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Duties of Trustees and Other Fiduciaries

Will Trustees Set the Bar for the Fiduciary Standard?

by Janice J. Sackley, CLU, CFE

What is a Fiduciary?

A survey of definitions of the word “fiduciary” offered by academics, attorneys and judges in textbooks, legal dictionaries, articles, journals, court decisions and other published material results in recurring terminology that is commonly used to describe a fiduciary and the relationship with the person that is owed a duty. The words trust, candor, honesty, loyalty and power are found frequently. Certain phrases that crop up with regularity, such as “utmost good faith”, “avoid self-dealing”, “avoid conflicts of interest”, “sole interests” (and sometimes, “best interests”¹), and “undivided loyalty” are often used to describe the obligations of the fiduciary.

No matter the words used to describe a fiduciary relationship, there does seem to be universal consensus that a fiduciary obligation imposes the highest possible standard of duty that one party can owe another under the law.²

Think about the many fiduciary relationships that occur in life:

- Attorney-Client
- Executor-Estate
- Director-Corporation/Stockholders

- Partner-Partnership
- Plan Sponsor-Plan participants
- IRA Trustee-IRA Owner/Beneficiary
- Attorney in fact-Principal (under Power of Attorney)
- Conservator-Protected person’s estate
- Guardian-Ward
- CPA-Client
- Executive Director&Board-Charity/Foundation
- Mayor/Councilpersons-Municipality
- Parent-Child
- Investment advisor-client
- Trustee-Beneficiaries

There are many other relationships not listed here that could give rise to fiduciary obligations. Basically, a fiduciary relationship exists when an individual or firm has the duty to act for the benefit of another party under an umbrella of trust, confidence and dedicated loyalty.

Why do trustee duties matter?

This article is intended to highlight the basic duties of a trustee, a type of fiduciary that has well-established principles rooted in the common law. The duties ascribed to trustees, especially the duty of loyalty, are often benchmark standards for other types of fiduciaries. The reader may be surprised to learn that banks and thrifts that utilize their trust powers to enter into agency relationships with customers to manage their funds are sub-

ject to the same fiduciary principles that apply to trustee relationships, per trust banking law and many state statutes (“investment advice for a fee” is a fiduciary capacity).³

A better understanding of trustee duties may enable the compliance officers of broker-dealers, financial planning firms, investment advisory firms, and insurance firms to conduct a better assessment of the current business practices in their shops with an eye towards what might be expected in the future if a fiduciary standard of behavior ever becomes the controlling principle for certain customer relationships. Or, where fiduciary relationships already exist, a deeper understanding of trustee duties can help the reader better assess the adherence of current practices to true fiduciary principles.

This briefing is not intended to be a scholarly dissertation on all of the legal interpretations of trustee duties as evolved over the ages through court opinions. Although these historical interpretations are very important because ultimate liability is ascribed by a court based on these definitions and precedents and not on bank trust law per se, it would not assist the reader in figuring out what must be analyzed with respect to basic business practices. Whole textbooks and law school classes, and even degrees (for example, Campbell University offers a major in Trust and Wealth Management),

Jan Sackley is Principal at Fiduciary Foresight, LLC, a risk and regulatory consulting firm (www.fiduciaryforesight.com) and is also a Certified Fraud Examiner. Follow her on Twitter@FidFore or contact her at Jan@FiduciaryForesight.com

are offered in the realm of the fiduciary.

Pending legislation, discussed below, is often the disdain of compliance officers who already have too much on their plates. But the fact remains that there is heightened discussion of a possible fiduciary standard for financial intermediaries. Those compliance officers and firm executives who have not previously been exposed to fiduciary standards may wish to be better prepared for significant changes to current business models that may be required in the future should a fiduciary standard become the norm.

Customer Expectations

Even more of a driver than possible legislative or regulatory dictates is the fact that discussion of fiduciary standards is no longer limited to trade publications, courtrooms, and the halls of Congress. Popular consumer financial publications, daily newspapers, blogs, and cable news shows have all published stories about the “fiduciary standard” or have used the word “fiduciary” to describe duties between parties, albeit sometimes inaccurately.

