St. John's Law Review

Volume 87
Number 2 *Volume 87, Spring-Summer 2013, Numbers 2-3*

Article 6

# Can the Retail Investor Survive the Fiduciary Standard?

Paul R. Walsh

David W. Johns

# CAN THE RETAIL INVESTOR SURVIVE THE FIDUCIARY STANDARD?

PAUL R. WALSH[†] AND DAVID W. JOHNS[‡]

For the retail investor in the United States, generally two options are available for seeking professional investment advice to reach their financial goals: hiring a broker-dealer or an investment adviser. Each entity is governed under separate regulatory schemes. With the recent financial collapse and the ensuing jump to regulation, there is a push to make a uniform standard for all investment recommendations—a fiduciary standard—that would be a one-size-fits-all reaction, leading to less access and higher costs for the smaller investor.[1] Continued regulation of more disclosure and transparency in the investment sales process, stronger requirements of the investment sales person, proliferation of common sense education of the investing public in handling their own money, and swifter punishment under existing rules of bad actors should be the regulatory focus.

## I. REGULATORY ENVIRONMENT OF BROKER-DEALER AND INVESTMENT ADVISORS

Regulation of broker-dealers is primarily under the purview of the U.S. Securities and Exchange Commission's ("SEC") antifraud authority within the Securities Act of 1933 ("Securities

[†] Paul R. Walsh is a 1992 graduate of St. John's University School of Law. He is a Senior Vice President and Director of Compliance for a dually registered U.S. investment adviser and broker-dealer. Paul is also an Adjunct Professor of Law at St. John's University School of Law where he teaches Broker-Dealer Regulation.

[‡] David W. Johns attended Stetson University College of Law, obtaining his M.B.A. and J.D. in 2011. He is an Assistant Vice President and Compliance Specialist at a large financial services firm and has extensive experience with various regulatory agencies, responding to inquiries and investigations by the SEC, FINRA, and state agencies.

[1] *See* Michael Finke & Thomas P. Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice*, 25 J. FIN. PLAN. 28, 33 (2012) (imposing a uniform fiduciary standard on both investment advisors and broker-dealers does not account for individual client characteristics and business models, and will result in adverse consequences).

Act"), the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act rules and Self-Regulatory Organization ("SRO") rules. A broker-dealer's obligations to its customers flow from the SEC, and the rules, case law, disciplinary actions, and enforcement actions promulgated by its primary SRO, the Financial Industry Regulatory Authority ("FINRA"). FINRA's primary responsibility is to protect investors from abusive practices caused by the conflicting financial interests between broker-dealers and their client, and the rules impose suitability obligations on broker's recommendations.[2]

Conversely, regulation of investment advisers falls under the Investment Advisers Act of 1940 ("Advisers Act"), which imposes a fiduciary duty on the adviser to act in its client's best interests.[3] Arguably, the key difference in regulation is the regulatory approach: rule-based versus principle-based.

### A. *Broker-Dealer Regulation: Rule-Based Regulation*

Broker-dealer regulation has generally been described as the duty to deal fairly with customers, adhere to high standards of commercial honor and fair and equitable trade principles, and respect specific obligations, including ensuring investment suitability and disclosing certain conflicts of interest.[4] The primary legislation for broker-dealer regulation is the Exchange Act. Under the Exchange Act, a broker is defined as "any person engaged in the business of effecting transactions in securities for the account of others," whereas a dealer is defined as "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise."[5] The Exchange Act provides for detailed regulation of the conduct of broker-dealers, including investor protection provisions in the form of antifraud controls that prohibit both the misrepresentation or omission of material facts and fraudulent or manipulative practices in connection with the purchase or sale of securities.[6]

---

[2] *See* U.S. SEC. & EXCH. COMM'N STAFF, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS iv (2011) [hereinafter SEC STUDY], *available at* http://www.sec.gov/news/studies/2011/913studyfinal.pdf (noting that broker-dealers are obligated, by statutory provisions, to deal fairly with clients).

[3] *Id.* at 21–22.

[4] *Id.* at 106.

[5] Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(4)(A)–(5)(A) (2006).

[6] SEC STUDY, *supra* note 2, at 53.

