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Major Investor Losses Due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty

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Public Investors Arbitration Bar Association Report
MAJOR INVESTOR LOSSES DUE TO CONFLICTED ADVICE:
BROKERAGE INDUSTRY ADVERTISING CREATES THE
ILLUSION OF A FIDUCIARY DUTY
Misleading Ads Fuel Confusion,
Underscore Need for Fiduciary Standard

Joseph C. Peiffer and Christine Lazaro

Executive Summary

No national standard exists today requiring brokerage firms to put their clients' interests first by avoiding making profits from conflicted advice. In the five years since the passage of the Dodd Frank Act, inaction by the Securities and Exchange Commission (SEC) on a fiduciary standard has cost American investors nearly \$80 billion, based on estimated losses of \$17 billion per year.

Amid encouraging recent signs of possible action from the Department of Labor and the SEC, there is a compelling case to be made for a ban on conflicted advice in order to protect investors. In the absence of such a standard, brokerage firms now engage in advertising that is clearly calculated to leave the false impression with investors that stockbrokers take the same fiduciary care as a doctor or a lawyer. But, while brokerage firms advertise as though they are trusted guardians of their clients' best interests, they arbitrate any resulting disputes as though they are used car salesmen.

A review by the Public Investors Arbitration Bar Association (PIABA) of the advertising and arbitration stances of nine major brokerage firms – Merrill Lynch, Fidelity Investments, Ameriprise, Wells Fargo, Morgan Stanley, Allstate Financial, UBS, Berthel Fisher, and Charles Schwab – finds that all nine advertise in a fashion that is designed to lull investors into the belief that they are being offered the services of a fiduciary.

For example, Merrill Lynch advertises as follows: "It's time for a financial strategy that puts your needs and priorities front and center." Fidelity Investments appeals to investors with these words: "Acting in good faith and taking pride in getting things just right. The personal commitment each of us makes to go the extra mile for our customers and put their interests before our own is a big part of what has always made Fidelity a special place to work and do business."

Nonetheless, all nine brokerage firms using the fiduciary-like appeals in their ads eschew any such responsibility when it comes to battling investor claims in arbitration. Adding to the confusion is the fact that five of the eight

brokerage firms – Ameriprise, Merrill Lynch, Fidelity, Wells Fargo, and Charles Schwab – have publicly stated that they support a fiduciary standard. But these firms are every bit as vociferous as the other four brokerages in denying that they have any fiduciary obligation when push comes to shove in an arbitration case filed by investors who have lost some or all of their nest egg due to conflicted advice.

In this atmosphere of misleading advertising and a complete disavowal by brokerage firms of the same ad claims in arbitration, investor losses will continue to mount at the rate of nearly \$20 billion per year until the SEC and DOL prescribe the long-overdue remedy: a “fiduciary duty” standard banning conflicted advice.

Introduction

Currently, there is no national standard requiring brokerage firms to put investors’ interest in preserving their nest eggs over brokerage firms’ interest in making money from those investors’ accounts. According to a recent study, every year that goes by without a rule that requires brokers to put investors’ interests first costs American investors another \$17 billion.¹ Dodd- Frank, passed five years ago, mandated that the Securities & Exchange Commission (the “SEC”) study this issue. During the course of the last five years without a SEC rule, inaction on the issue has cost investors nearly \$80 billion.²

The problem continues to grow worse as more and more Americans lose their defined benefit plans and, instead, roll their life savings into IRAs,³ which they must invest for their future. A critical component of the problem is the brokerage industry’s marketing efforts to convince investors they absolutely require the assistance of brokers to protect their retirement savings. The Public

1. See “The Effects of Conflicted Investment Advice on Retirement Savings,” February 2015, available at http://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

2. See *id.* \$17 billion times 4.6 years since the passage of Dodd-Frank equals \$79.22 billion.

3. Beginning in the 1970s and continuing through the end of 2013, the number of Americans covered by a traditional pension plan was cut in half while the number of Americans depending on 401(k)s and IRAs more than doubled. See “The Effects of Conflicted Investment Advice on Retirement Savings,” February 2015, p.5 available at http://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

Investors Arbitration Bar Association (“PIABA”)⁴ has conducted a study to determine whether brokerage firms advertise like they have a duty to put investors interests first, but when called to account for their actions, litigate like they have no such duty.

The results are striking. Firms routinely advertise themselves as giving personalized, ongoing, non-conflicted advice that puts the customer first. Brokerage firms have also taken the position publicly with the regulators that such a duty should exist. But, when called to account for their actions, these same brokerage firms litigate like they have no such duty. This highlights the need for a national, strong fiduciary duty that holds firms to the standard they advertise to the public and articulate to the regulators.