Some industry financial writers urge investors to demand a fiduciary level of duty from their brokers and advisors. Such encouragement serves to create new customer expectations. Financial professionals are likely to be asked by some customers, if they have not been already, to whom they owe allegiance when making recommendations on the purchase of a security, fund or insurance product. Thus, firms would be wise to elevate their understanding of what customers expect, how a fiduciary standard may impact their business models, and which marketing approaches, business practices, policies, procedures, and training may require adjustment should changes become necessary.

Trust Firms

There are some firms that are better prepared than others for these fiduciary assessments. For example, a number of broker-dealer firms are affiliated with financial service compa-

nies or bank holding companies that may own banks or thrifts with trust powers, and these affiliates may have fiduciary expertise on staff as well as fiduciary counsel. Also, some financial firms, where permitted under state law, have organized private trust companies. Others have organized limited or special purpose (non-deposit) banks with trust powers.

There have also been cases where individual advisory employees have agreed to act as trustee or as successor trustee for clients who are trust settlers, hopefully only with the approval of their firms and only after an educated risk assessment of the potential pitfalls and firm liability.

Depending on how the trust firm is organized, regulatory oversight could be under the purview of any one (or more) regulators, such as state banking regulators, the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the Federal Reserve or, for state non-Fed member banks, the Federal Deposit Insurance Corporation (FDIC). Each of these regulatory agencies has experienced fiduciary examiners on staff who conduct exams annually or, in the case of large banks, continuously. These regulators take the view that all activities pursuant to the bank’s trust powers, including all services where investment advice is rendered for a fee (whether or not a trust is involved), is fiduciary activity.⁴

Duties of the Trustee

There are commonly accepted duties of trustees, and they are articulated in authoritative publications on trusts⁵ as well as in the issuances of regulators that oversee financial firms such as banks that act as trustees.⁶ Here is a partial list of the principle duties of a trustee:

- **Duty of Loyalty.** A trustee must administer a trust solely in the interests of beneficiaries. A trustee must not engage in acts of self-dealing. **This is the most fundamental duty of a trustee.**
- **Duty of Administration.** A trustee must administer a trust in accor-

dance with its terms, purposes and interests of the beneficiaries. A trustee must act prudently and exercise reasonable care, skill and caution.

- **Duty to Control and Protect Trust Property.** A trustee must take steps to control of and protect trust assets.
- **Duty to Keep Trust Property Separate and Maintain Adequate Records.** A trustee must keep trust property separate from the trustee’s own property (no commingled accounts) and render clear and accurate records with respect to trust administration.
- **Duty of Impartiality.** A trustee must act impartially if there are two or more beneficiaries, with respect to investing, managing, and distributing trust assets.
- **Duty Not to Delegate.** A trustee should not delegate functions to others that it can reasonably perform itself, and may not transfer the position of trustee to another. [Note: many states now permit delegation of certain duties, such as investment management, pursuant to statute].
- **Duty to Furnish Information.** A trustee must keep beneficiaries reasonably informed about the administration of the trust and of material facts necessary for them to protect their interests.
- **Duty of Prudent Investment.** A trustee who invests and manages trust property has a duty to comply with the prudent investor rule unless otherwise stated in the trust terms or permitted by state law.
- **Duty to Enforce and Defend Claims.** A trustee must take reasonable steps to enforce claims of the trust and to defend claims made against the trust.

It is important for the non-fiduciary professional to recognize from the above list that the myriad of duties that a trustee must fulfill are not all related to the actual investment management of trust assets. Some investment professionals have been surprised when confronted with these other duties and the level of knowledge and skill it requires to properly execute them. For example, adhering to the language of a trust instrument

(Duty of Administration) generally requires an understanding of the accepted legal interpretations of certain terms. Such understanding is usually obtained by years of guided mentoring by experienced trust administrators along with input from fiduciary attorneys.

Below are brief highlights of selected duties.

Duty of Loyalty/Conflicts of Interest

The Duty of Loyalty is one that applies to all fiduciaries and thus deserves special emphasis. As noted above in the list of trustee duties, loyalty is really the foundation of the trust relationship and is the crucial element of the trustee's obligations. A fiduciary is in a special position of power and expertise and the other party is relying on the fiduciary to act with prudence and without regard to the fiduciary's own self-interests.

