Advisors, Brokers and Customers…

OH MY!

The ABCs of the Current Debate Regarding a Uniform Fiduciary Standard for the Financial Services Industry

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I. **Starting Off**

As the landscape of securities investing has changed over the last half-century, the roles of those who advise the public about investing also have changed. Recently, there has been a great push to create a uniform fiduciary standard for those providing personalized investment advice regarding securities to retail investors. This push has been championed by investor groups and legislators alike, as well as some advocates within the financial industry, and recently has been fueled by the executive branch of the federal government.

In this paper, we will discuss the different standards currently applied to Broker-Dealers and Investment Advisers, as well as calls for regulators to raise the bar with respect to the standard of conduct for those involved in the financial industry. We also will discuss the U.S. Department of Labor's proposed amendment to the definition of "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA"), and potential effects from the recently proposed rule. Similarly, this report will discuss the U.S. Securities and Exchange Commission's efforts to study the effects of imposing a uniform fiduciary standard, and potential effects from such a standard.

This issue has proven to be a constantly moving target. As such, this report reflects the authors' analysis of the effects of the potential rules as we presently view them. However, the authors expect to update this report as (or if) the fiduciary standard becomes clearer in the future.

II. **Who's Who and What's What – An Introduction**

At first blush, the term "financial advisor" appears to be self-explanatory – *i.e.,* one who provides financial advice. In our current financial services landscape, however, this seemingly simple term has taken on new and varying meanings. Today, the term "financial advisor" encompasses various professionals. Two types of professionals are most often associated with the term "financial advisor": (1) individuals associated with Registered Investment Advisers

("IAs"), and (2) registered representatives of Broker-Dealers ("BDs"). IAs, which are regulated under the Investment Advisers Act of 1940 (the "Advisers Act") and must register with either the Securities and Exchange Commission (the "SEC") or state securities agencies, are held to a *fiduciary standard.*[2] This standard requires IAs to provide unbiased, well-founded assistance to their customers when selecting retail financial investments. A fiduciary standard encompasses both the duty of care and the duty of loyalty, whereby the fiduciary must avoid conflicts of interest and operate with full transparency to the client. In addition, a fiduciary must provide continuous and ongoing monitoring of a client's investments and changing financial situation.

On the other hand, BDs are regulated under the Securities Exchange Act of 1934 (the "Exchange Act") and generally fall under the jurisdiction of the Financial Industry Regulatory Authority ("FINRA"), a self-regulatory organization for the securities industry. BDs have the primary task of facilitating the sale of select securities and may, incidentally, also provide financial advice to clients.[3] BDs are subject to the less stringent *suitability standard*. This standard requires that a registered representative have a reasonable basis to recommend a particular investment for the client at the time of the investment, based on information available to the representative at that time. The suitability standard, in most cases, does not impose an ongoing duty on the BD to continuously monitor the client's investment.[4]

Since the "Great Recession," much debate has circulated around implementing a uniform fiduciary standard for those providing personalized advice regarding securities to retail customers, regardless of whether they are doing so on the IA platform or the BD platform. Proponents of a uniform fiduciary standard say that it would be in the interest of retail customers to be able to hold those with whom they entrust their investments and retirement futures to the highest standard possible – a standard that would require advice imparted with the customer's

best interests in mind. Others argue that a uniform fiduciary standard may not be appropriate in many cases, as BDs and IAs operate differently with respect to, *inter alia*, compensation structures and regulatory schemes. As such, detractors contend that that imposing a broad fiduciary standard for BDs could increase the costs associated with obtaining financial advice and, therefore, could limit the access to financial advice for many of the investors such a standard purportedly would protect.

Recent governmental studies have suggested that many investors are not aware of the inherent differences between the standards of care of BDs and IAs.[5] The enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") on July 21, 2010, heralded the most significant changes to financial regulation in the United States since the Great Depression. Some of the changes brought about by Dodd-Frank are likely to directly impact the applicable standards of care for both IAs and BDs, and are intended to address investor confusion about the standard of care owed by professionals who provide investment advice. Dodd-Frank specifically instructed the SEC to: 1) evaluate current standards of care for those providing personalized investment advice to retail customers; and 2) investigate the potential effects of holding those investment professionals to a standard at least as stringent as that required of IAs under the Advisers Act, whether it be uniform for IAs and BDs or not. Dodd-Frank then granted the SEC rulemaking power to establish such a standard of care.

While not required by Dodd-Frank, the U.S. Department of Labor (the "DOL") commenced a similar mission to enact a fiduciary standard for professionals providing individualized investment advice in connection with assets or accounts covered by the Employee Retirement Income Security Act of 1974 ("ERISA"). The DOL's first proposed rule was unveiled in 2010 (the "2010 Proposal") and was met with significant criticism by those in the

investment industry. After receiving scores of comments detailing the potential negative ramifications, the DOL withdrew the 2010 Proposal and went back to the drawing board. Then, on April 20, 2015, the DOL, along with the Employee Benefits Security Administration ("EBSA"), officially proposed an updated version of its rule: "Definition of the Term 'Fiduciary'; Conflict of Interest Rule – Retirement Investment Advice" (the "2015 Proposal").

III. Who Owes What to Whom – Current Standards of Conduct for IAs and BDs

IAs and BDs are currently held to different standards of conduct in most situations. Their respective standards stem from different statutory, common law and regulatory constructs. In certain instances these standards may overlap, but in many situations the standard of conduct for those from whom investors receive their investment advice is different and depends greatly on how the respective professionals are registered. Of course, the discrepancies between standards of conduct do not necessarily indicate that advice received from an IA is better or more carefully crafted than that received from a BD. The differences between the two standards, however, may affect the types of investments to which a prospective investor is exposed, as well as the instances in which a BD may be held liable for breaches of the applicable standard of conduct.