The lack of a national fiduciary standard is not just an abstract philosophical question. The lack of such a standard has real-world implications for investors, like Ethel Sprouse. Ms. Sprouse is a baby boomer from Cedar Bluff, Alabama. Her husband suffers from Alzheimer’s disease. Her adult daughter is mentally disabled and lives in a group home. Ms. Sprouse and her husband are unsophisticated investors and, like most, entrusted their retirement savings to a trusted financial adviser, who in the Sprouses’ case was a registered representative of Allstate Financial (“Allstate”). As her husband’s mental capacity and daughter’s health diminished, the financial strain on the family increased and Ms. Sprouse’s reliance on Allstate to provide her with sound financial advice grew even more crucial. In 2007, the Sprouses transferred all of their life savings to Allstate so that it could be managed by one trusted firm. In short, Allstate used the trust placed in them and invested virtually all of the Sprouses’ nest egg into a non-diversified portfolio of stocks, which objectively is very risky and unsuitable for most investors. As a result, Mr. and Mrs. Sprouse lost approximately \$400,000 and the Sprouses sued Allstate in arbitration⁵ to recover their losses. The arbitration case is currently pending.

4. PIABA is a national, not-for-profit bar association comprised of more than 450 attorneys, including law school professors and former regulators, who devote a significant portion of their practice to the representation of public investors in securities arbitration.

5. Allstate included a pre-dispute mandatory arbitration clause in its brokerage agreement with Mr. and Mrs. Sprouse. As result, the Sprouses are unable to seek the help of a court or a jury of their peers, but rather, had no choice other than to file an arbitration administrated by the Financial Industry Regulatory Authority (which is owned by the very brokerage firms customers such as the Sprouses sue) to seek a recovery of their losses.

For decades, Allstate's marketing success has been based on the principle that they put their clients' interest first. The "You're In Good Hands" slogan is one of the most prolific in U.S. history. Indeed, while the Sprouses' retirement savings were invested with Allstate, every monthly account statement contained the "Good Hands" recognizable symbol and phrase of trust. However, as illustrated below, when sued, Allstate's legal position is it owed no fiduciary duty to the Sprouses. This report will first review the current landscape of the differing standards of duty that apply to brokerage firms and investment advisors and the SEC and Department of Labor's (DOL) efforts to harmonize those duties. The report then discusses a number of firms' public positions and advertisements regarding their commitment to act in investors' best interest contrasted with their litigation strategy of denying that any such duty exists. The report concludes that the SEC and DOL should hold brokerage firms to their public statements and remove all doubt that brokerage firms must put investors' interest first.

The Current Landscape: Investment Adviser and Broker Duties

Investment advice is provided to investors by two different types of financial advisors:

Investment Advisers and Brokers. Each is subject to different regulatory regimes, although there is some overlap in those who enforce the regulations. Investment Advisers are subject to the Investment Advisers Act of 1940 (the "Advisers Act") and the rules promulgated thereunder as well as state statutes and regulations. The SEC and the state securities regulators enforce those statutes and regulations. Brokers are governed by the Securities Exchange Act of 1934 (the "Exchange Act") and the rules promulgated thereunder as well as by state statutes and regulations. In addition, Brokers are regulated by the Financial Industry Regulatory Authority ("FINRA"), a self-regulatory organization and are subject to the rules promulgated by FINRA.⁶

Investment Advisers must adhere to a fiduciary duty standard, which is derived from judicial interpretations of the Advisers Act. The fiduciary duty is generally defined by case law to include the duty of loyalty and care, and the obligation to always put the client's interests before and above the Investment Advisor's own interests when the Advisor interacts with a client. Brokers, instead of a fiduciary standard, must adhere to a suitability standard which is

6. Both brokers and investment advisers are subject to the various states' common law regarding the imposition of fiduciary duty. The patchwork of inconsistent state laws on the subject only serves to highlight the critical need for a national standard.

premised on a FINRA rule that requires a Broker to have a reasonable basis for believing a recommendation of a security or an investment strategy is “suitable” for a client, based on the client’s investment profile.

