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Broker/Advisor “Titles”: Potential Rulemaking at the SEC
*Rulemaking on Titles is Needed to Comply with FINRA Rule 2210 and
Fulfill the Mission of Advisers Act of 1940*

Wednesday, September 6, 4:15pm ET

A Fiduciary September 2017 Event



The Advisers Act of 1940

Why.

“One [reason] was to protect the public from ‘fraud and misrepresentations of unscrupulous tipsters and touts.’ and the other was to protect bona fide investment advisers from the ‘stigma’ of associating with unscrupulous members of the profession.”¹

What.

“The Advisers Act focused on the relationship between the adviser and the client...Another witness stated....‘The relationship...is essentially a personal one involving trust and confidence.’”²

¹ Arthur B. Laby, *Selling Advice and Creating Expectations*, p. 721 <http://www.thefiduciaryinstitute.org/wp-content/uploads/2013/02/LabySellingAdviceCreatingExpectations.pdf>

² Ibid, 722.

FINRA Rule 2210, In Part:

- (A) All member communications must...be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.

- (D) Members must ensure that statements are clear and not misleading

The Advisers Act of 1940 vs. The Impact of Advertising, Today

“In part, (investor) confusion arises from the myriad titles financial professionals confer upon themselves, with many strains of ‘advisers’ offering their services while operating under different regulatory environments...The idea that if someone calls themselves a financial adviser — that means absolutely nothing, right?”

- Acting SEC Chair, Michael Piwowar,
On Wall Street, March 3, 2017

In Apparent Breach of FINRA Rule 2210

Why Branding Registered Reps “Advisers” is Inherently Misleading

- Obfuscates the primary role of BDs in primary offerings of securities, which is to distribute and offer securities *on behalf of, and as an agent of, the issuer*
- Implies to investors that the BD (and the RRs) serve solely as their agent and that the BD (and the RRs) are providing un-conflicted recommendations and are acting solely in their interest
- Conceals obligations owed by the BDs (and the RRs) to the issuers; causes customers to wrongly believe that the purpose of a BD (and the RRs) is to provide advice to the customers

Advertising Works

“Advertising advice and adviser titles induce individuals to contract with broker-dealers and ground a reasonable expectation that a broker-dealer will provide advice.”³

“The SEC has stated that regulating advertising is important because of the impact Advertising has on retail investors.”³

³ Laby, 764.

Advertising, Titles and “Puffery”

Puffery: “A claim (that) no reasonable person would take seriously.” ([Wikipedia](#))

“One counter argument (to the argument that advertising and titles matter) is that advertising is not meant to be taken literally...(because) it is mere puffery.”⁴

“Under the puffery doctrine, words such as ‘trust’, ‘advice’ and ‘trusted advice’ are not meant to be believed as actually true.”⁴

⁴ Laby, 765.

Goldman Sachs and “Puffery”

In *Richman v. Goldman Sachs Group*, June 21, 2012⁵

“Integrity and honesty are at the heart of our business.”

“Our clients’ interests always come first.”

“Defendants argue that these statement (which include the ones above) are non-actionable statements of opinion, puffery...”

⁵ US District Judge Paul Crotty, p. 15. <http://www.law.du.edu/documents/corporate-governance/securities-matters/richman-v-goldman-sachs-group-062512crotty.pdf>

Goldman Sachs and “Puffery”

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Crotty also cites a precedent limiting the general principle of ‘nonactionable statements’:

“The important limitation on these principles is that optimistic statements may be actionable upon a showing that the defendants did not genuinely or reasonably believe the positive opinions they touted...”

Goldman Sachs and “Puffery”

In *Richman v. Goldman Sachs Group*, June 21, 2012

“Goldman’s arguments in this respect are Orwellian. Words such as ‘honesty,’ ‘integrity,’ and ‘fair dealing’ apparently do not mean what they say; they do not set standards; they are mere shibboleths. If Goldman’s claim of ‘honesty’ and ‘integrity’ are simple puffery, the world of finance may be in more trouble than we recognize.”⁶

⁶ US District Judge Paul Crotty, footnote 8, p. 15.