Shortly after it passed the Exchange Act, Congress passed the Maloney Act Amendments, which established a system of self-regulation for broker-dealers and resulted in what is now FINRA.[7] The Maloney Act created and empowered a variety of SROs, including national securities exchanges and the NASD—now known as FINRA—to have extensive oversight over securities broker-dealers and other market players.[8] Thus, while the Exchange Act rules are more focused on fraud prevention and are the backdrop for broker-dealer obligations, FINRA rules, among others, address unethical behavior that may not rise to the level of fraud.

### *B. Investment Advisers Act: Principle-Based Regulation*

In 1935, the SEC commissioned a study of investment trusts and investment companies.[9] A product of the study, the Investment Counsel Report ("Counsel Report"), revealed that the number and amount of assets investment advisers managed was ambiguous.[10] The Counsel Report identified two major problems: (1) harm to the public inflicted by dishonest advisers; and (2) reputational harm to legitimate investment advisers.[11] In response to these problems, Congress passed the Investment Advisers Act of 1940,[12] subjecting investment advisers to statutory fiduciary standards.[13] While some provisions and rules impose specific prohibitions or requirements, the fiduciary duty is the main governor of the adviser-client relationship.[14] While the term "fiduciary" is not found in the Advisers Act, the Act prohibits investment advisers from engaging in fraudulent or

---

[7] *See* Maloney Act of 1938, Pub. L. No. 75-719, 52 Stat. 1070 (codified as amended at 15 U.S.C. § 78o-3 (2006)) (providing guidelines for registering as a national securities association with the SEC).

[8] Saule T. Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, 35 BROOK. J. INT'L L. 665, 693 (2010).

[9] *See* H.R. DOC. NO. 76-477 (1939).

[10] *See id.* at 2, 8.

[11] *See* S. REP. NO. 76-1755, at 21 (1940).

[12] Investment Advisors Act of 1940, Pub. L. No. 76-768, 54 Stat. 789 (codified as amended at 15 U.S.C. § 80b-1 to -21 (2006)).

[13] *See id.* § 206(3), 54 Stat. at 852 (codified as amended at § 80b-6).

[14] *See* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191, 194 (1963) (interpreting the Investment Advisers Act of 1940 as Congressional recognition of the fiduciary relationship between investment advisers and their clients).

deceptive transactions and imposes on them a duty to make disclosures to their clients even when there is no intent to defraud.[15]

Congress defined an "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities."[16] As a consequence of such a broad definition, broker-dealers fell within its purview and were subject to its reach.[17] Thus, the broker-dealer exclusion was born. Because broker-dealers were regulated by the Exchange Act, Congress excluded broker-dealers from the Advisers Act if two conditions were met: (1) the broker's advice was "solely incidental" to brokerage services; and (2) the broker did not receive any "special compensation" for the advice.[18] The term "solely incidental" was not defined, but legislative history specifies that the exclusion will apply only if the compensation received by the broker-dealer is strictly commission-based.[19]

### *C. Standards of Conduct*

Brokers must meet a suitability standard when providing information regarding financial products. "Suitability" means that there is a reasonable basis for investment recommendations with regard to a customer's financial situation.[20] The suitability standard does not require a broker to recommend the best possible product for the situation, nor does it require the broker to notify the client that another broker could perform the transaction for less commission; rather, it requires the broker to find the "best execution" for the product.[21]

---

[15] 15 U.S.C. § 80b-6 (2006) (effective July 22, 2010).

[16] *Id.* § 80b-2(a)(11).

[17] Arthur B. Laby, *Reforming the Regulation of Broker-Dealers and Investment Advisers*, 65 BUS. LAW. 395, 403 (2010).

[18] SEC STUDY, *supra* note 2, at 15–16; 15 U.S.C. § 80b-2(a)(11)(C).

[19] *See* S. REP. NO. 76-1755, at 22 (1940); Laby, *supra* note 17, at 403.

[20] SEC STUDY, *supra* note 2, at 52 n.226.

[21] *See id.* at 69 (explaining that broker-dealers are legally obligated to obtain the most favorable terms reasonably available in executing a customer's trades). *But cf. id.* at 54 (stating that "courts have found broker-dealers to have a fiduciary duty under certain circumstances").