The Duty of Loyalty is the duty that most frequently gives rise to conflicts of interest. Its application to those who give investment advice creates uncertainty for some as to what is permissible conduct and what is not. Conflict situations frequently are not black and white and do not have clear solutions in all cases.

Internal debates about conflicts can be rather routine in a large fiduciary firm, and the application of the Duty of Loyalty can invoke controversial discussion of the fiduciary standard. A trustee is required to avoid conflicts. Certain conflicts can be waived specifically in the governing instrument, by statute or court order⁷, or by waiver from every beneficiary to the trust. In the case of unborn beneficiaries or minor beneficiaries to the trust, a guardian ad litem may have to be appointed by the court to represent their interests. The commentary to Section 802 of the Uniform Trust Code explains further:

Subsection (b) states the general rule with respect to transactions involving trust property that are affected by a conflict of interest. A transaction affected by a conflict between the trustee's fiduciary and personal inter-

ests is voidable by a beneficiary who is affected by the transaction. Subsection (b) carries out the "no further inquiry" rule by making transactions involving trust property entered into by a trustee for the trustee's own personal account voidable without further proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. See Restatement (Second) of Trusts Section 170 cmt. b (1959).

...Under subsection (c), a transaction between a trustee and certain relatives and business associates is presumptively voidable, not void. Also presumptively voidable are transactions with corporations or other enterprises in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment. The presumption is rebutted if the trustee establishes that the transaction was not affected by a conflict between personal and fiduciary interests. Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be transacted with an independent party.

Even where the presumption under subsection (c) does not apply, a transaction may still be voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary interests existed and that the transaction was affected by the conflict. The right of a beneficiary to void a transaction affected by a conflict of interest is optional. If the transaction proves profitable to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand. For a comparable provision regulating fiduciary investments by national banks, see 12 C.F.R. Section 9.12(a).

In the asset management world and for insurance agency sales, potential conflicts arise from not only the related interests of the individual investment professional, but also the

related interests of the employing or licensing firm and any subsidiaries and affiliated companies, agencies, employees, officers and directors. Products and services manufactured by the fiduciary or its affiliates, or which yield sales commissions, mark-ups, ongoing revenues, or other favorable benefits, both direct and indirect, to any of these parties are considered conflicts of interest. A bank acting in a fiduciary capacity must meet the same conflict waiver requirements for its agency relationships as for its trustee relationships.⁸

"Favorable benefits" may include non-financial benefits, such as depletion of an unattractive asset from a firm's inventory even where all mark-ups are removed, valuation methodologies, common directors, or other situations.⁹

Non-trustee fiduciary relationships can meet the waiver requirement in some cases through the use of disclosure and consent by the account owner. Such disclosures act, in essence, as amendments to the agency agreement. But the requirements for a conflict waiver disclosure are not to be taken lightly as they are far more nuanced than one might think.

Disclosures and Consents

A consent to a waiver of a conflict of interest on the part of a trustee can withstand scrutiny only there is full, fair, honest and conspicuous disclosure of all information that would be material to the customer's decision to grant consent to the conflict. Furthermore, the information about the conflict must be understood by the customer as the decision to waive the conflict must be done on a fully informed basis.¹⁰ Put yourself in the shoes of the customer and ask what you would want to know about the possible benefits to the fiduciary if you were deciding whether or not to grant consent to a conflicted transaction.

It is very important to note that some SEC-accepted methods of handling conflict disclosures by registered investment advisors are not condoned by banking regulators for a

bank fiduciary, whether in a trustee capacity or an agency capacity. For example, disclosures without accompanying consent specifying the use of products or services of an affiliated company that are made in a Form ADV would not be adequate for a bank fiduciary. Absent language in the governing trust, court order, or statutory exemption, the disclosure provided by a trustee must meet the “full and fair” hallmarks discussed above, be understood by the party granting the waiver, and the subsequent consent obtained only if these requirements are met. General language is not normally considered adequate to relieve the conflict absent precedent in the courts or statutes of jurisdiction.¹¹

Many conflicts are impermissible regardless of whether or not customer consent is obtained. For example, it is a felony for a bank trustee to loan funds from a trust it administers to any bank officer, director or employee.¹² Neither client direction nor court order can override this prohibition.¹³ To illustrate how restrictive this law is, if the trust grantor is a parent of a bank employee, a loan from the trust cannot be made to the bank employee even if he or she is a beneficiary of the trust or even if the grantor is insistent that the bank trustee make the loan.