Although both Investment Advisers and Brokers are regulated extensively, the differences in these regulatory regimes lead to different results for investors. Investors generally are not aware of these differences or their legal implications. Many investors are also confused by the different standards of care that apply to Investment Advisers and Brokers, and many do not even know with which type of investment professional with whom they are doing business. Investors believe their financial advisor, be the title “broker” or “investment adviser,” is acting in their best interest. That confusion has been a source of concern for regulators and Congress. Section 913 of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”) required the SEC to conduct a study to evaluate:

- The effectiveness of existing legal or regulatory standards of care (imposed by the Commission, a national securities association, and other federal or state authorities) for providing personalized investment advice and recommendations about securities to retail customers; and
- Whether there are legal or regulatory gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for providing personalized investment advice about securities to retail customers that should be addressed by rule or statute.⁷

Proposed Changes

In January 2011, the Staff of the SEC issued its report to Congress following the study it conducted pursuant to section 913 of Dodd-Frank. The Staff made the following recommendation:

The Commission should engage in rulemaking to implement the uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers. Specifically, the Staff recommends that the uniform fiduciary standard of conduct established by the Commission should provide that:

7. See “Study on Investment Advisers and Broker-Dealers,” Executive Summary, p. i, January 2011, available at <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interests of the customer without regard to the financial or other interests of the broker, dealer, or investment adviser providing the advice.⁸

The Staff interpreted this uniform fiduciary standard to encompass the duties of loyalty and care as interpreted and developed under the Advisers Act Sections 206(1) and 206(2).⁹

Between 2011 and 2013, the SEC did not issue any rules in furtherance of the Staff's recommendations. Instead, in March 2013, two years after the staff recommendation, the SEC sought further data and other information, noting it had not yet decided whether to commence rulemaking.¹⁰

SEC Commissioner Perspectives

PIABA believes that the SEC should commence rule-making immediately, clarifying the existence and extent of the fiduciary duty and thereby holding brokerage firms to the standards of conduct they advertise to the public. Commissioners White and Aguilar have both expressed support for rulemaking that would stop brokerage firms from marketing like they have a duty to put investors first and litigating like no such duty exists.¹¹

8. See "Study on Investment Advisers and Broker-Dealers," pp. 109–10, January 2011, available at <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

9. See *id.* at p. 111.

10. See "Duties of Brokers, Dealers, and Investment Advisers," SEC Release No. 34069013, p. 9, available at <http://www.sec.gov/rules/other/2013/34-69013.pdf>.

11. Chairman White has recently expressed her view on the subject. She recently stated that the SEC should "implement a uniform fiduciary duty for broker-dealers and investment advisers where the standard is to act in the best interest of the investor." <http://www.bloomberg.com/news/articles/2015-03-17/sec-will-develop-fiduciary-duty-rule-forbrokers-white-says>

Commissioner Aguilar has been strongly in support of adoption of a fiduciary duty for Brokers: "I am issuing this statement to be clear as to my position — it is in the best interests of investors and our markets for broker-dealers who provide investment advice to be held to the fiduciary standard that is currently applied to investment advisers." Statement by SEC Commissioner: Statement in Support of Extending a

Commissioner Stein has not clearly articulated her stance on a uniform fiduciary rule, but has expressed support for aligning the interests of brokers and investors, which underlies a part of a uniform fiduciary rule.¹² Commissioners Gallagher and Piwowar have both stated that they believe more study is necessary.¹³

The Department of Labor Action

The Department of Labor has examined the role Brokers and Investment Advisers play in the management of retirement accounts. In 2010, the DOL proposed a rule under ERISA broadly defining the circumstances under which a person is considered to be a “fiduciary” by reason of giving investment

Fiduciary Duty to Broker-Dealers who Provide Investment Advice, May 11, 2010, available at http://www.sec.gov/news/speech/2010/spch051110_laa.htm.

12. Commissioner Stein explained her position as follows:

No doubt, disclosure remains the heart of our investor protection regime. But we also know from experience that sometimes it isn't enough – or to put it another way, that it works better under some conditions than others. What are the conditions under which it works best? Basically, where we have done everything we can to align those interests that should naturally be aligned. When interests are aligned, there are fewer incentives to play games, and better results for ordinary investors, who can make straight-forward, smart decisions... On the market participant side, we have professional standards and rules to ensure that investment advisers' and broker-dealers' interests are appropriately aligned – or at least, not misaligned – with the investors they serve... Are our rules in all of these areas perfect? No. Is there a lot to be done and improved? Absolutely. For example, the Commission is in the midst of considering how to better align the interests of broker-dealers with the investors they serve. It's an important area, and I'm looking forward to seeing progress made.

Remarks Before the Consumer Federation of America's 27th Annual Financial Services Conference, December 4, 2014, available at <http://www.sec.gov/News/Speech/Detail/Speech/1370543593434#.VO5nGfnF8Yk>.