A. Standard of Conduct – IAs

Section 202(a)(11) of the 1940 Act defines "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, or who, for compensation as part of a regular business, issues or promulgates analyses or reports concerning securities.[6]

Section 202(a)(11)(C) of the Advisers Act excludes from the definition of investment adviser any broker or dealer that meets these requirements: (1) the performance of investment

advisory services is "solely incidental" to the conduct of its business as a broker-dealer; and (2) no "special compensation" is received for advisory services.[7]

IAs owe their clients a fiduciary duty.[8] This fiduciary duty includes a duty of care and a duty of loyalty, and encompasses an IA's entire relationship with its clients and prospective clients.[9] The duty of loyalty requires a fiduciary to act in the best interests of its clients, even if doing so may not be in the best interests of the fiduciary. The duty of loyalty also requires a fiduciary to disclose potential conflicts of interest so as to make the client aware of matters where the adviser might render advice which is not necessarily in the best interest of the client, whether consciously or unconsciously.[10] The duty of care requires a fiduciary to make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information.[11] In other words, IAs have a duty to ensure the suitability of their investment recommendations, and such duty is ongoing and continuous.

B. Standard of Conduct – BDs

Section 3(a)(4)(A) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others."[12] A "dealer" is defined under section 3(a)(5)(A) of the Exchange Act as "any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise."[13]

BDs are generally held to a suitability standard as evidenced by FINRA Rule 2111. Rule 2111 states in relevant part:

> (a) A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may

> disclose to the member or associated person in connection with such recommendation. [14]

This standard has been generally held to be non-fiduciary in nature.[15] BDs, however, may have a fiduciary duty under certain circumstances, some of which arise under state common law.[16] BDs may also owe fiduciary duties to their customers, similar to that of IAs, when they exercise discretion or control over customer assets, and/or under other limited extraordinary circumstances.[17] This fiduciary duty, however, normally terminates upon the execution of the order in the case of a nondiscretionary account.[18] Thus, BDs do not normally have an ongoing duty to monitor their customers' accounts or provide advice on an ongoing basis (in the context of a nondiscretionary account).[19] Even if advice is given, this may not trigger a duty to continue to give advice.[20]

BDs also have a duty to deal fairly with their customers, derived from the antifraud provisions of federal securities laws.[21] By virtue of engaging in the brokerage profession, a BD makes an implicit representation to those with whom it transacts business that it will deal fairly with them, consistent with the standards of the profession.[22] In addition, BDs must observe high standards of commercial honor and just and equitable principles of trade when dealing with customers.[23] This duty includes ensuring the suitability of a BD's recommendations; engaging in fair and balanced communications with the public; providing timely and adequate confirmation of transactions; providing account statements; disclosing conflicts of interest; receiving fair compensation in agency and principal transactions; and giving customers an opportunity to resolve disputes through arbitration.[24] So, while generally not rising to the level of a fiduciary, BDs' duties to their customers are significant. In fact, the SEC has described FINRA's suitability rule as having the most far-reaching potential for dealing with improper selling practices,[25] and as critical to ensuring investor protection and fair dealing with customers.[26]

IV. Taking Action – Dodd-Frank's Mandate

Among its many measures, §913 of Dodd-Frank delegated to the SEC the task of studying the effectiveness of existing standards of care for different financial advisor groups and the possible effects a new standard would have on the investment industry. Section 913 also granted the SEC rulemaking authority to establish rules that would create a fiduciary standard for professionals who provide individualized investment advice to retail customers.[27]

To empower the SEC, §913 of Dodd-Frank added §§15(k) and (l) to the Exchange Act, and §§211(g) and (h) to the Advisers Act.[28] With respect to the Exchange Act, Dodd-Frank added in relevant part:

> (k) STANDARD OF CONDUCT.—
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> (1) IN GENERAL.—Notwithstanding any other provision of this Act or the Investment Advisers Act of 1940, the Commission may promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940. The receipt of compensation based on commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of such standard applied to a broker or dealer. Nothing 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.
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> (2) DISCLOSURE OF RANGE OF PRODUCTS OFFERED.—Where a broker or dealer sells only proprietary or other limited range of products, as determined by the Commission, the Commission may by rule require that such broker or dealer provide notice to each retail customer and obtain the consent or acknowledgment of the customer. The sale of only proprietary or other limited range of products by a broker or dealer shall not, in and of itself, be considered a violation of the standard set forth in paragraph (1).
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> (l) OTHER MATTERS.—The Commission shall—

(1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and

(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.[29]

With respect to the Advisers Act, Dodd-Frank added in relevant part:

(g) STANDARD OF CONDUCT.—

(1) IN GENERAL.—The Commission may promulgate rules to provide that 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 interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice. In accordance with such rules, any material conflicts of interest shall be disclosed and may be consented to by the customer.

Such rules shall provide that such standard of conduct shall be no less stringent than the standard applicable to investment advisers under section 206(1) and (2) of this Act when providing personalized investment advice about securities, except the Commission shall not ascribe a meaning to the term 'customer' that would include an investor in a private fund managed by an investment adviser, where such private fund has entered into an advisory contract with such adviser.

The receipt of compensation based on commission or fees shall not, in and of itself, be considered a violation of such standard applied to a broker, dealer, or investment adviser.

(2) RETAIL CUSTOMER DEFINED.—For purposes of this subsection, the term 'retail customer' means a natural person, or the legal representative of such natural person, who—

(A) receives personalized investment advice about securities from a broker, dealer, or investment adviser; and

(B) uses such advice primarily for personal, family, or household purposes.

(h) OTHER MATTERS.—The Commission shall—

> (1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and
>
> (2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.[30]

Pursuant to its marching orders, the SEC requested data and information relating to the benefits and costs that could result from various alternative approaches regarding the standards of conduct and other obligations of BDs and IAs (the "Study").[31] The Study was meant to inform the SEC on how it may approach imposing a new alternative standard of conduct for BDs and IAs who provide personalized investment advice about securities to retail customers. The Study, which will be discussed more fully below, resulted in two recommendations by the Staff of the SEC with respect to instituting a uniform fiduciary standard for BDs and IAs.

V. <u>The DOL Gets in on the Action</u>

Although Dodd-Frank did not mandate that the DOL make any changes, the DOL was the first regulator to act to redefine and implement changes to the fiduciary standard for those rendering personalized investment advice to investors that maintain plans or accounts subject to ERISA. ERISA does not distinguish between BDs and IAs for the purposes of determining a fiduciary standard. However, because of the widespread use of accounts covered by ERISA, including Individual Retirement Accounts ("IRAs"), the DOL's proposed rule stands to affect both BDs and IAs on a large scale, as well as the customers they serve. Because the DOL has recently unveiled the 2015 Proposal (and the SEC has yet to utilize its power to do so granted by Dodd-Frank), this paper will discuss the DOL's proposed rule first.