The suitability standard is codified in the recently enacted FINRA Rule 2111 and uses a broker's "recommendation" to a customer as the "triggering event" for its application.[22] What constitutes a "recommendation" is determined by the facts and circumstances surrounding the transaction.[23] Under FINRA Rule 2111, investment *strategies* involving securities, regardless of whether the recommendation results in a transaction, must be suitable even if the recommended strategy is to hold a particular investment and do nothing.[24] Rule 2111 explicitly sets forth the information that a broker-dealer must attempt to obtain and review in order to perform a sufficient suitability analysis. This information includes the client's age, investment experience, time horizon, liquidity needs, risk tolerance, tax status, financial situation and needs, investment objectives, and other holdings.[25] A broker-dealer, through its associated persons, must document with specificity its basis for believing that a particular factor is not relevant in determining suitability for a particular client in order to be exempt from gathering that information.[26]

Rule 2111 consists of three main obligations: reasonable basis suitability, customer-specific suitability, and quantitative suitability.[27] Reasonable basis suitability requires that a broker's recommendation is suitable for at least *some investors* based upon the potential risks and rewards associated with recommending that security.[28] Customer-specific suitability requires that the broker's recommendation is suitable for a *particular investor* based upon that investor's investment profile.[29] Quantitative suitability requires that a broker with actual or de facto control over a customer's account have a reasonable basis for a series of recommendations and prohibits the broker from making excessive and unsuitable transactions for the customer.[30] When determining quantitative suitability,

---

[22] FIN. INDUS. REGULATORY AUTH., REGULATORY NOTICE 11-02, KNOW YOUR CUSTOMER AND SUITABILITY 2 (2011), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122778.pdf.

[23] *Id.*

[24] *Id.* at 3.

[25] *Id.* at 2.

[26] *Id.* at 4.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

the transactions must be viewed as a whole considering the customer's investment profile.[31] In sum, Rule 2111 requires that a broker fully understand both the recommended product and the customer; a lack of either understanding is a suitability violation.[32]

## II. THE GAME-CHANGERS

### A. *The Blurring of the Broker-Dealer / Investment Advisor Line*

In the 1990s, some brokerage firms started offering fee-based, as opposed to commission-based, compensation.[33] Increased competition between broker-dealers resulted in the prioritization of revenue stabilization and the movement to fee-based brokerage services.[34] At the same time, the SEC commissioned a committee to review the conflicts of interest in the brokerage industry and the recommended "best practices" for a compensation structure for registered representatives of broker-dealers.[35] It recommended that a portion of a registered representative's compensation be based upon the assets held in the account regardless of whether any transactions occur, resulting in a continued "revenue stream" for the broker and reducing the risk of "churning" in the account.[36] As fee-based brokerage services grew, the distinction between investment advisors and broker-dealers became ambiguous. Each now had analogous functions and similar compensation schemes, which could be considered "special compensation" under the Advisers Act because the schemes were not commission-based.[37] Broker-dealers found themselves backed into a corner.

---

[31] *Id.*

[32] *Id.*

[33] COMM. ON COMP. PRACTICES, REPORT OF THE COMMITTEE ON COMPENSATION PRACTICES 3 (1995), *available at* http://www.sec.gov/news/studies/bkrcomp.txt [hereinafter REPORT ON COMPENSATION PRACTICES].

[34] *See* Leslie Wayne, *The Discounters Storm Wall Street*, N.Y. TIMES, Dec. 26, 1982, at 3 (explaining how full-service firms are competing with discount firms by offering products not offered by discount firms, and on a fee for service basis).

[35] REPORT ON COMPENSATION PRACTICES, *supra* note 33, at 4–5.

[36] *Id.* at 10; Laby, *supra* note 17, at 406.

[37] *See* Certain Broker-Dealers Deemed Not To Be Investment Advisers, Exchange Act Release No. 34-51,523, Investment Advisers Act Release No. 2376, 70 Fed. Reg. 20,424, 20,425 (Apr. 12, 2005) [hereinafter Release No. 51,523] (defining "special compensation" as involving "the receipt by a broker-dealer of compensation other than brokerage commissions or dealer compensation); *see also* Certain Broker-

Application of the Advisers Act to fee-based accounts presented numerous new regulations, in addition to the regulatory scheme already in place for broker-dealers. Of primary concern was section 206(3) of the Advisers Act, which bars certain transactions, unless written disclosure is provided to the client and consent is given prior to each transaction.[38] This requirement, because of the active nature of the markets, would effectively ban a broker's ability to effect principal trades for its account.[39] In response, the SEC enacted Rule 202(a)(11)-1 under the Advisers Act, which prevents the application of the Act to broker-dealers due to a fee-based structure if three conditions were met: (1) the advice provided was not discretionary; (2) the advice was solely incidental to brokerage services; and (3) the broker-dealer informed the customer that their account was a brokerage account.[40] The rule did not sit well with investment advisers because, in their view, it circumvented the fiduciary duty and disclosure protections given to clients under the Advisers Act and fostered competition with broker-dealers who were not required to adhere to equivalent regulatory responsibilities.[41] This culminated in the 2007 decision by the U.S. Court of Appeals for the Washington, D.C. Circuit in *Financial Planning Association v. SEC*.[42]

