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FIDUCIARY DUTY – NOW AND IN THE FUTURE

Christine Lazaro[1]

The celebrated jurist Benjamin Cardozo opined that the fiduciary duty is "the duty of finest loyalty", and that a fiduciary "is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[2] The question most customers have is whether their broker is subject to this duty of finest loyalty, or if they are bound merely by the morals of the marketplace. Currently this is a very difficult question to answer, and will depend on whether the customer is dealing with a broker or an investment adviser, where the customer is located, the type of account the customer has, among other things. However, the answer may be made clearer in the coming months.

With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act[3] ("Dodd-Frank") on July 21, 2010, the Securities and Exchange Commission (the "SEC") has been tasked with evaluating the effectiveness of the current legal or regulatory standards for brokers, dealer and investment advisers. Shortly thereafter, the SEC sought public comment on the issue. The next step will be for the SEC to decide what steps, if any, it should take to address the issues raised.

This article will examine the current standards applicable to brokers and investment advisers in their dealings with customers. It will then discuss what is required of the SEC pursuant to Dodd-Frank as well as various viewpoints on the topic.

I. The Current Standard

Brokers and investment advisors are regulated under two different regulatory schemes. As such, they are each held to different standards of

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2. Meinhard v. Salmon, 249 N.Y. 458, 463-64, 164 N.E. 545, 546 (N.Y. 1928).
3. Pub. L. No. 111-203, 124 Stat 1376 (2010).

conduct in their dealings with customers. Investment advisers are regulated by the Investment Advisers Act of 1940 (the "IAA")[4] and brokers are regulated by the Securities Exchange Act of 1934 (the "'34 Act")[5].

A. Investment Advisers

Notwithstanding that the IAA does not use the term "fiduciary" in the context of the standard applicable to investment advisers, case law has consistently held that "§ 206 [of the IAA] establishes 'federal fiduciary standards' to govern the conduct of investment advisers."[6]

Section 206 of the IAA[7] provides:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
>
> (3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

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4. 15 U.S.C. §§ 80b-1 *et seq.*
5. 15 U.S.C. §§ 78a *et seq.*
6. Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 17, 100 S. Ct. 242, 246 (1979) (citing to Santa Fe Industries, Inc. v. Green, 430 U.S.462, 471, n. 11, 97 S.Ct. 1292, 1300 (1977)); Burks v. Lasker, 441 U.S. 471, 481-482, n. 10, 99 S.Ct. 1831, 1839 (1979); Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-192, 84 S.Ct. 275, 282-283 (1963).
7. 15 U.S.C. §80b-6.

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

Therefore, if an account is being handled by an investment adviser pursuant to the IAA, the adviser has a fiduciary duty to the customer. In *Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc.*[8], the Court explained, "The Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline as investment adviser - consciously or unconsciously - to render advice which was not disinterested." The IAA specifically exempts brokers who provide investment advice, so long as the advice is solely incidental to the brokerage services, and the broker does not receive special compensation for the advice.[9]

B. Brokers

Brokers are not subject to a federal fiduciary standard. The '34 Act is worded differently from the IAA, and courts have not held that it creates a federal fiduciary standard for brokers. Rather, at the federal level, brokers are held to the "suitability" standard that has been created by the rules of the self-regulatory organization, the Financial Industry Regulatory Authority ("FINRA").[10] The suitability standard is set forth in FINRA Rule 2310[11], which states in relevant part:

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8. 375 U.S. 180, 191-92, 84 S. Ct. 275, 282-83 (1963).
9. 15 U.S.C. §80b-2(a)(11).
10. On July 30, 2007, FINRA was created through the consolidation of the National Association of Securities Dealers and the member regulation, enforcement and arbitration operations of the New York Stock Exchange. FINRA is the largest independent regulator for all securities firms doing business in the United States, and it oversees nearly 4,700 brokerage firms, and approximately 635,000 registered securities representatives. *See* www finra.org (last visited September 9, 2010).
11. FINRA Rules are reviewed by, and ultimately approved by the SEC. *See* "FINRA Rulemaking Process", www finra.org/Industry/Regulation/FINRARules/RulemakingProcess (last visited September 9, 2010).