Another example is that prohibited transactions under ERISA or the Internal Revenue Code for qualified plans and IRAs cannot be waived by a plan sponsor, participant or IRA owner.¹⁴

Some conflicts of interest for fiduciaries can be overridden by statute. For example, nearly all states permit a corporate trustee to invest in affiliated mutual funds where an RIA affiliate may also be the investment advisor to the funds.¹⁵ The Uniform Trust Code has provisions to permit these investments, though a majority of states have not adopted the Code and some have amended various parts.¹⁶ Some states require an offset against the trustee’s fee in the same amount as the fund advisor receives. Other states do not have this requirement but in certain situations the bank trustee may

voluntarily reduce its overall trustee fee. The reason for doing is that the total fees received by the trustee, including any funds received by affiliates and subsidiaries, must be reasonable.¹⁷

Duty to Control and Protect Trust Property

Some investment advisors and brokers have expressed frustration or questioned why a bank trustee insists on holding the assets of the trust and refuses to permit custody in the hands of a broker custodian when an investment advisor has been hired to manage the assets of the trust. This insistence is more easily understood once the investment professional understands the trustee’s obligation to “Control and Protect Trust Property”.

It is incumbent on the trustee to retain possession and control of all trust assets wherever possible. Certain situations, of course, require the engagement of outside facilities or custodians, but only after prudent due diligence. For example, if the trust property includes art work, precious metals, or other physical assets it may not be feasible for the trustee to store these assets and may require the use of a proper facility in order to properly secure and preserve the asset.

Even where trust property is used as loan collateral or as security for a derivative such as a prepaid variable forward contract, the trustee must generally hold the assets or otherwise retain control to prevent distribution by an unauthorized party that does not have distributive powers. If necessary the trustee can keep assets separate from other property of the trust specifically for the benefit of the counterparty in the event the assets are needed to honor a security obligation. The use of securities depositories are permitted.

Duty of Impartiality

In any investment setting (RIA, broker, trustee, bank investment manager, etc.) a portfolio manager who is making investment recommendations for assets held in a trust, especially an irrevocable trust, should be balancing

the needs of current beneficiaries against the needs of remainder beneficiaries. Are your brokers and advisors adequately trained to understand these differences if they are managing trust assets where the grantor does not have discretion? For example, if the current income beneficiary is demanding high payouts and presses for investment in low rated, high interest bonds, is that balanced against the desire of remainder beneficiaries to preserve or grow principal?

While this is a simplistic description of the Duty of Impartiality, there are several statutory provisions and industry practices that may temper this duty, such as taking into account non-productive trust assets, the current financial situation of the income beneficiary, permissibility in the jurisdiction for total return trusts, and most importantly, the intent of the grantor as articulated in the governing instrument. It may be of interest to non-trustee investment professionals to learn that trustees are expected to review the financial statements and even tax returns of income beneficiaries who make distribution requests to ascertain their true needs prior to distributing any principal which would decrease the ultimate trust corpus for remainder beneficiaries.

Possible Fiduciary Standard for Brokers

Brokerage and insurance executives as well as compliance officers may have expressed a sigh of relief upon hearing that there was no fiduciary standard mandate in the draft financial reform bill passed by the Senate Banking Committee on March 22, 2010, entitled “Restoring American Financial Stability Act of 2010”.¹⁸ However, the House version, “Wall Street Reform and Consumer Protection Act of 2010”¹⁹ does contain a requirement that investment advice rendered by a broker be under a fiduciary standard. While there are some other provisions of concern to those who are promoting a fiduciary standard, this provision seems to, for the most part, accomplish the Administration’s goal as set forth in the Obama

Administration's White Paper on financial reform.²⁰ In addition, some SEC Commissioners have been vocal about their view that a fiduciary standard is an important element of investor protection.²¹

It remains to be seen what final Senate legislation may contain and what results from the reconciliation process.