After the 2010 Proposal by the DOL fell flat, the DOL rolled out its 2015 Proposal in April. Whether or not the new proposal is an improvement, though, is yet to be determined. The re-proposed regulation institutes a standard for determining when a person providing investment advice with respect to an employee benefit plan or IRA will be considered a fiduciary under ERISA and the Internal Revenue Code of 1986 ("Code"). However, the SEC remains the only agency in charge of such an undertaking across all financial sectors. Nonetheless, the DOL's 2015 Proposal, if enacted, will undoubtedly have an enormous effect on the retirement investment industry and securities markets worldwide. In order to understand the potential effects of the proposed rule, we first examine the current fiduciary standard imposed by ERISA.

A. Status Report–Current Fiduciary Standard under ERISA

Under ERISA, a person is a fiduciary to a qualifying plan or IRA if he or she engages in specified plan activities, including rendering individualized investment advice for a fee or other compensation with respect to plan or IRA assets (or has any authority or responsibility to do so).[32] In 1975, the DOL issued a narrowly tailored five part regulatory test for determining what constitutes "investment advice," as follows:

(1) Make recommendations on investing in, purchasing or selling securities or other property, or give advice as to their value

(2) On a regular basis

(3) Pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary

(4)That the advice will serve as a primary basis for investment decisions with respect to plan assets, and

(5) The advice will be individualized to the particular needs of the plan or participant.[33]

An investment advisor is not treated as a fiduciary unless *each* of the five elements of this test is satisfied for *each* instance of advice.[34]

In response to growing concern that the present standard was ambiguous, lacked consistent implementation, and did not address the changing financial marketplace, the DOL and the IRS set out to revise the standard. The biggest concern both agencies are addressing is the widespread shift to 401(k)-type plans, participant directed 401(c) plans, IRA's and rollover of plan assets from fiduciary-protected plans to IRA's, which were not commonplace in the mid-1970's when the last major regulations went into effect.

B. First Foray – The DOL's Initial Offering

The DOL's 2010 Proposal stated that a person renders "investment advice" by giving (1) appraisals of fairness opinions concerning the value of securities or other property; (2) recommendations as to the advisability of investing in, purchasing, holding or selling securities or other property; (3) recommendations as to the management of securities or other property; or (4) when advice is provided for a fee or other compensation, direct or indirect, the person giving the advice is a fiduciary.[35] Investment advice under the 2010 Proposal included advice provided to plan participants, beneficiaries and IRA owners, as well as to plan fiduciaries.[36] Significantly, the 2010 Proposal suggested doing away with the current five-part test and instituting a new four-part test to determine when a person would be treated as a fiduciary advisor. An advisor would be held to a fiduciary standard if he/she provided one of the above types of "investment advice" and either:

(1) Represented that he/she was acting as an ERISA fiduciary;

(2) Acknowledged existing fiduciary status for purposes of providing advice;

(3) Was already an investment advisor under Section 202(a)(11) of the Investment Advisers Act of 1940; or

(4) Provided individualized advice or recommendations pursuant to an agreement, arrangement or understanding, written or otherwise, with the plan, a plan fiduciary or a plan participant or beneficiary, where the advice may be considered in making investment or management decisions with respect to plan assets.[37]

Part (2) was particularly significant because under the old test, a party could acknowledge fiduciary status and still not be held liable if she did not meet all five parts of the old test, but under the 2010 Proposal, satisfaction of at least one prong of the four-part test would have been sufficient.

Although the 2010 Proposal encapsulated many more instances that would make an advisor a fiduciary based on the investment advice rendered, the DOL proposed four specific "carve-outs" under which an advisor would not become a fiduciary:

(1) When providing recommendations as a seller or purchaser with interests adverse to the plan, its participants, or IRA owners, if the advice recipient reasonably should have known that the advisor was not providing impartial investment advice and the advisor had not acknowledged fiduciary status;

(2) Providing investment education information and materials in connection with an individual account plan;

(3) Marketing or making available a menu of investment alternatives that a plan fiduciary could choose from, and providing general financial information to assist in selecting and monitoring those investments, if these activities include a written disclosure that the advisor was not providing impartial investment advice;

(4) Preparing reports necessary to comply with ERISA, the Code, or regulations or forms issued thereunder, unless the report valued assets that

> lack a generally recognized market, or served as a basis for making plan distributions.[38]

During a lengthy commentary process, the 2010 Proposal was received with both praise and opposition. Supporters of the new standard, such as The Committee for the Fiduciary Standard and The Financial Planning Coalition – comprised of the Certified Financial Planner Board of Standards, Inc., the Financial Planning Association® and the National Association of Personal Financial Advisors – praised the attempt by the DOL to set new standards in an area where conflicts of interest may harm investors and their retirement needs.[39] These groups lauded the efforts to impose a "best-interest of the customer" standard of conduct for the IRA market, which had been untouched in previous regulatory reviews.[40] Both sides of the fiduciary standard debate agreed upon this last point, in principle, but disagreed on the best strategy for imposing such a standard.

Critics of the 2010 Proposal, including The Securities Industry and Financial Markets Association ("SIFMA"), focused their concerns around a few key issues. Perhaps the greatest area of concern was that under the 2010 Proposal's test for fiduciary status, investment advice no longer had to be offered on a regular basis to render an advisor a fiduciary – offering advice on a single occasion could result in long-term fiduciary status.[41] Another concern with the 2010 Proposal was whether sufficient analysis had been conducted on the economic effects the proposed fiduciary standard would have on the future of the financial services industry, as well as plan sponsors, participants, beneficiaries, and IRA owners.[42]

Although not submitted in response to the 2010 Proposal, in a comment letter Charles Schwab & Co., Inc. submitted to the SEC in 2010, the company explained that "[m]any retail investors seek to manage their investments through a mix of self-directed brokerage services, non-fee based advice, and fee-based investment advisory services, both discretionary and non-

discretionary," and customers select what services fit their needs "based on the size and complexity of their portfolios, their investing experience, their personal preferences, and their willingness and ability to pay for an ongoing advice relationship."[43] According to Charles Schwab & Co., a uniform fiduciary standard was not necessary given the regulatory structures already in place and potential costs to investors who might not need or want the ongoing services of an IA, which would likely increase the costs associated with IRAs for those investors not relying on full time personalized investment advice.[44] Lastly, many of the comments to the 2010 Proposal emphasized the deleterious effects that could take place without clear inter-agency coordination between the writings of Dodd-Frank, the SEC standards of care, the business conduct standards of the Commodity Futures Trading Commission ("CFTC") and the DOL.[45]

