# Why Your Family May Need A Corporate Fiduciary

The terms "fiduciary" and "fiduciary duty" keep cropping up in the news.

• In March 2013 the Government Accountability Office (GAO) issued a report on rollovers from qualified retirement plans when an employee separates from service. The agency found that plan service providers tended to favor IRA rollovers in their advice, downplaying the admittedly more complicated options of leaving the money in the former employer's plan or rolling it into a new employer's retirement plan. The GAO recommended extending the definition of "fiduciary" to cover these advisors. Industry spokesmen objected, warning that such a change to the legal obligations of advisors likely would decrease communication and ultimately be counterproductive.

• The Dodd-Frank bill in 2010 directed the Securities and Exchange Commission (SEC) to study the idea of imposing fiduciary duties on all stockbrokers, a standard that already applies to investment advisors. The idea is not without its critics. In March 2013 the SEC released a white paper on the subject and requested additional industry feedback (http://www.sec.gov-/rules/other/2013/34-69013.pdf). Industry resistance may be expected.

The fiduciary standard is the highest standard of care recognized by the law. A salesman is under no obligation to determine that his product is appropriate for a buyer, or that the buyer can afford it, or that the purchase is in the best interests of the buyer. A fiduciary does have those obligations and more.

## The fiduciary duties of every trustee

The fiduciary standard always has applied to trustees and their dealings with beneficiaries. The simplest way to explain it is that the interests of the beneficiaries must come first, ahead of the financial interests of the trustee. But that generalization can be expanded to cover more specific obligations or duties owed to beneficiaries.

• *Duty to administer a trust by its terms.* Every trust agreement should make plain the purposes of the trust, as they provide the critical benchmarks for evaluating the trustee's actions.

• *Duty of skill and care.* A high standard of performance is required, even if an amateur is named who has no prior experience as a trustee.

• *Duty to give notices.* Notices may concern legal rights of the trust beneficiaries, such as a power to make withdrawals, or they may cover such ministerial matters as designating a successor trustee or an agent to assist in trust administration.

• *Duty to furnish information and to communicate.* The trustee must respond to requests from beneficiaries concerning the trust and its administration.

• *Duty to account.* A written accounting of the assets, liabilities, receipts and disbursements of the trust must be provided to the beneficiaries regularly.

• *Duty not to delegate.* Although a trustee may employ professionals to assist in trust administration, the trustee may not accept blindly the advice of such persons. The trustee retains supervisory responsibility. Matters concerning the exercise of judgment and discretion generally cannot be delegated.

• *Duty of loyalty.* Trusts must be administered solely for the benefit of the trust beneficiaries.

• *Duty to avoid conflict of interest.* This is closely related to the duty of loyalty, and it may come up when a beneficiary is named as cotrustee. Generally, the trustee should not engage in transactions with the trust unless such activities are authorized by the trust.

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*Investments are not FDIC-insured, hold no bank guarantee, may lose value, are not a deposit, and are not insured by any federal government agency.*

# Trust & Wealth Management

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• *Duty to segregate trust property.* Trust assets must not be commingled with personal funds or other nontrust assets.

• *Duty of impartiality.* The trustee must not favor one beneficiary over another, unless the trust document directs that providing for a particular beneficiary is a principal purpose of the trust.

• *Duty to invest.* Trust assets must not be left idle. In addition to making the trust investments, the trustee has a duty to diversify the investments and develop an asset allocation plan. This is a job for professional investors or corporate fiduciaries.

• *Duty to enforce and defend claims.* Reasonable steps must be taken to protect the trust from adverse claims and enforce the rights of the trust and its beneficiaries.

• *Duty of confidentiality.* Normally, the terms of a trust, the identity of its beneficiaries and their respective interests, and the nature of the trust assets cannot be disclosed to anyone except the beneficiaries and those who need such information in order to be able to administer the trust.

## Add in corporate characteristics

Given this list of responsibilities, one quickly can see the value of corporate fiduciaries, organizations such as us, dedicated to trust administration as a business. To be in the business of administering trusts and estates, trust companies and bank trust departments are granted "trust powers" by financial regulators. With these powers come regulatory supervision as well as the legal duties of every trustee.

Individuals may serve as trustees. Some talented individuals do so serve. But as a rule, a corporate trustee will be a better choice because a team of professionals will have the responsibility for trust management. The team approach provides:

- better infrastructure support for accounting and recordkeeping;
- broader investment sophistication;
- permanence and availability—the whole team doesn't go on vacation at once;
- judgment and experience.

Another very important advantage of a corporate trustee for many families is the the ability to be impartial, and to be recognized by all family members as a neutral decision maker. A trust typically has current income beneficiaries and future or remainder beneficiaries. The interests of both types of beneficiaries must be balanced carefully. Conflicts need to be resolved by a trustee respected by all parties.

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