Studies Demanded by Draft Bill

Instead of requiring a fiduciary standard out of the blocks, the draft Senate committee bill demands 16 studies, two of which are about standards of care.²²

First, the bill requires the Comptroller General of the United States to study various aspects of the Commodity Futures Trading Commission and the Securities Exchange Commission regarding 1) jurisdictional disputes; 2) holding futures and securities in the same account for cross-netting; 3) possible "harmonizing" of laws and merging of agencies, and 4) the benefits and feasibility of imposing a uniform fiduciary duty on financial intermediaries who provide similar investment advisory services.²³

Of perhaps even greater interest is the draft bill language that calls for a "Study and Rulemaking Regarding Obligations of Brokers, Dealers, and Investment Advisers".²⁴ This study is to look at regulatory gaps as well as the practices of FINRA and the SEC with respect to enforcing "the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers when providing personalized investment advice and recommendations about securities to retail customers."

This same section of the bill directs the SEC to consider "the specific instances in which—(A) the regulation and oversight of investment advisers provide greater protection to retail customers than the regulation and oversight of brokers and dealers; and (B) the regulation and oversight of brokers and dealers provide greater protection to retail customers than the

regulation and oversight of investment advisers..."²⁵

In addition, the study is to cover a number of other elements. The fiduciary standard comes into play due to the provision that states that the study is to assess the potential impact on the access of retail customers "to the range of products and services offered by brokers and dealers, of imposing upon brokers, dealers and persons associated with brokers and dealers—(A) the standard of care applied under the Investment Advisers Act of 1940 for providing personalized investment advice about securities to retail customers of investment advisers; and (B) other requirements of the Investment Advisers Act of 1940."²⁶

Recall that the Investment Advisers Act of 1940 does not actually mention the word "fiduciary," but numerous court cases have firmly established that a fiduciary duty is owed by an advisor to a client.²⁷

Why Care About Pending Legislation?

Even though the imposition of a fiduciary standard on brokers and insurance agents does not, for the moment, appear imminent, it would be prudent for a firm's regulatory risk and compliance departments, and others with regulatory assessment responsibility, to think about their firm's business model and what would be the likely impacts on business practices should a fiduciary standard become reality for all employees who render personalized investment advice.

Discussions with firm owners and executives should commence to educate and prepare management for possible changes that will require their long-term planning. Perhaps you could start with this article.

To undergo a "fiduciary standard" assessment, it is necessary to understand what the business practices and governance structure of the firm are in order to identify those behaviors and structures that may create a fiduciary relationship with the customer.²⁸ Those activities then should be reviewed to determine if the firm's business model requires modification,

if certain services will be discontinued to avoid a fiduciary duty, or determine if a fiduciary duty will be embraced. If the latter, substantial effort will have to be put forth to be sure that business practices are revised to comply with a fiduciary principles.

What Business Practices Should Be Analyzed?

The present challenge for compliance officers at broker-dealers is to take time, before any final legislation is passed or new regulations are introduced, to assess the business model at their firms. Look at all the types of interactions representatives or call centers have with customers, know what the customer expectations are, and figure out where and how changes may need to be made to eventually comply with a fiduciary standard in areas where it currently is not applicable. Most importantly, the compliance officer must be able to articulate the implications of such a standard to the business executives who are responsible for determining the organizational structure of the firm and establishing service delivery.

Here is a list of just some of the issues common to many broker-dealers that should be addressed in a comprehensive assessment.

- **Commissions.** This subject is a hot issue, with some insisting that fiduciary duty does not preclude receipt of commissions. Any type of financial benefit to the fiduciary for an action or inaction in the account, under the fiduciary's discretion, is an indisputable conflict of interest.²⁹
- **Affiliates and Subsidiaries (Related Interests).** Does your firm have any affiliates or subsidiaries that provide services where the customer is paying for such services? For example, an investment advisor may have an affiliate broker-dealer, and vice versa. Or you may have an affiliated broker engaged in capital markets activity that provides an inventory of stocks or bonds for your representative to sell to customers. Another conflict situation is where an advisor or representative facilitates the purchase of an insur-

ance product through an affiliate, where commissions are payable to the firm or the advisor and not refunded to the customer.³⁰