Due to the important issues raised by comments on the 2010 Proposal, the DOL withdrew the 2010 proposal in 2011 and went back to the drawing board. The DOL contends that the 2015 Proposal takes into consideration the issues brought forth in the comments submitted in response to the 2010 Proposal, but keeps the framework of the 2010 Proposal.[46]

C. Take Two – the DOL's 2015 Proposal

The 2015 Proposal expands the criteria of who is considered a fiduciary to include any individual receiving a fee or other compensation for providing advice that, pursuant to an agreement, arrangement or understanding, is individualized or specifically directed to an employee benefit plan, a plan fiduciary, participant or beneficiary, or an IRA owner for consideration in making investments or investment management decisions.[47] A "fee or other compensation" is defined as "any fee or compensation for the advice received by the advice provider (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered."[48] Such a "fee

or compensation" may include, but is not limited to, brokerage fees, mutual fund trailers, and insurance sales commissions.[49] The new definition includes the following four categories of fiduciary investment advice:

> **(1)** ***Investment recommendations***- A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA.
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> **(2)** ***Investment management recommendations***- A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA.
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> **(3)** ***Appraisals of investments***- An appraisal, fairness opinion or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange of such securities or other property by the plan or IRA.
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> **(4)** ***Recommendations of persons to provide compensated investment advice or to manage plan assets***- A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice in the prior three categories.[50]

The first category, investment recommendations, makes a clear distinction that one does not act as a fiduciary simply by providing participants with information about plan or IRA distribution options, as that would be considered investment education, not recommendations.[51] A person who represents that he or she is acting as a fiduciary under ERISA or the Code will, of course, continue to fall within the general definition of a fiduciary.[52]

The 2015 Proposal incorporates some of the comments to the 2010 Proposal as carve-outs which exclude certain types of activity from falling within the definition of fiduciary investment advice:

(1) Statements or recommendations made to a "large plan investor with financial expertise" by a counterparty acting in an arm's-length transaction;

(2) Offers or recommendations to plan fiduciaries of ERISA plans to enter into a swap or security-based swap that is regulated under the Exchange Act or the Commodity Exchange Act;

(3) Statements or recommendations provided to a plan fiduciary of an ERISA plan by an employee of the plan sponsor if the employee receives no fee beyond his or her normal compensation;

(4) Marketing or making available a platform of investment alternatives to be selected by a plan fiduciary for an ERISA participant-directed individual account plan;

(5) The identification of investment alternatives that meet objective criteria specified by a plan fiduciary of an ERISA plan or the provision of objective financial data to such fiduciary;

(6) The provision of an appraisal, fairness opinion or a statement of value to an Employee Stock Option Plan ("ESOP") regarding employer securities, to a collective investment vehicle holding plan assets, or to a plan for meeting reporting and disclosure requirements; and

(7) Information and materials that constitute "investment education" or "retirement education."[53]

In addition to providing these carve-outs, the DOL took into consideration the widespread concerns voiced by the financial services industry, and provided for certain exemptions to otherwise prohibited transactions. The most significant exemption may likely be the "Best Interest Contract Exemption" ("BICE") that, in theory, will allow BDs to retain a commission-based fee structure while providing fiduciary investment advice. The BICE allows a BD to receive commission-based compensation related to or in connection with the sale or holding of certain assets by a plan's participants and beneficiaries, and IRA account holders, as long as the BD enters into a contract with the client.[54] The contract must specifically "acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, warrant

that [the BD has] adopted policies and procedures reasonably designed to mitigate any harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest and on the cost of their advice."[55] The 2015 Proposal specifically states that the BICE would not apply if the contract contains exculpatory provisions disclaiming or otherwise limiting liability of the advisor or financial institution for a violation of the contract terms.[56] Significantly, this provision appears to indicate that the 2015 Proposal would allow for a private right of action for breach of contract against any advisor or financial institution who fails to act in the best interest of the client, and also allows for a client to participate in a class action against the advisor or financial institution.[57]

The 2015 Proposal also includes a Principal Transaction Exemption ("PTE"), which softens the general prohibition against BDs acting as principals (purchasing and selling securities from or to their customers through the BDs' own accounts) by allowing "investment advice fiduciaries to engage in purchases and sales of certain debt securities out of their own inventory…under conditions designed to safeguard the interests of these investors."[58] The safeguards under the PTE are essentially the same as the contract requirements of the BICE, but also include additional conditions related to the price of the debt security involved in the transaction. For example, the advisor would have to "obtain two price quotes from unaffiliated counterparties for the same or a similar security, and the transaction would have to occur at a price at least as favorable to the plan or IRA as the two price quotes."[59] Additionally, in order to permit for the utmost transparency, the advisor would be required to disclose the amount of compensation and profit that she expects to receive on the transaction, and obtain the investor's written consent to such transaction, which must be terminable at the investor's will without penalty.[60]

The 2015 Proposal was published in the Federal Register on April 20, 2015. The DOL initially scheduled a 75-day comment period – through July 6, 2015 – but has recently extended the comment period an extra 15 days pursuant to requests from multiple private parties as well as a group of legislators. The DOL plans to schedule a public hearing within 30 days of the end of the comment period, after which there will be a post-hearing public comment period. Then there will be a period of time during which the DOL will respond to comments received after the public hearing. If approved, the DOL is authorized under ERISA to publish and implement a final rule. Whether this happens remains to be seen.