13. See Remarks at the 2014 SRO Outreach Conference, September 16, 2014, available at <http://www.sec.gov/News/Speech/Detail/Speech/1370542969623#.VO5lkPnF8Yk>; Remarks at the National Association of Plan Advisors D.C. Fly-In Forum, September 30, 2014, available at <http://www.sec.gov/News/Speech/Detail/Speech/1370543077131#.VO5pJfnF8Yk>.

advice to an employee benefit plan or a plan's participants.¹⁴ The DOL encountered fierce industry opposition from the very brokerage firms that advertise their personalized service, received extensive comments on the rule proposal, and withdrew the proposal in order to conduct further analysis.¹⁵

The DOL is in the process of reintroducing the rule proposal to require that those providing retirement investment advice act in the best interest of investors.¹⁶ The DOL cited to a study by the White House Council of Economic Advisers to explain the harms faced by investors as a result of conflicted investment advice:

Based on extensive review of independent research, the White House Council of Economic Advisers (CEA) has concluded that conflicted advice causes affected savers to earn returns that are roughly 1 percentage point lower each year (for example, a 5 percent return absent conflicts would become a 6 percent return). As a result, a retiree who receives conflicted advice when rolling over a 401(k) balance to an IRA at retirement will lose an estimated 12 percent of the value of his or her savings if drawn down over 30 years. If a retiree receiving conflicted advice takes withdrawals at the rate possible absent conflicted advice, his or her savings would run out more than 5 years earlier. Since conflicted advice affects an estimated \$1.7 trillion of IRA assets, the aggregate annual cost of conflicted advice is about \$17 billion each year.¹⁷

The DOL has submitted the rule proposal to the OMB's Office of Information and Regulatory Affairs ("OIRA") for a standard interagency review, after which it will publish a "Notice of Proposed Rulemaking" ("NPRM").

14. See "Definition of the Term "Fiduciary"," 29 CFR Part 2510, available at <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24328>.

15. See Department of Labor, "FAQs: Conflicts of Interest Rulemaking," available at <http://www.dol.gov/featured/ProtectYourSavings/faqs.htm>.

16. See Department of Labor, "FAQs: Conflicts of Interest Rulemaking," available at <http://www.dol.gov/featured/ProtectYourSavings/faqs.htm>.

17. See Department of Labor, "FAQs: Conflicts of Interest Rulemaking," available at <http://www.dol.gov/featured/ProtectYourSavings/faqs.htm>. See also "The Effects of Conflicted Investment Advice on Retirement Savings," February 2015, available at http://www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf.

**Brokerage Firms Advertise Like They Offer Ongoing
Personalized Service That Puts the Investor First, But Deny Any
Such Duty When Called To Account For Their Actions**

There is a striking difference between the positions brokerage firms take when soliciting customers and those they take when those customers arbitrate claims against the same firms. Set forth below are various firms' proclamations to the public set forth in advertisements contrasted with those firms' arguments set forth to FINRA arbitrators. On one hand, the firms boast that they offer unconflicted, trustworthy advice while, on the other hand, those same firms argue they are little more than salesmen with a single duty: to execute trades in customers' accounts.

ALLSTATE

Allstate Tells The Public That Investors are "In Good Hands."



The Allstate slogan "You're in good hands" was created a half century ago by Allstate Insurance Company's sales executive David Ellis to demonstrate Allstate's ongoing commitment to customers. The phrase came to him as the result of a reassuring remark made to his wife during the Spring of 1950 about their ailing child. She told him, "The hospital said not to worry. We're in good hands with the doctor." A study announced in September 2000 by Northwestern University's Medill Graduate Department of Integrated

Marketing Communications found that the Allstate slogan “You’re in good hands” ranked as the most recognizable in America.¹⁸

Ethel Sprouse trusted Allstate and its financial adviser. She believed that they were required to put her interests first. Indeed, while Allstate managed the Sprouses’ retirement savings, every monthly account statement contained the above illustrated recognizable symbol and phrase of trust.

