions on **financial risk and return considerations**, acting solely in the best financial interest of plan participants and beneficiaries.

When considering investments with private market exposure—whether through private equity, private credit, or other non-publicly traded investments—advisors should evaluate their unique attributes (e.g., liquidity, valuation). But, ultimately, the fiduciary investment standard is unchanged: advisors should select an investment with or without private

market exposure if reasonably determined to optimize risk adjusted financial returns. Likewise, ESG factors may be considered only when relevant for this determination. Fiduciaries cannot subordinate financial interests to policy, social, or non-financial objectives.

<https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC03?>

<https://www.federalregister.gov/documents/2022/11/22/2022-25783/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights>

<https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020?>

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