

Services

[Employee Benefits and Executive Compensation](#)

[Fiduciary Duties and Governance](#)

[Qualified Retirement Plans](#)

[Taft-Hartley Plans](#)

[Health and Welfare Plans](#)

[Government Plans](#)

[Higher Education](#)

[Employee Stock Ownership Programs \(ESOPs\)](#)

[Executive Compensation and Nonqualified Plans](#)

[ERISA and Benefits Litigation](#)

[College Savings and ABLE Plans](#)

[Mandatory Paid and Unpaid Leave](#)

[Audits and Investigations](#)

Managed Accounts and Investment Advice: What Fiduciaries Should Know

Recently, multiple lawsuits have been brought against large recordkeepers (e.g., TIAA, Empower, Fidelity) and other service providers that offer investment advice and managed account products to retirement plan participants. These lawsuits serve as a reminder that investment advice is fiduciary advice that plan fiduciaries must review and monitor regardless of how it is offered (in person, phone, computer program, website module).

An underlying theme in the recent litigation is self-dealing. The growing popularity of low-cost, passively managed investment options and pressure to reduce fees has reduced recordkeeper revenue. To offset this decrease in revenue, plaintiffs in the recent cases claim that self-dealing arises in several ways, one of which is that investment advice programs improperly direct participants to invest in a recordkeeper's proprietary investment products. Employees are allegedly incentivized through "bonus" quotas to push managed account products and proprietary products of the service providers. The investment advice and managed account services allegedly provide biased investment advice, directing participant investments into the recordkeeper's proprietary investments even if other investments might be more suitable.

Selecting an investment advice provider or managed account product is a fiduciary decision that requires a diligent initial review and ongoing monitoring thereafter. Fiduciaries should understand the following:

1. How is advice offered, who is the fiduciary for the advice, and is it prudent to appoint them as fiduciary?
2. Does the offeror of the advice rely on Department of Labor guidance to ensure the advice does not cause a prohibited transaction or are they complying with a prohibited transaction exemption?
3. What investment strategies are applied to generate the advice (who evaluates and determines how the plan investment options are used)?
4. Does the way the advice is implemented among the plan investments align with the stated strategies?
5. Do participants benefit from the offerings?

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6. Is direct or indirect compensation generated when participants use the advice?
 - a. Is that compensation unreasonable or does it create a nonexempt conflict?

The above list is not comprehensive, and fiduciaries need to be aware of these issues and more to ensure that the managed account program and investment advice services are offered in a manner that solely benefits participants and their beneficiaries (e.g., is the higher cost of the managed account service providing increased value?). If a plan sponsor chooses to offer a managed account product and cannot explain or demonstrate how the product's operation is in the best interests of participants, then the sponsor runs the risk of breaching its own fiduciary responsibilities.

What Should Fiduciaries Do Now?

Fiduciaries should review their investment advice offerings and continue to monitor the advice provided. We recommend having a formalized process to ensure that these issues are periodically reviewed and confirmed as appropriate.

If you have questions or need assistance reviewing your plan's participant investment advice or managed account product, please contact a member of our Employee Benefits and Executive Compensation group.