Allstate Tells Arbitrators That Good Hands Owe No Fiduciary Duty

Notwithstanding Allstate’s famous slogan, when Ms. Sprouse sued Allstate in FINRA arbitration after her trusted Allstate financial advisor breached their trust relationship and lost approximately \$400,000 of the Sprouses’ life savings, Allstate raised the defense that “Allstate Financial Services owed no fiduciary duty to Claimants, and, therefore, no such duty was breached.”¹⁹

UBS

UBS Tells The Public That the Client Comes First

“Until my client knows she comes first. Until I understand what drives her. And what slows her down. Until I know what makes her leap out of bed in the morning. And what keeps her awake at night. Until she understands that I’m always thinking about her investment. (Even if she isn’t.) Not at the office. But at the opera. At a barbecue. In a traffic jam. Until her ambitions feel like my ambitions. Until then. We will not rest. UBS.” (Emphasis in advertisement.)²⁰

18. See <http://www.adslogans.co.uk/site/pages/gallery/youre-in-good-hands-with-allstate.8355.php>.

19. See Ex. 1. Also included in the exhibit is a copy of the Sprouses’ Statement of Claim that served as the basis for the Answer.

20. See Ex. 2.

UBS Tells Regulators That The Client Does Not Come First

UBS, like many other firms, ignores the representations in its advertising when it is forced to defend its actions. “[A] broker does not owe a fiduciary duty to his customer in a nondiscretionary account.”²¹

Morgan Stanley Tells The Public That It Provides a Personalized Plan

“Having an intimate knowledge of blue chips and small caps is important. But even more important is an intimate knowledge of you and your goals. Get connected to a Morgan Stanley Financial Advisor and get a more personalized plan for achieving success.”²² Morgan Stanley Tells Arbitrators That Its Personalized Plans Can Put The Firm’s Interests Ahead of Clients’ Despite representing that personalized plans would be used, Morgan Stanley says it will only have a fiduciary duty when the service goes beyond the plan and includes Morgan Stanley taking over the trading in an account on a discretionary basis. “There is no fiduciary duty where, as here, the client maintains a non-discretionary brokerage account.”²³

“Claimants claim of breach of fiduciary duty fails as a matter of law and should be dismissed in its entirety. Claimant’s claim seeks to impose ‘fiduciary’ obligations and duties on Respondents that only arise in very limited circumstances that do not exist here, i.e. where Respondents are given discretionary trading authority over Claimant’s accounts.”²⁴

21. *See* Ex. 3.

22. *See* Ex. 4.

23. *See* Ex. 5.

24. *See* Ex. 6.

BERTHEL FISHER**Berthel Fisher Tells The Public That It Maintains the
“Highest Standard of Integrity.”**

“We are committed to maintaining the highest standards of integrity and professionalism in our relationship with you, our client. We endeavor to know and understand your financial situation and provide you with only the highest quality information and services to help you reach your goals.”²⁵

**Berthel Fisher Tells Arbitrators That the “Highest Standard of
Integrity” Does Not Include a Duty to Put Investors First**

While “highest standard of integrity” certainly sounds like a representation that a clients’ interests will be put first, Berthel Fisher says it does not owe a fiduciary duty to clients. “Respondents deny that they owed fiduciary duties to Claimants.”²⁶

AMERIPRISE FINANCIAL**Ameriprise Financial Tells The Public That Its Advisors are
Ethically Obligated To Act With Your Best Interests At Heart.”**

“Focus on your dreams and goals

“Once you’ve identified your dreams and goals, and you and the advisor have decided to work together, you can count on sound recommendations that address your goals. You’ll be able to clearly see and discuss how the actions and decisions you make today will affect your tomorrow. You can expect to hear about the options you have and any underlying factors to consider. Our advisors are ethically obligated to act with your best interests at heart.”²⁷

25. See <http://www.kevinyaley.com/!CustomPage.cfm?PageID=1&disclaimer=accept>.

26. See Ex. 7.

27. From the Ameriprise Financial website, Our Advisors, “What to expect from an Ameriprise financial advisor,” <http://www.ameriprise.com/financial-planning/>

“Personalized advice and recommendations on an ongoing basis

“Perhaps the best thing about working with a personal financial advisor is that your financial plan is custom made for you. The financial advisor you choose to work with knows all about you. When and if you experience a life change, your priorities shift or you have a pressing financial question, you can contact your advisor for information and financial advice that’s meaningful to you. You may meet a few times during a year and have several discussions. Your advisor will make every effort to be available to you when needed.”²⁸

Ameriprise Financial Tells Regulators That It Advocates For A Uniform Fiduciary Duty

Ameriprise has publicly told the SEC that it supports the imposition of a fiduciary duty on brokers, such as Ameriprise. “Our business has been built on a financial planning model with personalized investment advisory services at its core. Our experience in offering retail advice under the Advisers Act, with its enhanced disclosure requirements and other investor protections, has led us to advocate for a uniform fiduciary standard throughout the recent legislative process and endorse SIFMA’s support of a uniform fiduciary standard of conduct for broker-dealers and investment advisers providing personalized advice about securities to retail clients.”²⁹

Ameriprise Financial Tells Arbitrators That It Doesn’t Believe this Duty Exists

Despite its advertising campaign promising to put client interests first and even publicly supporting and acknowledging a belief that a fiduciary duty is required, Ameriprise has nevertheless argued in arbitration it owes no such

ameriprise-financialadvisors/financial-advisor-expectations.asp, last visited February 25, 2015.

