

Washington Legislative and Regulatory Update FIRMA Risk Management Training Conference

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We Have Much to Cover Today

- The fiduciary “Brand”
- Select Dodd-Frank Act developments
 - MMMFs
 - Volcker Rule
 - FSOC attention to asset managers
- What the OCC has been up to
- Some uniform law developments
- and, of course, tax matters

The Fiduciary “Brand”

- Dilution and diffusion of the “fiduciary” brand
 - Multiplicity of standards
 - Common law fiduciary with OCC overlay for banks
 - DOL promulgating re-definition of ERISA “fiduciary”
 - SEC Standard of Care for BDs uses “fiduciary” rubric
 - SEC publicizes investment advisers “fiduciary” role
 - Additional conduct standards from SEC/CFTC in swaps context
 - Customers are confused
 - Expect confusion in the courts: What governs?

The Fiduciary “Brand”

Selected Duties and Remedies Available under Trust Law and Agency Law

	Trustee, Executor, Guardian, Custodian Under Uniform Gifts to Minors Act	Investment Adviser
Source of Duties and Remedies	Common law. State statutes. Federal banking laws and regulations.	SEC v. Capital Gains Bureau, 375 U.S. 18 (1963). Federal securities laws and regulations, including the Investment Advisers Act of 1940.
Duty of Care / Administration	<p>Among other things, a fiduciary must:</p> <p>(1) administer the account in accordance with its terms, purposes, and interests of beneficiaries; (2) administer the account prudently using reasonable care; and (3) incur only reasonable costs of administration.</p>	Advisers must provide investment advice that is consistent with the client’s investment objective(s) and have a reasonable, independent basis for its recommendations.
Duty of Loyalty	<p>A fiduciary must act and administer an account solely in the best interests of the beneficiaries.</p> <p>Conflicts only may be waived in the governing document, by statute, by court order, or by waiver from all beneficiaries. For example, bank fiduciaries may not use affiliated investment products sponsored by a bank or its affiliates, unless authorized by the governing document, statute, court order, or by a waiver from all beneficiaries after full disclosure of the conflict.</p> <p>Even when the duty of loyalty is waived by statute, court order, or waiver of all beneficiaries, fiduciaries must still comply with their many other duties, including the duty to invest prudently.</p>	<p>Advisers must act in solely in the best interests of clients.</p> <p>Generally, clients may consent, either before or after the conduct has taken place, to waive an agent’s duties. For example, an adviser may use affiliated investment products as long as that fact is disclosed to the client</p>
Remedies Available to Clients Due to Breach of Duties	<p>A full range of remedies may be available to clients:</p> <ul style="list-style-type: none"> • Reduction/Denial of Trustee’s Compensation and Fees • Trustee’s Payment of Damages, including Interest • Information and accounting • Injunction • Increase in Trustee’s Bond • Removal of Trustee • Appointment of a Receiver or Successor Trustee • Court Setting Aside Acts of Trustee • Court Direction to Trustee for Specific Performance • Court Supervision of Trustee Act’s <p>Note: A court is not confined to a limited list of remedies but can mold the relief in equity to protect the client’s rights.</p>	<p>Clients have limited private rights of action and no equitable remedies against advisers. Thus, as a practical matter they may only recover fees paid to the adviser. Clients may have other private rights of action under state law.</p>

DFA: SEC Money Market Fund Final Rule

Type	NAV	Permissible Investors	Liquidity Fees and Redemption Rules Apply
Government Funds	Stable	All	Permissible, not required
Retail Prime Funds	Stable	“Retail Investors”	Yes
Institutional Prime Funds	Floating	All	Yes

DFA: SEC Money Market Fund Final Rule

- Omnibus investments in retail MMMFs
- New diversification and disclosure rules for MMMFs
- IRS tax reporting relief for FNAV MMMFs
- Compliance dates
 - Diversification/disclosure: 04/14/15
 - FNAV and fees/gates: 10/14/16
- Market reaction to date

DFA: Volcker Rule

- Generally regulates a Banking Entity's proprietary trading and sponsorship/ownership of "Covered Funds"
- Questions on key definitions, such as what is a "covered fund"?
- Federal Reserve Board delays covered fund compliance for certain legacy accounts
- Recent FAQ regarding foreign funds

FSOC Attention to Asset Managers

- September 2013 – OFR report to FSOC: Asset Management and Financial Stability
- September 2013 – SEC invites public feedback on OFR Report (through November 2013)
- May 2014 – FSOC Asset Management Conference
- December 2014 – FSOC seeks comment on asset management products and activities

OCC Revisions to Key AM Handbooks

- Personal Fiduciary Activities
- Conflicts of Interest
- Collective Investment Funds
- Retirement Plan Products and Services

ABA Comments on OCC Regulation 9

- Letter to OCC recommending ways to modernize fiduciary rules and provide reasonable relief
- Specific Comments on:
 - 9.8, Recordkeeping
 - 9.10, Fiduciary Funds Awaiting Investment or Distribution
 - 9.13, Custody of Fiduciary Assets
 - 9.14, Deposit of Securities with State Authorities
 - 9.18, Collective Investment Funds

Latest Uniform Law Developments

- Fiduciary Access to Digital Assets Act
- Trust Decanting Drafting Committee
- Divided Trusteeship Drafting Committee

IRA Related Matters

- IRS New Policy on IRA Rollovers
- Treasury Department's myRA Initiative
- Labor Department's Fiduciary Definition Re-Proposal

IRC 67(e) Final Rule

- IRS Rule: Expenses of non-grantor trust/estate subject to 2% floor if:
 - an itemized miscellaneous deduction, and
 - “commonly” or “customarily” incurred by an individual
- Treatment of “Bundled” Fees
- Compliance date

Questions?

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