(a) In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

(b) Prior to the execution of a transaction recommended to a non-institutional customer, other than transactions with customers where investments are limited to money market mutual funds, a member shall make reasonable efforts to obtain information concerning:

(1) the customer's financial status;
(2) the customer's tax status;
(3) the customer's investment objectives; and
(4) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

Although brokers are subject to this suitability standard when recommending an investment to a customer, recommendations only account for a portion of the interaction between brokers and customers. Moreover, the suitability standard requires that a recommendation merely be suitable for a customer, not necessarily that it be in the customer's best interest. Whether or not a broker owes a customer a fiduciary duty in addition to meeting the minimum suitability standard varies from state to state.

Certain states recognize a fiduciary duty in every broker – customer relationship. For example, in California, "[w]ith respect to stockbrokers it is recognized, 'The duties of the broker, being fiduciary in character, must be exercised with the utmost good faith and integrity.' *Meyer,* The Law of Stockbrokers and Stock Exchanges (1931) p. 253." *Twomey v. Mitchum, Jones & Templeton, Inc.*[12].

In other states, the duty a broker owes to a customer depends on the type of account the customer has. Many states recognize that brokers have limited duties when handling a non-discretionary account:

> Defendants' limited definition of a broker's duty to his customer is correct so long as the customer has a non-discretionary account with his broker, i.e., an account in which the customer rather than the broker determines which purchases and sales to make. In a non-discretionary account each transaction is viewed singly. In such cases the broker is

12. 69 Cal. Rptr. 222, 236 (Cal. Ct. App. 1968).

> bound to act in the customer's interest when transacting business for the account; however, all duties to the customer cease when the transaction is closed. Duties associated with a non-discretionary account include: (1) the duty to recommend a stock only after studying it sufficiently to become informed as to its nature, price and financial prognosis. *Cash v. Frederick and Co.*, 57 F.R.D. 71 (E.D.Wis.1972); *Hanly v. S.E.C.*, 415 F.2d 589 (2d Cir. 1969); (2) the duty to carry out the customer's orders promptly in a manner best suited to serve the customer's interests, *Richardson v. Shaw*, 209 U.S. 365, 28 S.Ct. 512, 52 L.Ed. 835 (1908); *Robinson v. Merrill Lynch*, 337 F.Supp. 107 (N.D.Ala.1971), Aff'd, 453 F.2d 417 (5th Cir. 1972), and cases cited therein; (3) the duty to inform the customer of the risks involved in purchasing or selling a particular security, *Hanly v. S.E.C.*, *supra*; *Cash v. Frederick and Co.*, *supra*; (4) the duty to refrain from self-dealing or refusing to disclose any personal interest the broker may have in a particular recommended security, *Chasins v. Smith Barney & Co.*, 438 F.2d 1167 (2d Cir. 1971); *S.E.C. v. Capital Gains Bureau*, 375 U.S. 180, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963); (5) the duty not to misrepresent any fact material to the transaction, *Carras v. Burns*, [516 F.2d 251, 258 (4th Cir. 1975)]; *Shorrock v. Merrill Lynch*, CCH Fed.Sec.L.Rep. P 96,251 (D.Or., Nov. 18, 1977); and (6) the duty to transact business only after receiving prior authorization from the customer, *Robinson v. Merrill Lynch*, *supra*.

Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.[13] Like the suitability obligation, the duties discussed above relate to all transactions within the customer's account, not just those that are recommendations.

When the broker is handling a discretionary account[14], courts have routinely held that the broker has a fiduciary duty to the customer. In *Leib*, the court specifically set forth the duties the brokers owe customers:

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13. 461 F. Supp. 951, 952-53 (E.D. Mich. 1978), *aff'd sub nom.* Leib v. Merrill Lynch, Pierce, Fenner & Smith Inc., 647 F.2d 165 (6th Cir. 1981).

14. FINRA Rule 2510 pertains to discretionary accounts, and provides in part that "[n]o member shall effect with or for any customer's account in respect to which such member or his agent or employee is vested with any discretionary power any

> Unlike the broker who handles a nondiscretionary account, the broker handling a discretionary account becomes the fiduciary of his customer in a broad sense. Such a broker, while not needing prior authorization for each transaction, must (1) manage the account in a manner directly comporting with the needs and objectives of the customer as stated in the authorization papers or as apparent from the customer's investment and trading history, *Rolf v. Blyth Eastman Dillon & Co., Inc.*, 570 F.2d 38 (2d Cir. 1978); (2) keep informed regarding the changes in the market which affect his customer's interest and act responsively to protect those interests (see in this regard, *Robinson v. Merrill Lynch*, [337 F.Supp. 107 (N.D.Ala.1971)]); (3) keep his customer informed as to each completed transaction; and (5) explain forthrightly the practical impact and potential risks of the course of dealing in which the broker is engaged, *Stevens v. Abbott, Proctor and Paine*, 288 F.Supp. 836 (E.D.Va.1968). [*sic*]