Dealers Deemed Not To Be Investment Advisors, Exchange Act Release No. 42,099, Investment Advisors Act Release No. 1845, 64 Fed. Reg. 61,226, 61,228 (Nov. 4, 1999) (receiving compensation other than traditional brokerage commission may constitute "special compensation").

[38] Investment Advisers Act of 1940 § 206(3), 15 U.S.C. § 80b-6(3) (2006); *see* Opinion of Director of Trading and Exchange, Relating to Section 206 of the Investment Advisors Act of 1940, Section 17(a) of the Securities Act of 1933, and Sections 10(b) and 15(c) (1) of the Securities Exchange Act of 1934, Investment Advisers Act Release No. 8, 11 Fed. Reg. 10,997 (Feb. 5, 1945) (noting that an investment advisor is a fiduciary, and therefore, must act in the client's best interests and obtain consent before effecting a transaction).

[39] *See* Laby, *supra* note 17, at 408 (explaining that the speed of electronic trading inhibits advisors ability to effect such transactions because they do not have time to comply with the requirements of section 206(3)).

[40] *Id.* at 409.

[41] SEC Release No. 51,523, *supra* note 37, at 11.

[42] 482 F.3d 481 (D.C. Cir. 2007).

1. *Financial Planning Association v. SEC*

Rule 202(a) (11)-1 did not have a long existence. It was overruled, which revived the question of whether broker-dealers were subject to the Advisers Act for fee-based accounts.[43] The primary argument of the Financial Planning Association ("FPA") was that the SEC lacked the statutory authority to implement the rule.[44] Conversely, the SEC argued that Section 202(a)(11)(F), which provides the SEC with the power to exclude "such *other* persons not within the intent of this paragraph, as the [SEC] may designate," gave it the authority to exclude certain brokers from the Advisers Act that do receive special compensation because the investment advice provided was the same as that provided by brokers already excluded from the Act.[45] Specifically, the argument was that the advice was incidental to the brokerage services provided.[46] However, the Court found the rule at odds with the Advisers Act, and thus, struck it down.[47]

Because of the massive amount of assets accrued in fee-based brokerage accounts at the time of the Court's decision, the SEC obtained a stay until October 1, 2007.[48] The SEC ultimately decided that by the expiration of the stay, customers had to decide to either "convert their fee-based brokerage accounts to advisory accounts or to traditional commission-based brokerage accounts."[49] Therefore, the issue of whether a broker's investment advice is the same as an investment adviser's advice remained unsettled. That is, until the financial crisis of 2008, when these issues became the forefront of discussion yet again.

---

[43] *See id.* at 493 (vacating the Broker-Dealer Rule).

[44] *See id.* at 487 (contending that the SEC exceeded its statutory authority by excepting from IAA coverage a group of broker-dealers Congress did not identify and intend to except in subsection (C)).

[45] *Id.* at 488.

[46] *See id.* at 487–88 (referring to Section 202(a)(1)(C) that excepts from IAA coverage brokers or dealers whose investment advisory services are "solely incidental" to their regular business and who do not receive additional commission for such services).

[47] *Id.* at 488.

[48] Fin. Planning Ass'n v. SEC, No. 04-1242, 2007 U.S. App. LEXIS 15169 (D.C. Cir. June 25, 2007).

[49] Temporary Rule Regarding Principal Trades with Certain Advisory Clients, Investment Advisers Act Release No. 2653, 72 Fed. Reg. 55,022, 55,024 (Sept. 24, 2007).