28. From the Ameriprise Financial website, Our Advisors, “What to expect from an Ameriprise financial advisor,” <http://www.ameriprise.com/financial-planning/ameriprise-financialadvisors/financial-advisor-expectations.asp>, last visited February 25, 2015.

29. Ameriprise Financial, Inc. Letter to the SEC dated August 30, 2010, available at <http://www.sec.gov/comments/4-606/4606-2640.pdf>.

duty. “Respondent owed no fiduciary duties to Claimants and, even if it did, no such duties were breached.”³⁰

MERRILL LYNCH

Merrill Lynch Tells The Public That It Puts Investors “Needs Front and Center”

“It’s time for a financial strategy that puts your needs and priorities front and center.

“Adapting the approach as life changes and goals are reached. As goals and priorities change, so should your approach.”³²

“Our organization has all the tools and technology and ease of use that you would want. But ultimately, the real measure is when you sit down with your advisor and build that trusting relationship... and at any time you know exactly where you stand... when you think about progress towards what it is you want to accomplish with your... finances and with your money.

“Our entire company’s purpose is to help you achieve the best life for yourself, and for your family. And this purpose, to making life better extends even further to our communities and beyond. We’re proud of our company. We want you to be proud of it as well, and for you to value your relationship with us.”³³

30. *See* Ex. 8.

31. [sic] Footnote omitted from original report.

32. From the Merrill Lynch website, Working with Us, “From a Conversation to a Relationship,” <https://www.ml.com/life-goals.html>, last visited February 25, 2015.

33. From the Merrill Lynch website, Working with Us, “From a Conversation to a Relationship,” John Thiel, the head of Merrill Lynch Wealth Management, on what makes working with Merrill Lynch so different, <https://mlaem.fs.ml.com/content/dam/ML/working-with-us/pdfs/transcriptlife-goals-thiel.pdf>, last visited February 25, 2015.

**Merrill Lynch³⁴ Tells Regulators That It
Supports A Uniform Fiduciary Duty**

“Bank of America supports applying a new, harmonized standard of care to all financial professionals providing personalized investment advice to individual investors. In particular, we believe that both broker-dealers and investment advisers giving personalized investment advice to individual investors should be subject to a fiduciary duty that is clearly prescribed. We further believe that any new fiduciary standard of care should be applied in a manner that both enhances investor protection and preserves the availability of choices for clients. Informed client choice is critical to ensuring that investment objectives are attained.”³⁵

**Merrill Lynch Tells Arbitrators That It Has No
Duty to Put Investors “Front and Center”**

Despite marketing that clients’ interest would be “front and center” and a desire to “build a trusting relationship” as well as publicly supporting the imposition of a fiduciary duty, Merrill Lynch has refused to acknowledge it owes a fiduciary duty in arbitration when it breaches that duty to investors. “The Second Circuit ruled that in a non-discretionary securities account, there is no ongoing duty of reasonable care that requires a brokerage firm to give advice or monitor information beyond the limited transaction-by-transaction duties that are implicated in executing its customer’s instructions.”³⁶

“Respondents did not stand in a fiduciary relationship with Claimants.”³⁷

34. Bank of America purchased Merrill Lynch in the fall of 2008 and Merrill Lynch is therefore now a division of Bank of America Corp.

35. Bank of America Corp. Letter to the SEC dated August 30, 2010, available at <http://www.sec.gov/comments/4-606/4606-2583.pdf>.

36. *See* Ex. 9.

37. *See id.*

FIDELITY INVESTMENTS**Fidelity Investments Tells The Public That It Puts Investors' "Interests Before Our Own"**

"Acting in good faith and taking pride in getting things just right. The personal commitment each of us makes to go the extra mile for our customers and put their interests before our own is a big part of what has always made Fidelity a special place to work and do business. With millions relying on us for their savings or the growth of their business, we handle every action and decision with integrity and personal attention to detail. Getting things just right doesn't mean we're perfect, but rather setting high standards, refusing to cut corners, and believing that every product, every experience, and every outcome can always be better."³⁸