Some courts have also recognized that other circumstances create a fiduciary relationship. In *Marchese v. Nelson*[15], the court set out a brief survey of various judicial approaches to determine whether a fiduciary relationship has been created:

> The *Hotmar* [*v. Listrom & Co.*, 808 F.2d 1384, 1386 (10th Cir.1987)] court, in finding no fiduciary relationship, analyzed whether the broker agreed to manage or otherwise control the account, or rather, whether he merely rendered advice. *Id.* at 1387. Finding no agreement by the broker to monitor his clients' nondiscretionary accounts, the court found no fiduciary relationship. *Id.*
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> …
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> [T]he *Baker* [*v. Wheat First Sec.*, 643 F.Supp. 1420, 1429 (S.D.W.Va.1986)] court found a fiduciary relationship where the broker exerted "de facto control" over the account. *Baker*, 643 F.Supp. at 1429. To the *Baker* court, such de facto control existed when "'the client routinely follows the recommendations of the broker.' " *Id.* (quoting *Mihara v. Dean Witter & Co.*, 619 F.2d 814, 821 (9th Cir.1980)).

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transactions of purchase or sale which are excessive in size or frequency in view of the financial resources and character of such account." FINRA Rule 2510(a).

15. 809 F.Supp. 880, 893 (D. Utah 1993)

> …
> Finally, other courts assume the existence of a fiduciary relationship even if the account is [non]discretionary [sic], and then analyze the facts to determine the scope of the duty and whether the broker breached the duty. See, e.g., *Romano v. Merrill, Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 530 (5th Cir.1987) (interpreting federal securities law). Applying this analysis, the Romano court found no breach where the customer, an alert and vigilant businessman, controlled his nondiscretionary account and made all decisions regarding activity in the account. *Id.* (citations omitted).

In *Leib*, the court observed that although an account may be non-discretionary, a broker may nonetheless have handled the account in a manner more closely akin to a discretionary account. "Such an account is one in which the broker has usurped actual control over a technically non-discretionary account. In such cases, the courts have held that the broker owes his customer the same fiduciary duties as he would have had the account been discretionary from the moment of its creation."[16] *Leib* then set forth several factors courts should consider in determining whether the broker has usurped control over the account:

> In determining whether a broker has assumed control of a non-discretionary account the courts weigh several factors. First, the courts examine the age, education, intelligence and investment experience of the customer. Where the customer is particularly young, *Kravitz v. Pressman, Frohlich & Frost*, 447 F.Supp. 203 (D.Mass.1978), old, *Hecht v. Harris*, *supra*, or naive with regard to financial matters, *Marshak v. Blyth Eastman Dillion & Co., Inc.,* 413 F.Supp. 377 (N.D.Okl.1975), the courts are likely to find that the broker assumed control over the account. Second, if the broker is socially or personally involved with the customer, the courts are likely to conclude that the customer relinquished control because of the relationship of trust and confidence. *Kravitz v. Pressman*, *supra*; *Hecht v. Harris*, [430 F.2d 1202 (9th Cir. 1970)]. Conversely, where the relationship between the broker and the customer is an arms-length business relationship, the courts are inclined to find that the customer retained control over the account. *Shorrock v. Merrill Lynch*,

16. 461 F.Supp. at 954.

> [CCH Fed.Sec.L.Rep. P 96,251 (D.Or., Nov. 18, 1977)]. Third, if many of the transactions occurred without the customer's prior approval, the courts will often interpret this as a serious usurpation of control by the broker. *Hecht v. Harris*, *supra*. Fourth, if the customer and the broker speak frequently with each other regarding the status of the account or the prudence of a particular transaction, the courts will usually find that the customer, by maintaining such active interest in the account, thereby maintained control over it. *Robinson v. Merrill Lynch*, *supra*.

de Kwiatkowski v. Bear, Stearns & Co., Inc.[17] also set forth 'special circumstances' which can create a fiduciary duty on the part of the broker:

> The transformative "special circumstances" recognized in the cases are circumstances that render the client dependent – a client who has impaired faculties, or one who has a closer than arms-length relationship with the broker, or one who is so lacking in sophistication that de facto control of the account is deemed to rest in the broker. The law thus imposes additional extra-contractual duties on brokers who can take unfair advantage of their customers' incapacity or simplicity. See, e.g., *Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Int'l Ltd.,* 251 A.D.2d 137, 674 N.Y.S.2d 648, 649 (App.Div.1998) (referring to the broker's "requisite high degree of dominance and reliance"); *Leib,* 461 F.Supp. at 954 (referring to heightened duties where "broker has usurped actual control," such as a case involving a 77-year-old widow); *cf. Robinson,* 337 F.Supp. at 113 (absent an express advisory contract, there is no fiduciary duty on part of broker-dealer "unless the customer is infirm or ignorant of business affairs").

In addition to the nature of the account and the relationship between the broker and the customer, the type of fees a customer pays is another factor in determining whether or not a fiduciary duty exists. As noted earlier, the IAA exempts brokers who provide investment advice so long as the advice is incidental to the brokerage services, and the broker does not receive special compensation for the advice. In 1999, the SEC expressed concern that because brokerage firms were now offering fee-based accounts in addition to

17. 306 F.3d 1293, 1308-09 (2d Cir. 2002).

commission-based accounts, they would be subject to the IAA.[18] The SEC recognized that customers were getting the same services regardless of the broker's compensation scheme. Ultimately, the SEC adopted a rule ensuring that brokerage firms offering fee-based accounts would not be subject to the IAA.[19] However, in 2007, the Court of Appeals for the D.C. Circuit held that the SEC did not have authority to broaden the exception set forth in the IAA, and it struck down the rule.[20] Hence, brokers who offer fee-based accounts are deemed to receive special compensation under the IAA and are required to be registered as investment advisers and as such, are subject to the fiduciary obligations of the IAA.[21]

II. The Dodd-Frank Wall Street Reform and Consumer Protection Act

Dodd-Frank was signed into law by President Obama on July 21, 2010. The final version of the bill was a compromise between the House and the Senate versions. "Changes to the standards of conduct applied to broker-dealers and investment advisers were present in both the House and the Senate versions of financial regulatory reform. However, the House and the Senate had different approaches to this issue. The House approach was to harmonize the fiduciary standard for brokers, dealers, and investment advisers. The Senate approach was to have the SEC conduct a study to evaluate the effectiveness of existing standards of conduct for brokers, dealers, and investment advisers."[22]

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18. S.E.C. Notice of Proposed Rulemaking, 64 Fed. Reg. 61,228 (Nov. 10, 1999).

19. The Commission adopted final rule 202(a)(11)-1 under the IAA on April 15, 2005. *See S.E.C. Rel. No. 34-51523,* available at www.sec.gov/rules/final/34-51523.pdf. However, the Commission did not take any actions against firms which offered fee-based accounts between the issuance of the proposed rule in 1999 and the adoption of the final rule in 2005.

20. Financial Planning Ass'n v. Securities and Exchange Commission, 482 F.3d 481 (D.C. 2007).

21. It should be noted that the IAA only confers a limited private right of action. *See* Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11,24, 100 S.Ct. 242, 349 (1979) ("For the reasons stated in this opinion, we hold that there exists a limited private remedy under the Investment Advisers Act of 1940 to void an investment advisers contract, but that the Act confers no other private causes of action, legal or equitable.").

22. MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41381, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: STANDARDS OF CONDUCT

Section 913 of Dodd-Frank is entitled, "Study and Rulemaking Regarding Obligations of Brokers, Dealer, and Investment Advisors." Pursuant to subsection (b), the SEC is required to conduct a study to evaluate:

> (1) the effectiveness of existing legal or regulatory standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice and recommendations about securities to retail customers imposed by the Commission and a national securities association, and other Federal and State legal or regulatory standards; and
>
> (2) 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 brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers that should be addressed by rule or statute.