D. The Road Ahead – Potential Effects of the DOL's 2015 Proposal

If enacted, the 2015 Proposal is likely to have a significant impact on the existing relationship between BDs and their customers maintaining accounts covered by the proposed rule, including:

- The 2015 Proposal would require many advisors not previously required to disclose conflicts of interest to do so. Potential conflicts that will now have to be disclosed include compensation to the advisor and relationships between the advisor and sponsors or issuers of recommended securities (including investment companies). This will require BDs to more closely monitor the variable compensation earned by their registered representatives, which may significantly increase compliance costs for these firms and their retirement businesses. Any increased costs would likely be passed on to the customers, especially in the case of publicly-owned BDs.[61]

- The BICE is supposed to be "principle based" (instead of "rules based"), which will allow firms some flexibility to customize their own compliance procedures and adapt them over time. However, it may be difficult to determine if the firms have adequately mitigated the conflicts associated with variable compensation without leveling the firm's payout to its individual advisors. Not all investments are covered by the definition of "Assets" covered by the BICE, however; for example, regulated investment companies are covered, but direct participation programs ("DPPs") are not.[62]

- The proposed rule will make it difficult to pay variable commissions to advisors because of the compliance concerns generated by entering into contracts pursuant to the BICE. As a result, due to the large volume of sales of DPPs to qualified

accounts, such as IRAs, the ability of private issuers to generate sales and raise capital may be significantly restricted. While some proponents of the proposed rule may argue this restriction on DPPs and the conflicts associated with some of their sales is precisely the result intended by the proposed rule, it should be noted that sales of investments such as DPPs may be well suited to holders of IRAs because of the typically longer time horizon associated with DPPs and the fact that holders of IRAs cannot generally access the funds held in those accounts like funds held in traditional cash brokerage accounts.[63]

- The number of BDs willing to render advice to customers with respect to accounts covered by the proposed rule may decrease, especially with respect to customers with smaller accounts. With a higher standard of care and the possibility that the compensation models utilized by many BDs will have to change, there is a distinct possibility that BDs may be unwilling to give advice that will impart an ongoing fiduciary duty under would-be compliant compensation models. This will not only affect the investment choices of account holders subject to the 2015 Proposal, primarily IRA holders in this instance, but will likely lead to investors having to choose between shifting their IRA accounts into advisory accounts or foregoing investment advice because of the management fees associated with advisory accounts.

These are just a few of the potential effects of the 2015 Proposal. Many more will likely surface during the comment period. We intend to update our analysis as warranted regarding the potential effects of the proposed rule.

VI. The SEC's Slow and Steady Approach

Dodd-Frank required the SEC to study the potential effects of a uniform fiduciary standard for BDs and IAs in the context of rendering personalized investment advice to retail customers.[64] In the Study, the staff of the SEC (the "Staff")[65] made recommendations to the SEC that the Staff believed would enhance retail customer protections and decrease retail customers' confusion about the standard of conduct owed to them upon receiving personalized investment advice from their respective financial professionals.[66] After the Staff published the Study, the SEC continued to consider the potential effects of instituting a fiduciary standard for BDs providing personalized investment advice, eventually requesting data and other information relating to the costs and benefits that could result from various alternative approaches regarding

the standards of conduct and other obligations of BDs and IAs. This section will focus on the Study, the subsequent request, and potential effects from a rule (or rules) implementing the fiduciary standards currently being considered by the SEC.

A. First Things First – Is the Current Regulation Working?

In the Study, the Staff undertook to understand (1) the effectiveness of the existing legal or regulatory standards of care for BDs, IAs, and persons associated with them for providing personalized investment advice and recommendations about securities to retail customers (such as those imposed by the SEC, FINRA, 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 BDs, IAs, and persons associated with them that should be addressed by rule or statute.[67]

In completing the Study, the Staff concentrated on several issues, including: (1) the current regulatory structure in place for BDs and IAs; (2) the amount of business transacted by BDs and IAs; (3) the current disclosures required of BDs and IAs; (4) the legal obligations BDs and IAs have to their customers; (5) remedies for customers against BDs and IAs for breaches of the applicable standard of conduct; and (6) state and other regulation of BDs and IAs (including ERISA).[68] The Staff considered several surveys, including those conducted by the SEC (and third parties contracted by the SEC) and the Consumer Federation of America ("CFA"), regarding retail investor perceptions and confusion regarding financial service provider obligations and standards of conduct.[69] In the end, the Staff concluded that, despite the extensive regulation of both IAs and BDs, retail customers do not understand and are confused by the roles played by IAs and BDs, and the applicable standards of care when these entities (and their respective agents) provide investment advice.[70]

The Staff then made two primary recommendations in the Study: (1) that the SEC engage in rulemaking to implement a uniform fiduciary standard of conduct for BDs and IAs when providing personalized investment advice about securities to retail customers; and (2) that the SEC consider harmonizing certain regulatory requirements of BDs and IAs where such harmonization appears likely to enhance meaningful investor protection, taking into account the best elements of each regime.[71] In making its recommendations, the Staff attempted to address what it considered as retail customer confusion about the obligations BDs and IAs owe to those customers, and to preserve retail customer choice without decreasing retail customer's access to existing products, services, service providers or compensation structures.[72]

While the Study displayed the opinion of the Staff, and the SEC approved the Study for publication, the individual commissioners did not all agree with the Study's findings and/or recommendations. SEC Commissioners Kathleen L. Casey and Troy A. Paredes opposed the Study's findings and stated, among other things, that a stronger analytical and empirical foundation than provided by the Study is required before regulatory steps are taken that would revamp how BDs and IAs are regulated.[73] Many other groups weighed in on the Study as well, with over 3,500 comments being submitted. Somewhat like the DOL's 2010 Proposal, both sides of the debate generally agreed with the proposition that holding those who render personalized investment advice to retail customers to a fiduciary standard would be beneficial to customers. However, the two sides diverged with respect to the amount and scope of regulation necessary to accomplish that goal. For example, Charles Schwab & Co.'s comment to the SEC recommended the Study define "personalized investment advice," and fill in any gaps in regulation without instituting an entirely new standard for BDs.[74] The CFA voiced concerns that the Study's intent (and eventual conclusion) did not adequately address the increasingly adviser-like role the CFA

believes BDs have played without being held to the same standard as IAs, and that BDs should be held to the same standard as IAs when rendering personalized investment advice to retail customers."[75]

Possibly due to the mixed reception to the Study, the SEC has not yet exercised its rulemaking power under Dodd-Frank. Instead, the SEC requested additional data and other information relating to the costs and benefits that could result from various approaches regarding the standards of conduct and other obligations of BDs and IAs.