### 2. The Dodd-Frank Act

After much debate in the legislative branches, Congress enacted the Dodd-Frank Wall Street and Consumer Protection Act of 2010 ("Dodd-Frank") to address the triggers of the 2008 financial crisis. Section 913 of the Dodd-Frank Act mandated the SEC to perform a study to examine broker-dealer and investment adviser duties to their clients prior to any rulemaking.[50] Specifically, the SEC was to evaluate, among other things, the following: (1) the effectiveness of the existing legal or regulatory standards of care for personalized investment advice and recommendations to retail customers; and (2) the existence of regulatory gaps, shortcomings, or overlaps in regard to the protection of retail customers that should be addressed.[51] Moreover, section 913 explicitly gives the SEC the authority to require broker-dealers and investment advisers to adhere to a universal fiduciary duty when providing personalized securities-related investment advice to retail customers.[52] The SEC study was released in January 2011, and among other findings, found that investors are often confused by differing standards of care that apply to investment advisers and broker-dealers.[53] Consequently, the major recommendation made by the SEC was to merge the standards of care for broker-dealers and investment advisors into a universal standard.[54] In other words, when personalized investment advice is given to retail customers, the best interest of the customer takes priority without regard to the financial interest or other interest of the broker, dealer, or investment adviser giving the advice.

## *B. No One Can Serve Two Masters*

The Biblical admonition that a person cannot serve two masters is at the heart of the problem in applying a fiduciary standard to a broker-dealers transaction-based commission business. By its very nature as a for-profit entity, a broker-dealer will inherently act in its own financial interest by dealing for its own account and by striving to maximize its profits.

---

[50] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 913, 124 Stat. 1376, 1826 (2010).

[51] *Id.* § 913(b)(1)–(2).

[52] *Id.* § 913(g).

[53] SEC STUDY, *supra* note 2, at i.

[54] *Id.* at v–vi.

Consequently, there is an inherent fatal flaw in the SEC's recommendation to apply a universal fiduciary standard. The universal fiduciary duty standard, as put forth by the SEC study, consists of two parts: the duty of loyalty and the duty of care.[55] The duty of loyalty is the primary tenet of a fiduciary standard, and violating it negates the very meaning of what it means to be a fiduciary.[56] Under the duty of loyalty, the broker or adviser is prohibited from placing their interest ahead of the interests of the customer and is required to disclose any conflicts of interest.[57] Under the duty of care, a broker or adviser is held to minimum standards of review and analysis when making investment recommendations or otherwise providing personalized investment advice to retail customers.[58] In other words, a broker-dealer that owes a duty of loyalty to its shareholders to make a profit would be violating the duty of loyalty it owes to it customers. Should a broker-dealer that makes a recommendation to a customer of a non-discretionary account somehow "ensure" that its recommendation is solely in the best interest of the customer and at least on par or better than the broker-dealer's best interest? Shouldn't the recommendation be suitable for the customer and then left to the customer to make the final call?

### C. *The Small Investor Loses Out*

A fiduciary duty is an ongoing obligation between the party that owes the duty of loyalty and care to the person relying on that duty.[59] Investment advisers are compensated generally by a percentage-fee charged against their client's assets under management.[60] This compensation scheme is consistent with the

[55] *Id.* at vi.

[56] Cheryl Goss Weiss, *A Review of the Historic Foundations of Broker-Dealer Liability for Breach of Fiduciary Duty*, 23 J. CORP. L. 65, 68 & n.5 (1997).

[57] SEC STUDY, *supra* note 2, at 112.

[58] *Id.* at 123.

[59] Weiss, *supra* note 56, at 68.

[60] *See* Christopher Condon, *The Rise of the Registered Investment Adviser*, BLOOMBERG BUSINESSWEEK (Mar. 3, 2011), http://www.businessweek.com/magazine/content/11_11/b4219041484091.htm (noting that most advisors do not depend on commission and instead, typically charge a fixed annual percentage of the client's money).

fiduciary duty. The investment adviser makes more money as his client's assets increase; thus, the duties and their pocketbooks are aligned.

For brokers who are paid commissions based upon individual investment transaction recommendations, the suitability standard is also consistent with their duties and pocketbooks. A broker gets paid for a suitable recommendation made at that time. To impose a fiduciary duty would extend a broker's duty beyond a single transaction recommendation. Now the broker would have to provide on-going monitoring of client's accounts, looking always to ensure the client's financial accounts are working in the client's best interest. A commission based compensation scheme cannot support adherence to a fiduciary duty imposed on a broker dealer. Thus, broker-dealers would most likely move to a percentage fee charged against assets under management model to support the enhanced requirements of the fiduciary duty. In order to make money, broker-dealers will require minimum assets for them to manage, just like investment advisers require. The small investor will not have the assets needed to get professional recommendations and advice until they are able to grow their own accounts perhaps through the use of online brokerage firms. Only individuals with sizable assets will be able to obtain the assistance of a broker or investment adviser.