Subsection (c) sets forth fourteen items that the SEC should consider when conducting the study, and includes the catchall of anything not explicitly set forth that the SEC deems necessary and appropriate. As summarized by the Congressional Research Service:

> Subsection (c) sets out what the SEC is required to consider in conducting the study: (1) the effectiveness of current legal or regulatory standards of care which have been imposed by the SEC or a national securities association and other federal and state legal or regulatory standards; (2) whether there are legal or regulatory gaps, shortcomings, or overlaps in the standards of conduct for protecting retail customers that should be addressed by rule or statute; (3) whether retail customers understand that there are different standards of care applicable to brokers, dealers, and investment advisers in the provision of personalized investment advice about securities to retail customers; (4) whether the existence of different standards of care concerning the quality of personalized investment advice that retail customers receive

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OF BROKERS, DEALERS, AND INVESTMENT ADVISERS (2010), available at www.cq.com/displaycrsreport.do? docid=3729478.

> is confusing to them; (5) the resources and activities of the SEC, the states, and a national securities association to enforce the standards of care, including the effectiveness of examinations of brokers, dealers, and investment advisers in determining compliance with regulations, the frequency of examinations, and the length of time of the examinations; (6) the substantive differences in regulating brokers, dealers, and investment advisers in their providing personalized investment advice and recommendations about securities to retail customers; (7) specific instances concerning personalized investment advice about securities in which regulation and oversight of investment advisers provide greater protection than regulation and oversight of brokers and dealers and instances in which regulation and oversight of brokers and dealers provide greater protection than regulation and oversight of investment advisers; (8) existing legal or regulatory standards of state securities regulators and other regulators intended to protect retail customers; (9) the potential impact on retail customers of imposing upon brokers and dealers the standard of care applied under the Investment Advisers Act; (10) the potential impact of eliminating the broker and dealer exclusion from the definition of "investment adviser" in the Investment Advisers Act; (11) the varying level of services provided by brokers, dealers, and investment advisers to retail customers; (12) the potential impact on retail customers that could result from changing the regulatory requirements or legal standards of care affecting brokers, dealers, and investment advisers concerning their obligations to retail customers about investment advice; (13) the potential additional costs to retail customers concerning the potential impact on the profitability of their investment decisions and to brokers, dealers, and investment advisers resulting from changes to the regulatory requirements or legal standards affecting brokers, dealers, or investment advisers; and (14) any other consideration that the SEC considers necessary and appropriate in determining whether to conduct a rulemaking.

Subsection (d) gives the SEC six months from the enactment of Dodd-Frank to submit its report to both the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives. Subsection (e) requires the SEC to seek public comments in preparing its report. Subsection (f) permits the SEC to "commence a rulemaking, as necessary or appropriate in the public interest and for the protection of retail customers" which addresses the standard of care a broker has towards a customer. Subsection (g) amends both the '34 Act and the IAA to allow the SEC to issue rules governing the standards of care owed by both brokers and investment advisers.[23] However, subsection (g) specifically states that "[n]othing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities."

III. Concerns and Responses

In 2009, the Treasury Department issued a report entitled "Financial Regulatory Reform - A New Foundation: Rebuilding Financial Supervision and Regulation".[24] The Report essentially addresses numbers (3) and (4) of subsection (c) of section 913 of Dodd-Frank:

> Retail investors are often confused about the differences between investment advisers and broker-dealers. Meanwhile, the distinction is no longer meaningful between a disinterested investment advisor and a broker who acts as an agent for an investor; the current laws and regulations are based on antiquated distinctions between the two types of financial professionals that date back to the early 20th century. Brokers are allowed to give "incidental advice" in the course of their business, and yet retail investors rely on a trusted relationship that is often not matched by the legal responsibility of the securities broker. In general, a broker-dealer's relationship with a customer is not legally a fiduciary relationship, while an investment adviser is legally its customer's fiduciary.
>
> From the vantage point of the retail customer, however, an investment adviser and a broker-dealer providing "incidental advice" appear in all respects identical. In the retail context, the legal distinction between the two is no longer meaningful. Retail customers repose the same degree of

23. *See id.*
24. http://www financialstability.gov/docs/regs/FinalReport_web.pdf (June 17, 2009).