B. Round Two – The SEC Examines the Zone of Impact

On March 1, 2013, the SEC published a request for information (the "Request").[76] Specifically, the SEC requested quantitative and qualitative data and other information about the benefits and costs of the current standards of conduct of BDs and IAs when providing advice to retail customers, as well as alternative approaches to the standards of conduct, including a uniform fiduciary standard of conduct applicable to all IAs and BDs when providing personalized investment advice to retail customers.[77] In order to clarify the data and other information that it was seeking, the SEC provided a series of assumptions for commenters to consider regarding any fiduciary standard to be adopted by the SEC, including that:

- "Personalized investment advice about securities" would include a "recommendation," as interpreted under existing BD regulation, and would include any other actions or communications that would be considered investment advice under the Advisers Act;

- The term "retail customer" would have the same meaning as in § 913 of Dodd-Frank; the uniform fiduciary standard would permit commission-based compensation and not force an asset-based fee;

- Generally, the uniform fiduciary standard would not require a BD or IA to have a continuing duty of care or loyalty, or provide services beyond those agreed to by the customer and the BD or IA; and

- The offering or recommending of only a proprietary or a limited range of products would not, in and of itself, be considered a violation of the uniform fiduciary standard of conduct.[78]

In the Request, the SEC specifically discussed a possible uniform fiduciary standard. In doing so, the SEC referenced §913 of Dodd-Frank, which (as discussed above) provides that the SEC may promulgate rules to provide the standard of conduct for all BDs and IAs when they provide personalized investment advice about securities to retail customers – which shall be to act in the best interest of the customer without regard to the financial or other interest of the BD or IA providing the advice.[79] The SEC also expressly reiterated that §913 provides that any standard of conduct to be adopted shall be no less stringent than the standard applicable to investment advisers under §§206(1) and (2) of the Advisers Act.[80] The Request noted that the SEC had not yet decided whether to exercise its rulemaking authority.[81]

The SEC also addressed duties encompassed by a would-be uniform standard, such as the duty of loyalty and the duty of care. With respect to the duty of loyalty, the Request instructed commenters to assume that any rule under consideration would expressly impose certain disclosure requirements, including disclosure of all material conflicts the BD or IA has with the retail customer, and a general relationship guide similar to Form ADV Part 2A to be delivered at the time of entry in to a retail customer relationship.[82] The Request also instructed commenters to assume any rule under consideration would treat conflicts of interest arising from principal trades the same as other conflicts of interest.[83]

With respect to the duty of care, the Request indicated that commenters should assume any rule under consideration would include customer-specific suitability obligations; product-specific requirements, such as due diligence; a duty of best execution; and fair and reasonable compensation.[84] The Request also indicated that commenters should assume, based on prior

guidance offered on §§206(1) and (2) of the Advisers Act, that any rule under consideration would require as part of the duty of loyalty that a fiduciary disclose to a retail customer its method of allocation of trades and aggregation of orders.[85]

In addition to a uniform fiduciary standard of conduct, the Request asked for comments on alternative approaches to the uniform standard, including:

- Applying a uniform requirement to provide disclosure about key facets of the services offered and the types of products offered, and material conflicts, without imposing a uniform standard of conduct;

- Applying a uniform standard of conduct but without extending to BDs the existing guidance precedent under the Advisers Act (which would continue to apply to IAs);

- Applying the uniform fiduciary standard of conduct to BDs, which could involve imposing a "best interest" standard for BDs which would be no less stringent than §§206(1) and (2) of the Advisers Act, when providing personalized investment advice about securities to retail customers;

- Specifying certain minimum professional obligations under an IA's duty of care (not currently enumerated by rule), which would take into account Advisers Act fiduciary principles, such as suitability and to seek best execution. These requirements would be similar to those already applicable to BDs by rule; or,

- Considering models set by regulators in other countries, such as the UK's FSA's requirement to act in the best interests of the customer and limits on rates charges to customers (including prohibiting the receipt of ongoing fees unless there are ongoing services, as well as the receipt of commissions).[86]

The Request also asked for data and other information related to changes in the marketplace for personalized investment advice resulting from the uniform fiduciary standard, as well as the alternative approaches.[87] This includes information on potential account conversions from the institution of such standards.[88] Finally, the Request sought information regarding areas of potential harmonization in regulation of BDs and IAs, such as advertising, use of solicitors, supervision, licensing and registration and books and records.[89]

Reaction to the Request was mixed, much like the Study. For example, the CFA argued that the assumptions provided in the Request would lead to an inadequate standard.[90] The CFA pointed out several inherent conflicts not adequately addressed by the assumptions that would provide for an inadequate standard, including the allowance of commission-based compensation without first assessing whether the same is possible under a fiduciary standard that requires an advisor to act in the best interest of the customer; the allowance of the sale of proprietary or limited range of products, which the CFA argues creates a clear conflict of interest; and the continued applicability of existing BD rules, which the CFA reserved judgment on until it has had an opportunity to further evaluate whether such rules would need to be updated under a new uniform fiduciary standard.[91] In the end, the CFA advocated for a standard that unequivocally requires those engaged in providing personalized investment advice regarding securities to retail customers to act in the best interest of those customers without regard to the financial or other interest of the BD or IA providing the advice.[92] The CFA suggests, among other things, this can be done by adopting a fiduciary standard for BDs without changing the Advisers Act standard.[93]

On the other hand, a comment letter submitted by SIFMA suggests that imposing the standard implied by §206 of the Advisers Act on BDs is the optimal manner to achieve a uniform fiduciary standard pursuant to the mandate of Dodd-Frank.[94] SIFMA also argues that the SEC must provide further guidance, in addition to a rule, regarding the application of this standard in order to properly advise BDs how to comply.[95] SIFMA suggests, however, that current precedent regarding the Adviser Act standard would not apply to BDs under Dodd-Frank, and that were it to apply, customers could not bring suit against BDs for breach of the new standard based on the prior precedent.[96]

SIFMA also argues that Congress clearly intended the SEC, not the DOL, to decide what standard of conduct should apply to retail accounts, including retirement accounts.[97] SIFMA further argues that the proposed DOL rule (as anticipated at the time) would likely cause a severe narrowing of investment services available to IRA holders. SIFMA cited statistics in support of its argument, including the fact that overall IRA assets will reach $7.3 trillion by 2016, and that virtually all IRAs with less than $25,000 are in brokerage accounts – which are at risk of being adversely affected in a significant way if the DOL moves forward with its proposal (as addressed above).[98]