Fidelity Investments Tells Regulators That It Supports A Uniform Fiduciary Duty

"Fidelity supports a uniform fiduciary duty for broker-dealers and investment advisers that would require broker-dealers and investment advisers to act in the best interest of retail customers when offering personalized investment advice about securities to such retail customers."³⁹

Fidelity Tells Arbitrators That It Denies Any Duty To Put Investors' Interests Before Their Own

Even though Fidelity Investments markets that it will put investors' interests before its own and has publicly supported a fiduciary standard for brokerage firms, Fidelity has argued no such duty exists when defending itself in arbitrations with customers. "Claimants first claim fails because Fidelity did not owe [the investors] any fiduciary duty."⁴⁰

38. From the Fidelity Investments website, About Fidelity, "Our Purpose and Standards," <https://www.fidelity.com/about-fidelity/our-purpose-standards>, last visited February 25, 2015.

39. Fidelity Investments Letter to the SEC dated July 5, 2013, available at <http://www.sec.gov/comments/4-606/4606-3117.pdf>.

40. See Ex. 10.

WELLS FARGO**Wells Fargo Tells The Public That Investors
“Feel that Your Best Interests are the Top Priority”**

“Are we working toward common goals? A healthy relationship with your Financial Advisor should make you feel that your best interests are the top priority, no matter what is happening in the market and no matter the size of your portfolio. Furthermore, you should like your advisor, and both you and your advisor should feel that all concerns are heard and addressed.”⁴¹

“Are we sharing information and asking questions? Your financial consultant should provide you with the relevant information needed to help you feel informed about financial events that pertain to your investments. Your Financial Advisor may also answer any questions you might have about your monthly statements. Stay in contact to ensure that your advisor is current on your objectives and can make changes when necessary.”⁴²

**Wells Fargo Tells Regulators That It
Supports A Uniform Fiduciary Duty**

“Wells Fargo fully supports the adoption of a uniform federal fiduciary duty standard for broker dealers when providing personalized investment advice regarding securities to retail clients. Properly implemented, such a standard will enhance protections for clients, preserve the opportunities for clients to select the level of service and type of relationship they desire, allow clients of all levels of sophistication and resources to be fully served and foster competition in the industry.”⁴³

41. From the Wells Fargo Advisors website, Working With a Financial Advisor, “How to Evaluate a Financial Advisor,” <https://www.wellsfargoadvisors.com/financial-advisor/articles/evaluatefinancial-advisor.htm>, last visited February 25, 2015.

42. *See id.*

43. Wells Fargo & Co. Letter to the SEC dated August 30, 2010, available at <http://www.sec.gov/comments/4-606/4606-2592.pdf>.

**Wells Fargo Tells Arbitrators To Forget About Feelings,
The Firm Is Not Required to Consider Investors' Interest First**

Ignoring that it markets itself as making investors feel their “best interests are the top priority” and that Wells Fargo has even publicly supported the need for a uniform fiduciary duty, in private arbitrations, Wells Fargo has refused to acknowledge owing a fiduciary duty. “The law establishes that a broker does not owe a fiduciary duty to a customer with respect to a nondiscretionary account.”⁴⁴

CHARLES SCHWAB

Charles Schwab Tells The Public That Its Brokers Are Proactive

“For many years, we’ve encouraged investors like you to “Talk to Chuck” so we could help you manage through the array of investing challenges and opportunities. I still encourage you to do that. We’ll share with you our passion for investing and our thoughts on how to do it well, and we’ll listen to you to understand how we can help you reach your goals. But going forward, you’ll be hearing more about the values we stand for and why they might matter to you. Our communications will emphasize the fundamental belief we share with you: a belief that through personal engagement and a relationship of mutual respect, your financial goals and a better tomorrow are within reach.”⁴⁵

“Does my broker discuss the risks in my investment portfolio?”

“All investors need to understand the various risks in their investment portfolio and their tolerance level for those risks. But, how much and how often do you discuss these risks with your broker? Is your broker proactive about communicating possible risks as things change in the markets, economy or in your personal situation?”⁴⁶

44. See Ex. 11.

45. From the Schwab website, Why Choose Schwab, “An Open Letter from Chuck,” http://www.schwab.com/public/file/P-6083252/Chuck_Open_Letter.pdf, last visited February 25, 2015.

46. From the Schwab website, Own Your Tomorrow, “Stay Engaged Questions,” <http://content.schwab.com/corporate/own-your-tomorrow/#Stay-Engaged-Questions>, last visited February 25, 2015.