### *D. Caveat Emptor*

The recommendation of a fiduciary duty for a registered representative of a broker-dealer emphatically ignores the relationship between a registered representative and a client. *Caveat emptor*, the Latin phrase for "let the buyer beware," proclaims that the buyer must perform her own due diligence when purchasing an item or service. Brokers, dealers, and advisors commonly lack authority to perform transactions or commit a customer's property without prior customer approval, and most clients of a registered representative do not wish to grant this power; in other words, the broker cannot exercise discretion.[61] In short, a broker is a salesperson. Accordingly, imposition of a fiduciary duty on a salesperson conflicts with the

[61] *See* Weiss, *supra* note 56, at 76 (requiring that the broker execute the customer's order "in exact conformity to the customer's instructions").

purpose of the sales profession—to make money.[62] Why does it appear that lawmakers and regulators alike want to credit broker dealer salespersons with knowledge beyond the minimum requirements enacted to become an investment salesperson? If the belief in our culture is that someone who calls themselves a "financial adviser" or "financial representative" is credited with expertise beyond required training, then educational requirements for entry into the financial investing world should be raised by regulation.

A broker's livelihood is based upon the amount of commissions earned with each sale. Like with any non-financial salesperson, most consumers automatically go on the defensive because they know the goal of the salesperson is to make the sale. Instinctively, the general public is skeptical of a salesperson's "puffery," has a desire to shop around with other vendors, and seeks out additional advice before making a purchase.[63] Protecting people from themselves is a deadweight that kills growth, entrepreneurialism, opportunities, including job opportunities, and investor returns.[64] It adds nothing to the wealth of society and, indeed, prevents the functioning of a healthy economy.[65] Morgan Clemons in his paper, *Harmonization v. Demarcation: The Problems with a Broker Fiduciary Duty and the Benefits of the Merrill Rule*, clearly articulates the innate defense mechanism within the general public regarding sales persons. He states:

> While there are so-called "lemon laws" for cars, implied warranties for various products, etc., arguably these are duties of care and not duties of loyalty; no one expects that a car salesman will sell the car that is in the customer's budget necessarily but rather the car that may yield him the higher commission from that particular sale.[66]

---

[62] Morgan Clemons, *Harmonization v. Demarcation: The Problems with a Broker Fiduciary Duty and the Benefits of the Merrill Rule* 27 (Oct. 28, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699274.

[63] *Id.*

[64] *See id.* at 27–29 (analogizing brokers to salesmen and stating that if salesmen had to propose the best car for the individual, they would charge more to cover the cost of the training that would help ensure that the advice given is accurate and would be inclined to sell a narrow class of American-made cars, causing customers to resort to markets overseas).

[65] *See id.*

[66] *Id.* at 27–28.

The investing public must change their views of investment salespersons to be more in line with the views the general public exhibits for the car salesman. An effort should be made through the American educational system, regulatory notices, and public service messages to heighten the public's knowledge of the interests of broker-dealers as salespersons. Broker-dealers should be required to provide plain English language disclosures agreed upon by regulators disclosing the conflicts. Customers should shop around, meet different brokers, and get recommendations from family and friends before selecting someone who will provide recommendations. Regulators should not be so hesitant to punish salespersons for unsuitable recommendations, and the marketplace should put out of business those brokers whose recommendations consistently lose their client's money.

## CONCLUSION

The imposition of a fiduciary duty onto the broker or salesman will create a barrier to the availability of investment advice to the small investor. If the investor can afford an investment advisor, that relationship will be governed by the fiduciary standard of care and the costs associated with it. If the investor can only afford transaction-by-transaction recommendations, that option should not be eliminated. Instead of regulations that would result in fewer investment options for the small investor, the focus of regulators should be on informing and educating the public, and aggressively pursuing brokers and investment advisers who violate existing rules and obligations. Concurrently, investors are encouraged to take a stronger interest in the qualifications, reputations and success of the individuals they seek to compensate for investment recommendations. Brokers are part of a transaction based compensation system where the product is central and their advice is incidental. The inverse is found in the investment adviser-client relationship; the product is incidental to the advice. Therein lies the dilemma: How could a fiduciary standard, which would require disinterested investment advice, be reconciled with a compensation structure linked to the product? It would not be reconciled; the average investor will lose access to transactional investment brokers, and access to professional investment advice would be limited to the wealthy.