C. The Road Ahead, Without a Map

There is no clear road map to a fiduciary standard that the SEC may implement. However, even SIFMA agrees that it is a matter of *how*, and not *whether*, a fiduciary standard for BDs will be implemented.[99] At this point, it appears the SEC is considering multiple ways to implement such a standard. As such, potential effects from the implementation of a fiduciary standard are all over the map. Here are some possible points of interest:

- Pursuant to the Request, it appears that the SEC is very cost conscious in deciding how to implement a fiduciary standard of conduct. Therefore, because it would be the most direct way to implement such a standard, the SEC may, in fact, extend the Adviser Act standard to BDs under the Exchange Act;

- Doing so would almost certainly require BDs to disseminate a relationship and conflict disclosure similar to Form ADV Part 2A upon establishing a relationship in which the BD is going to render personalized investment advice on securities to the customer. This would increase costs associated with opening such an account, which would likely be passed on to the customer at some point;

- Doing so may also lead to increased litigation over the alleged breach of such a standard. The Public Investors Arbitration Bar Association ("PIABA") has already lauded the DOL 2015 proposal and presumably would welcome a similar proposal from the SEC, stating that arbitration cases by investors who believe they were misled by brokers about rolling over a 401(k) to an IRA, or about other retirement advice, would be easier to prove.[100] SIFMA, however, suggests that extending the Advisers Act standard to BDs would not lead to the wave of litigation that PIABA expects;[101]

- Any SEC imposed fiduciary standard for BDs may also reduce the number and type of investments available to investors, should such a standard require the BD to abstain from certain conflicts such as principal trades and offering limited or proprietary products;

- Imposing a uniform fiduciary standard would likely reduce customer confusion regarding the standard of conduct for those imparting personalized investment advice to the customer; however, it remains to be seen whether such a reduction in confusion would lead to better returns on the customer's investments;

- BDs would likely have to modify at least some of their compensation models for their registered representatives to be able to monitor potential conflicts of interest, which would have to be disclosed under a uniform fiduciary standard, in a way that ensures compliance with applicable supervision rules, such as FINRA Rule 3110; and

- Should the SEC promulgate a rule that requires a standard of conduct other than the Advisers Act standard, even more guidance will be necessary to demonstrate how a BD can comply with such a standard. Such guidance will likely have to be rules-based, as opposed to principles-based like the Advisers Act, in order to comport with the model of regulation set by the Exchange Act.

There will certainly be more twists and turns *en route* to the perhaps inevitable destination. We will continue to keep our eyes on the road.

VII. Are We There Yet?

This road trip is not over and the toll booth is remains open. It seems clear, however, that the destination is a fiduciary standard for BDs. Should the DOL's 2015 Proposal eventually win approval, or the SEC gets its Dodd-Frank Act together (or both), BDs and IAs alike need to re-tool the way they provide advice to ERISA plans and retail customers. This topic will continue to be a source of much debate going forward, and any new fiduciary standard that emerges promises to re-pave the road traveled by all those in the securities industry.

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[2] Investment Advisers Act of 1940, Section 206, 15 U.S.C. §80b-6; see also, *Sec. & Exch. Comm'n v. Capital Gains Research Bureau,* 375 U.S. 180 (1963).
[3] Under Section 15 of the Securities Exchange Act of 1934 (the "Exchange Act"), "brokers" and "dealers" must register with the SEC and join a self-regulatory organization ("SRO"). FINRA and the national securities exchanges are all SROs, and although the vast majority of BDs are members of FINRA, in limited circumstances a BD may select another SRO that meets the requirements imposed by the SEC as its primary regulator.
[4] *See* FINRA Rule 2111.
[5] *See* Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.* (January 2011) ("Study").
[6] 15 U.S.C. §80b-2(11).
[7] *Id*. at 2(11)(C).
[8] *Sec. & Exch. Comm'n v. Capital Gains Research Bureau,* endnote 2*, supra.*
[9] *Id.*
[10] *Id.*
[11] *See e.g. In re Fahey,* Investment Advisers Act Rel. No. 2196 (Nov. 24, 2003)(settled order).
[12] 15 U.S.C § 78c(a)(4)(A).
[13] *Id.* § 78c(a)(5)(A).
[14] FINRA Rule 2111.
[15] *See e.g., Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F.Supp. 951 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981).
[16] California (*Hobbs v. Bateman Eichler, Hill Richards, Inc.*, 164 Cal.App.3d 174 (Cal. Ct. App. 1985)); Missouri (*State ex rel Paine Webber v. Vorhees*, 891 S.W.2d 126 (Mo. 1995)); South Carolina (*Cowburn v. Leventis*, CCH Par. 75,542 (S. Ca. Ct. App. may 16, 2005)); and South Dakota (*Dismore v. Piper Jaffray*, 593 N.W.2d 41 (S.D. 1999)) treat BDs as fiduciaries under state common law.
[17] *See e.g.*, *U.S. v. Skelly*, 442 F.3d 94,98 (2nd Cir. 2006); *Associated Randall Bank v. Griffin, Kubik, Stephens & Thompson, Inc.*, 3 F.3d 208 (7th Cir. 1993); *Leib, supra*; *MidAmerica Fed. Savings & Loan Ass'n v. Shearson/American Express, Inc.*, 886 F.2d 1249 (10th Cir. 1989).
[18] *See e.g.*, *Robinson v. Merrill Lynch*, 337 F.Supp. 107 (N.D. Al. 1971), *aff'd* 453 F.2d 417 (5th Cir. 1972); *Walston & Co. v. Miller*, 410 P.2d 658 (Az. S. Ct. 1966).
[19] *DeKwiatkowski v. Bear Stearns*, 306 F.3d 1293 (2nd Cir. 2002).
[20] *Id.*
[21] *See* SEC Special Study of Securities Markets, H.R. Doc. No. 88-95 (1st Sess. 1963).
[22] *Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2nd Cir. 1943)
[23] *See* FINRA Rule 2010.
[24] *See* FINRA Rules 2111, 5110(c) and 12200, and NASD Rules 2210(d), 2340, 2720, 3040, and 2440.
[25] *See* SEC Special Study of Securities Markets, H.R. Doc. No. 88-95 (1st Sess. 1963).
[26] *See* SEC Order Granting Accelerated Approval of Proposal to Adopt FINRA Rules 2090 and 2111 in the Consolidated FINRA Rulebook, 75 Fed. Reg. 71479, 71479 (Nov. 23, 2010).
[27] Section 913 of the Dodd–Frank Wall Street Reform and Consumer Protection Act. Pub. L. 111-203, 124 Stat. 1376 (2010). 15 U.S.C. 80b–11(b), *et seq.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *See* the Study, endnote 5,*supra*.