Charles Schwab Tells Regulators That The Customers' Interests Should Come First

“Given the narrow area of overlap, the Commission should consider a straight-forward rule, simply tracking the language of Dodd-Frank Section 913(g)(1):

“The standard of conduct” when providing non-discretionary “personalized investment advice about securities to a retail customer” for a commission or other transaction-based compensation is “to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.”⁴⁷

Charles Schwab Tells Arbitrators That Customers' Interests Do Not Come First.

Even though Charles Schwab told regulators that personalized investment advice provided in exchange for a commission should require the broker to act in the best interest of a customer without regard to the broker's own financial interest, it takes a very different approach when pleading its case to the arbitrators. “Where a customer maintains a non-discretionary account, a broker-dealer's duties are quite limited. A broker does not, in the ordinary course of business, owe a fiduciary duty to a purchaser of securities.”⁵⁰

Why Wouldn't Investors Want A Uniform Fiduciary Rule?

In the above advertisements, brokerage firms consistently acknowledge that investors want, expect and need for brokerage firms to put their interests first. However, when the reality of the imposition of a fiduciary duty is evaluated, broker firms have changed their story and often argued that such a

47. Charles Schwab & Co., Inc. Letter to the SEC dated July 5, 2013, available at <http://www.sec.gov/comments/4-606/4606-3137.pdf>.

48. [sic] Footnote omitted from original report.

49. [sic] Footnote omitted from original report.

50. Ex. 12.

duty would actually harm investors. If some representatives of the brokerage industry are to be believed, the imposition of a national fiduciary duty would result in higher costs for investors and a barrier to low-income investors' access to brokerage advice. For example, the National Association of Plan Advisors ("NAPA"), a securities industry advocacy group, claims that a "conflict of interest" rule is really a "no advice" rule. In other words, according to NAPA, prohibiting conflicts of interests would "block Americans from working with the financial advisors and investment providers they trust simply because they offer different financial products – like annuities and mutual funds – with different fees."⁵¹

NAPA continues: "This rule could even restrict who can help you with your 401(k) rollover." The situation would be particularly dire, according to a 2011 study prepared by Oliver Wyman Inc. in response to the DOL's first attempt to propose a uniform fiduciary standard.⁵²

According to the abstract of the report, IRAs are widely held by small investors, who overwhelmingly favor brokerage relationships over advisory ones, and the proposed rule would prohibit 7.2 million current IRAs from receiving investment advice thanks to account minimums.⁵³

Further, the study claims that costs for brokerage IRA customers would increase between 75% and 195%.⁵⁴

Actual data, as opposed to the rhetoric and hyperbole, demonstrates that the imposition of a fiduciary duty upon brokers has no meaningful impact on cost to investors or access to investment advice.⁵⁵

In fact, differences in state broker-dealer common law standards of care have been tested to determine whether a relatively stricter fiduciary standard of care affects the ability to provide services to customers, and it was found that there is no statistical difference in the brokers' ability to provide services

51. "White House Rule Could Block 401(k) Participants from Advice," available at <http://asppanews.org/2015/02/23/white-house-rule-could-block-401k-participants-from-advice/>

52. The report was submitted to DOL by Davis & Harman LLP on April 12, 2011, on behalf of twelve financial services firms that offer services to retail investors. The cover letter and report can be found at <http://www.dol.gov/ebsa/pdf/WymanStudy041211.pdf>.

53. *See id.* at p. 2.

54. *See id.*

55. Finke, Michael S. and Langdon, Thomas Patrick, The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice (March 9, 2012). Available at SSRN: <http://ssrn.com/abstract=2019090> or <http://dx.doi.org/10.2139/ssrn.2019090>.

to higher or lower wealth clients, or their ability to provide a broad range of products including those that provide commissioned compensation. There was also no difference in the ability to provide tailored advice. And, perhaps most cuttingly for the industry's argument – there was no difference in the cost of compliance.

Given that the imposition of a uniform fiduciary rule neither affects access to investment advice nor increases costs, it is clear that the rule stands to benefit investors in a meaningful way by prohibiting conflicted investment advice.

Conclusion

Billions each year slip through the fingers of American investors because of the conflicted investment advice they receive. The SEC and DOL must take action to force brokerage firms to live up to the standard that they market to investors rather than the one brokerage firms argue when they have wronged those same investors. Brokerage firms advertise that they put customers' interests first, offer personalized advice and do all of this on an ongoing basis. In other words, they advertise that they are a fiduciary such as a doctor or lawyer. But, when a dispute arises with investors, brokerage firms consistently argue they have the duties of a used car salesman. SEC and DOL action for a strong, national fiduciary standard is the only way to protect investors' hard-earned retirement savings by holding firms to the image they themselves present.