Investment Fiduciaries

How Evolving Standards of Care Can Help Lawyers Avoid Liability While Helping Their Clients, Employees, and Themselves Take Better Care of Their Investments

Continuing education presentation

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1. Introduction

    a. Will Carter background
        i. Poorly paid public service lawyer
        ii. Dissatisfied financial services client
        iii. Entrepreneur/innovator
    b. Purposes of talk
        i. Ethics/office management
        ii. Personal financial stewardship
        iii. Not compliance or litigation support

2. History of investment fiduciary standard

    a. Fiduciary standard generally
    b. History of fiduciary standard in financial services industry
        i. Trustee
            1. Prudent man v. prudent investor
            2. Uniform Prudent Investor Act
            3. Uniform Principal and Income Act
            4. ERISA
        ii. Registered Investment Advisors
        iii. Brokers
    c. Dodd Frank
        i. 2016 Department of Labor regulations
        ii. 2017 SEC regulations
    d. Shifting practices are redefining the standard of care
        i. Banks
        ii. Registered Investment Advisors
        iii. Brokers

3. The Fiduciary Standard: Compliance Concerns

    a. Employer-based retirement plans
        i. Evolving obligations
            1. Defined benefit plans
            2. Defined contribution plans
        ii. Roles and responsibilities
            1. Trustee
            2. Consultant
            3. Sponsor

        4. Internal Administrator
        5. Record keeper
        6. Third-party administrator
        7. Insurance coverage
  b. *Tibble v Edison Int'l,* 135 S. Ct. 1823 (2015); a fiduciary normally has a continuing duty to monitor investments and remove imprudent ones, a plaintiff may allege that a fiduciary breached a duty of prudence by failing to properly monitor investments and remove imprudent ones.
  c. Growing litigation against colleges
  d. U.S. Dept of Labor regulations
  e. Securities and Exchange commission draft regulations

BREAK

4. The Fiduciary Standard: Best Management Practices

   Center for Fiduciary Studies:

  a. Know applicable legal framework
     i. Retirement plans
     ii. Personal trusts
        1. Distribution provisions
           a. Health, education, maintenance and support
              i. Time horizon
           b. Total return option
        2. Reporting
           a. WV Code 44D-8-813
              i. Rules differ before and after 2002
           b. What to report
              i. Statements
                 1. Holdings
                 2. Transactions
                 3. Value
              ii. Analysis
                 1. Performance
                 2. Downside risk
     iii. Personal assets
        1. No legal duty to be smart with your own money

  b. Diversify assets to specific risk/return profile
     i. Strategic diversification
        1. Stocks/bonds/alternatives/cash allocation
           a. Stocks
           b. Bonds
           c. Alternatives
        2. Historic performance
           a. Different allocations
           b. Different time horizons
     ii. Tactical diversification
        1. Stocks
           a. Size (large/mid/small capitalization)
           b. Style (value/growth/blend)

        c. Global (US/Developed Int'l/Emerging Markets)
        d. Sector (e.g. health, technology, industrial)
        e. Company (e.g., Walmart, Microsoft, JP Morgan Chase)
      2. Bonds
        a. Creditworthiness (investment grade, high yield)
        b. Duration
        c.

- c. Prepare investment policy statement
  - i. Cash needs
    1. Time horizon
    2. Amount
  - ii. Emotional considerations
  - iii. Specify expected range of returns

- d. Use prudent experts and document due diligence
  - i. Performance
    1. Absolute relative to goals
    2. Relative to benchmarks
       - a. Absolute
         - i. Indexes
         - ii. Managers
       - b. Risk-adjusted
  - ii. Personal
    1. Expert
    2. Strategist
    3. Administrator

- e. Control and account for expenses
  - i. Fiduciary
    1. Funds/portfolio managers
    2. Administrator
    3. Record-keeper
  - ii. Personal
    1. Core:
       - a. Financial autonomy analysis
       - b. Debt management
       - c. Insurance
       - d. Investment management
    2. Complex
  - iii. Tax considerations
    1. Tax free (Roth IRAs and 401(k)s, Charitable gift, Universal life)
    2. Tax-deferred (traditional IRAs and 401(k)s, variable annuities, capital gains
    3. Ordinary versus capital gains
    4. Income versus estate taxes

5. Next steps
   - a. Assess what kind of help your client (or you) need
   - b. Compare that to current configuration of help
   - c. Design plan to fill gaps
   - d. Execute plan
   - e. Evaluate benefits relative to costs