- **Securities Lending.** A fiduciary who lends its customer's securities to a third party without compensating the customer is using the customer's property for its own benefit.
- **Margin Lending.** If a fiduciary recommends a margin transaction in a customer account, it would be a conflict for the fiduciary to earn interest or fees from the resulting loan.
- **Customer-Directed Transactions.** It is unknown if the imposition of a fiduciary standard on brokers would provide a framework for a non-fiduciary capacity for those customers who entirely self-direct.
- **Training and Education.** Any new heightened standards will require a significant training effort of registered representatives, insurance agents, and other customer-contact employees who are unfamiliar with fiduciary requirements. It won't be a matter of only explaining what a fiduciary is; new business practices and procedures, new documentation, and the story behind it all will need to be communicated in order to make representatives both comfortable and effective.
- **Marketing and Advertising.** All materials should be reviewed to assure that there are no promises of fiduciary-type duties unless a business decision has been made to embrace a fiduciary standards, or the services rendered require fiduciary duties under regulations or statute.
- **Sales.** The mindset of a fiduciary is not one of a seller of product. A fiduciary is a purchaser of individual securities, funds, insurance, or other investment products that meet the needs of the client and are solely in the client's best interests.
- **Titles of Personnel.** Do your registered representatives and agents use titles containing the word "advisor", "strategist", "counselor" or other words that might create a false impression in a customer's mind that you are acting solely in their best

interests? If you do not intend to establish a fiduciary relationship with the customer, you should re-examine such titles and recognize that they may imply a standard of care in the customer's mind that you do not intend to create nor deliver.

Complicated Challenges

In reality, in spite of all the versions of rhetoric in proposed legislation, the "fiduciary standard" will not simply be what trade associations or even what regulators say it is. These entities can provide guidance and best practices and try to develop industry standards. The actual fiduciary standard is set by customer expectations and what our jurisprudence system has imposed, using two hundred years of past court decisions. The decisions of the future will rely heavily on the ones from the past. The principles adhered to by the fiduciary-trustee will likely be a frequent measure by which other fiduciaries will be judged in the future.



Endnotes

1. "Sole" versus "best" interests of the party to whom the fiduciary owes a duty is a distinction that can have significant implications. Academic discussions on this distinction include the argument that "best interests" permits a trustee to take an action to benefit a trust that may also have some benefit to the trustee, and thus is not "solely" in the beneficiary's interest. The counter-argument is that "sole" interest requires "no further inquiry," ie if there is any benefit to a trustee, the action cannot be taken. Space does not permit an in-depth discussion of this point.
2. Black's Law Dictionary 523 (7th ed. 1999); *FDIC v Stahl*, 854 F.Supp 1565 (S.D. Fla., 1994); *People v Township Board of Overlyssel*, 11 Mich 222 (1863); *Donovan v Bierwirth*, 680 F. 2d 263, 272 (2d Cir. 1982); *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996); and the oft-quoted Justice Cardozo in *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y.1928). All quotations omitted.
3. 12USC9.2 and 9.101;12USC550.30
4. IBID.
5. *Restatement of the Law(Third), Trusts, Volume 3*, American Law Institute; *Scott on Trusts, The Law of Trusts, Volume IIA*, Austin Scott and William Fratcher; *Bogert's Trusts 6th*, George Bogert; *Uniform Trust Code, Article 8*, passed by several states both with and without modifications, available here: <http://www.law.upenn.edu/bll/archives/ulc/uta/2005final.htm>