[32] *See* ERISA §3(21)(A) (codified at 29 CFR 2510.3-21(c)).
[33] *Id.*
[34] *Id*.
[35] Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 80 Fed. Reg. 21928-01, 21935 (to be codified at 29 CFR §§ 2509, 2510)(Proposed April 20, 2015).
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *See e.g.,* Financial Planning Coalition Renews Call for Increased Adviser Examinations by SEC, The Financial Planning Coalition (February 12, 2013), https://www.law.georgetown.edu/library/research/bluebook/citing-other.cfm; SIFMA Proposal Falls Short in Protecting Investors, Says Fiduciary Group in Letter to Congress, The Committee for the Fiduciary Standard (October 20, 2009), http://www.thefiduciarystandard.org/2009/10/20/sifma-proposal-falls-short-in-protecting-investors-says-fiduciary-group-in-letter-to-congress/.
[40] *Id.*
[41] *See* SIFMA Comment Letter to Chairman of the U.S. House Education and the Workforce Subcommittee on Health, Employment, Labor and Pensions as a follow-up to the subcommittee hearing on July 26, 2011 on the U.S. Department of Labor's (DOL's) proposed regulation to redefine the term "fiduciary." (September 6, 2011), http://www.sifma.org/issues/item.aspx?id=8589935364.
[42] Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 80 Fed. Reg. 21928-01, 21937 (to be codified at 29 CFR §§ 2509, 2510)(Proposed April 20, 2015).
[43] Letter dated Aug. 30, 2010 from Christopher Gilkerson, SVP and Deputy General Counsel, Charles Schwab & Co.,Inc. to Elizabeth Murphy, Secretary, SEC Re: Study Regarding Obligations of Brokers, Dealers, and InvestmentAdvisers, Rel. No 34-62577, IA-3058 Request for Data and Other Information, Duties of Brokers, Dealers andInvestment Advisers, Release No. 34-69013; IA-3558; File No. 4-606(July 30, 2010),http://advisorservices.schwab.com/public/file/P-6548148/Schwab_comment_letter_to_SEC_Request_for_data_on_Rule_Harmonization.pdf
[44] *Id.*
[45] Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice, 80 Fed. Reg. 21928-01, 21937 (to be codified at 29 CFR §§ 2509, 2510)(Proposed April 20, 2015).
[46] *Id.*at 21936.
[47] *Id.*
[48] *Id*.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id*. at 21938, 21948.
[55] *Id.* at 21948.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id*. at 21948-21949.
[61] *See,* Shields, Kevin, Griffin Capital Corporation, "U.S. Department of Labor Fiduciary Advisor Rule, What and When, the Impact and the Fight…", May 14, 2015.
[62] *See Id.*
[63] *See Id. See also, Kelly, Bruce,* "DOL fiduciary rule could hurt nontraded REIT sales: LPL's Casady," *Investment News,* April 30, 2015, http://www.investmentnews.com/article/20150430/FREE/150439995
[64] *See* Study, endnote 5, *supra*.
[65] A cross-divisional staff task force was assembled to complete the Study, including representatives from the Division of Investment Management; the Division of Risk, Strategy, and Financial Innovation the Division of Trading and Markets; the Office of Compliance Inspections and Examinations; Office of the General Counsel; and Office of Investor Education and Advocacy.
[66] SEC Release No. 34-690013; IA-3558; File No. 4-406, *Duties of Brokers, Dealers, and Investment Advisers*, at 6.

[67] Dodd-Frank (*supra*) §913(b).
[68] Study, at pp. 5-92.
[69] Study at pp. 93-101.
[70] Study at pp. 101.
[71] Study pp. 101-102.
[72] Study at viii, x, 101, 109, and 166.
[73] *See* Statement by SEC Commissioners Kathleen L. Casey and Troy A. Paredes (January 21, 2011).
[74] *See* Charles Schwab & Co.'s comment letter to Ms. Elizabeth Murphy, Secretary, SEC, regarding the Study (August 30, 2010)(submitted pre-release of the Study).
[75] *See* CFA Comment Letter submitted to Ms. Elizabeth Murphy, Secretary, SEC, regarding the Study (August 30, 2010)(submitted pre-release of the Study).
[76] "Duties of Brokers, Dealers, and Investment Advisers", SEC Exchange Act Release No. 34-69013; IA0-03558; File No. 4-606 (March 1, 2013).
[77] *Id*. at p. 11.
[78] *Id*. at p. 25-28.
[79] *Id*. at p. 29.
[80] *Id*.
[81] *Id*.
[82] *Id*. at pp. 32-33.
[83] *Id*. at pp. 33-34.
[84] *Id*. at pp. 34-36.
[85] *Id*. at pp. 37-38.
[86] *Id*. at pp 39-42.
[87] *Id*. at pp. 43-47.
[88] *Id*. at pp. 47-53.
[89] *Id.* at pp. 54-64.
[90] *See* comment letter submitted by Barbara Roper, Director of Investor Protection, CFA, to Elizabeth Murphy, Secretary, SEC, regarding the Request (July 5, 2013).
[91] *See Id*.
[92] *See Id*.
[93] *See Id*.
[94] *See* comment letter submitted by Ira Hammerman, Senior Managing Director and General Counsel, SIFMA, regarding the Request (July 5, 2013).
[95]*Id*.
[96]*Id. Citing Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11 (1979).
[97]*See* comment letter submitted by Ira Hammerman, Senior Managing Director and General Counsel, SIFMA, regarding the Request (July 5, 2013).
[98] *Id.*
[99] Schoeff, Mark, "Reps willing to bear 'substantial costs' of fiduciary duty: SIFMA Exec," *Investment News,* June 13, 2013.
[100] Barlyn, Suzanne, "Broker best-interest contracts seen as arbitration game-changer," PIABA, April 23. 2015 (can be found at: https://piaba.org/in-the-media/broker-best-interest-contracts-seen-arbitration-game-changer-suzanne-barlyn-1).
[101] *See* endnote 94, *supra*.