> trust in their brokers as they do in investment advisers, but the legal responsibilities of the intermediaries may not be the same

SEC Chairman Mary Schapiro made similar observations when she testified on July 22, 2009 before the United States House of Representatives Committee on Financial Services[25]:

> Many investors do not recognize the differences in standards of conduct or the regulatory requirements applicable to broker-dealers and investment advisers. When investors receive similar services from similar financial service providers, it is critical that the service providers be subject to the same standard of conduct and equivalent regulatory requirements, regardless of the label attached to the providers.
>
> I therefore believe that all financial service providers that provide personalized investment advice about securities should owe a fiduciary duty to their customers or clients and be subject to equivalent regulation. As such, I support the standard contained in the Department of the Treasury bill recently put forth entitled the "Investor Protection Act of 2009." That bill explicitly would enable the Commission to promulgate rules to provide all broker-dealers and investment advisers providing investment advice to retail customers act solely in the interest of their customers or clients without regard to the financial or other interests of the financial service professional. The establishment of this investor-focused approach as a consistent standard for all broker-dealers and investment advisers providing investment advice would represent a significant step forward in the protection of retail investors.

On July 27, 2010, the SEC published its request for public comment[26] as it was required to do pursuant to §913(e) of Dodd-Frank. By the date comments were due, August 30, 2010, thousands of comments were posted

25. *Regulatory Perspectives on the Obama Administration's Financial Regulatory Reform Proposals: Hearing Before the House Committee on Financial Services*, 111th Cong. (2009) (statement of Mary L. Schapiro, Chairman, S.E.C.); a copy of the statement is available at www.sec.gov/news/testimony/2009/ts072209mls htm.

26. *S.E.C. Release No. 34-62577; IA-3058,* "Study Regarding Obligations of Brokers, Dealers, and Investment Advisers", available at www.sec.gov/rules/other/ 2010/34-62577.pdf.

on the SEC's website. Many organizations commented, including PIABA[27], SIFMA[28], AARP[29], NASAA[30], and the Investment Adviser Association[31]. Each of these organizations supports a uniform standard for brokers and investment advisers, but their opinions vary in terms of what that really means.

CONCLUSION

It would be pure speculation at this point to try to determine what the SEC will do in response to the study it is now conducting. One would hope that the issues raised in connection with the confusion faced by customers every day could be resolved. It seems easy to simply create a true uniform fiduciary standard that would apply to any financial professional who does business with a retail customer. The argument that doing so would be cost prohibitive to brokerage firms, or that the diversity of products currently offered to customers would suddenly dry up, lacks support. As set forth above, in California, brokers are fiduciaries in the true sense. Yet that fact has not caused brokers and brokerage firms to flee the state. On the contrary, customers have the same opportunities to invest in California that they have in New York. The only difference is that customers in California are protected by the law and are not tasked with trying to determine what duties their broker may owe them.

In a speech given at the Consumer Federation of America 21st Annual Financial Services Conference on December 3, 2009, Chairman Schapiro[32] described the risks of maintaining the status quo:

> So, imagine an investor walking down Main Street in the town where you grew up. He steps into the office of the local securities professional and is handed a business card.
>
> But he doesn't look to see whether it says broker-dealer or investment adviser. Chances are he doesn't know the difference. Or even care. All he wants is helpful, investor-focused advice, a fair deal and a professional he can trust.

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27. www.sec.gov/comments/4-606/4606-2737.pdf.
28. www.sec.gov/comments/4-606/4606-2553.pdf.
29. www.sec.gov/comments/4-606/4606-2549.htm.
30. www.sec.gov/comments/4-606/4606-2607.pdf.
31. www.sec.gov/comments/4-606/4606-2563.pdf.
32. www.sec.gov/news/speech/2009/spch120309mls htm.

> These seem to me to be reasonable expectations. But today that investor — whether he knows it or not — is treated differently depending on what that business card says. If it's a broker-dealer, he's sold a product that is, "suitable" for him. If it's an investment adviser, he gets treated under a higher standard — the fiduciary duty standard — meaning that the investment adviser has to provide advice that puts the investor's interest first.
>
> Investors today should not be treated differently based on what door they walk into — or based on what is written on the business card they are handed.
>
> Instead, I believe that all securities professionals should be subject to the same fiduciary duty — and that all investors receiving advice should rest assured that the advice they get is being given with their interest at heart.
>
> But, to be effective, the fiduciary duty needs to be meaningful and uniform across all securities professionals. It cannot be weakened or diluted just so that it can be applied broadly.

The SEC's report is required to be submitted to the two committees by January 2011. Hopefully, by that time, the SEC will have begun the rulemaking process to adopt rules that will impose a strong, uniform fiduciary standard on both brokers and investment advisers.