6. See for example, Office of the Comptroller of the Currency, *Comptroller's Handbook, Personal Fiduciary Services*, 2002, page 19, available here: www.occ.treas.gov/handbook/pfsfinal.pdf
7. Comptroller of the Currency, *Comptroller's Handbook, Conflicts of Interest*, 2000, page 5 available here: www.occ.treas.gov/handbook/conflict.pdf
8. Comptroller of the Currency, *Comptroller's Handbook, Conflicts of Interest*, 2000, page 30-36 available here: www.occ.treas.gov/handbook/conflict.pdf
9. The conflict of interest that exists with respect to principal trades, ie purchases made from a firm's inventory, is part of the fiduciary standard debate. Such purchases from inventory of an affiliated broker by a bank fiduciary are prohibited 12CFR9.12(a)(1), and purchases of any asset underwritten by an affiliate of a bank fiduciary is subject to severe restrictions and onerous requirements as outlined in Regulation W (12USC371c-1(b)(1)). One of the requirements, for example, is prior permission from the bank's board of directors.
10. Uniform Trust Code, Section 1009. **"BENEFICIARY'S CONSENT, RELEASE, OR RATIFICATION.** A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless: (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or (2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach."
11. 12 USC 9.12. Also see *Comptroller's Handbook: Conflicts of Interest*, page 5.
12. 12 USC92a(h): **Loans of trust funds to officers and employees prohibited; penalties.** It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than \$5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.
13. *Comptroller's Handbook: Conflicts of Interest*, 2000, page 34: *When a bank officer makes such a loan or receives such a loan's proceeds, both the officer and the bank have committed a crime. For the bank to violate this statute, it need only be the trustee of funds that are lent to the officer, director, or employee. The fact that the transaction was executed at the direction of one or more persons does not make the bank any less culpable. No exceptions to this prohibition are allowed under 12 USC 92a(h). The statute prevails over any instrument authority, beneficiary consent, or court order purporting to authorize the transaction.*
14. A Prohibited Transaction Exemption, or Class Exemption, is required to overcome banned conflicts under ERISA and the Internal Revenue Code's "exclusive benefit rule." See ERISA 406 and IRC 4975.
15. Such statutory permission in no way relieves the fiduciary of the Duty of Prudent Investment. The OCC, for example, makes clear that "the bank must keep in mind its obligation to act solely in the best interests of account beneficiaries." The prescribed requirements include making a determination that

the investment meets the needs of the account and that it continues to be appropriate in the future. See *Comptroller's Handbook: Conflicts of Interest*, 2000, page 43.

16. Uniform Trust Code, Section 802:

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of [Article] 9. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee must at least annually notify the persons entitled under Section 813 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.

17. See Uniform Trust Code, Section 708 and commentary, available here: <http://www.law.upenn.edu/bll/archives/ulc/uta/2005final.htm>

18. http://banking.senate.gov/public/_files/ChairmansMark31510AYO10306_xmlFinancialReformLegislationBill.pdf

19. See section 7103, H.R. 4173 Wall Street Reform and Consumer Protection Act of 2009 available here: <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.4173>.

20. A New Foundation: Rebuilding Financial Supervision and Regulation issued by the Department of the Treasury, excerpted here: "*The SEC should be permitted to align duties for intermediaries across financial products. Standards of care for all broker-dealers when providing investment advice about securities to retail investors should be raised to the fiduciary standard to align the legal framework with investment advisers. In addition, the SEC should be empowered to examine and ban forms of compensation that encourage intermediaries to put investors into products that are profitable to the intermediary, but are not in the investors' best interest.*" Available at www.financialstability.gov/docs/regs/FinalReport_web.pdf

21. See, for example, speech by SEC Commissioner Elisse Walter February 25, 2010 <http://www.sec.gov/news/speech/2010/spch022510ebw.htm> and speech by SEC Commissioner Luis Aguilar March 26, 2010 <http://www.sec.gov/news/speech/2010/spch032610laa.htm>

22. Restoring American Financial Stability Act of 2010. No Bill number available at press time. Bill available here: http://banking.senate.gov/public/_files/ChairmansMark31510AYO10306_xmlFinancialReformLegislationBill.pdf

23. Ibid Sect. 763(a)(5), page 717.

24. Ibid Sect. 913(b), page 767.

25. Ibid Sect. 913(c), page 769.

26. Ibid Sect 913(c), page 770.

27. See, for example, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 194 (1963)

28. Bear in mind that even for broker-dealers, there are fiduciary duties with respect to the custodianship and safeguarding of customer securities, crediting of dividends, following corporate action instructions, and fund disbursements. Other activities, including acting as securities lending agent for a pension plan or other customer, may also give rise to a fiduciary duty. The subject legislation addresses the investment advice context.

29. Commission conflicts can, for certain account types, be remediated by proper disclosure and consent, return of the commission to the account where permitted by law, or by other methods authorized by statute.

30. Rebates of insurance commissions are prohibited in many states.

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Editor & Layout
Frederick D. Vorck, Jr.

Editor
Joan Hinchman