



First Ascent Asset Management

July 18, 2018

The Honorable Jay Clayton
Chairman
United States Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549

Subject: S7-08-18 Best Interest Standard Comments

Dear Chairman Clayton:

The SEC's proposed Best Interest Standard would subject brokers who make recommendations to retail clients to a best interest standard, while leaving registered investment advisers (RIAs) subject to the fiduciary standard under the Investment Advisers Act of 1940 (Advisers Act). I believe this is not an optimal solution for the reasons stated below, and I recommend modifying the proposed standard to subject both brokers and RIAs to the fiduciary standard.

1. **A Dual Standard Will Create Confusion**

Does the best interest standard raise the standard of conduct for brokers? If so, by how much? Does it impose the equivalent of a fiduciary standard on brokers even though the term "fiduciary" is never used in the proposed regulation? If not, by how much does it fall short?

The answers to these questions seem to be in the eye of the beholder:

- SEC Commissioner Kara Stein said the proposed standard "maintains the status quo."
- SEC Commissioner Hester Pierce has labeled it "suitability plus."
- Barbara Roper, director of investor protection at the Consumer Federation of America called it an "enhanced suitability" standard.
- Ira Hammerman, SIFMA Executive VP and general counsel, said it "clearly and significantly raises the bar from the current suitability standard," but not by how much.

- SEC Chairman Jay Clayton said, “It is definitely a fiduciary principle, just like the fiduciary duty in the investment advisor space is a fiduciary principle.”

At least one thing is clear. The best interest standard has generated plenty of confusion among people who are very knowledgeable about our industry. Can you imagine how confusing it will be for mom and pop investors? This is ironic since one of its stated purposes of the standard is to eliminate the confusion created by the current two-tiered regulatory framework that imposes a suitability standard on brokers and a fiduciary standard on RIAs.

Applying the Advisers Act fiduciary standard to both brokers and RIAs will accomplish the goal of eliminating confusion, since there would be nothing to be confused about. The standards would be the same.

2. A Single Fiduciary Standard is Good for Investors

Applying the fiduciary standard to brokers who give advice would accomplish another of the SEC’s goals. As you have stated, “Retail investors expect high-quality advice where their investment professional is not placing their interest ahead of the investor’s interest.” You further stated, “I want to make sure they are getting the protections they expect.” What better way than to impose the fiduciary standard that already has achieved that goal for decades?

You have suggested that there is really no difference between the fiduciary standard and the best interest standard. “[T]he core duty is the same,” you said. “There are people who try to say there is daylight between the two. But not the way we think about it.”

If there is truly no difference, or even if there are differences, but they are imperceptible to the naked eye, why go to the trouble of creating an entirely new standard? Why not eliminate the confusion and use the perfectly good fiduciary standard that is already in place?

3. We Don’t Need a Separate Standard to Reflect Differences in the Business Models

You have suggested that we need two separate standards to reflect the differences in the RIA and brokerage business models. You contrast the “episodic” nature of interactions between brokers and their clients with the more “holistic,” ongoing nature of RIA interactions with their clients. You also point out that the brokerage business model is more commission-based and can involve practices such as principal trading and the sale of proprietary products.

Let’s accept, for the moment, that the two business models are different in the ways you describe. Why should that impact the standard applicable to brokers and RIAs when they give advice to retail clients? If, as you say, the best interest standard “...is definitely a fiduciary principle,” why not just use the already existing fiduciary standard?

There is a much better way to inform investors that there are differences in the brokerage and RIA business models. Tell them directly. Indeed, the best interest standard proposal already includes extensive disclosure requirements designed specifically to explain the differences

between the two business models to investors. There is no need to do it by inventing a new standard of conduct for brokers who provide advice to their clients.

4. Congress Already Determined the Fiduciary Standard Should Apply to Brokers

In 1940 when Congress passed the Advisers Act, it anticipated that some brokers would provide advice to their client that was more than “solely incidental” to their brokerage services. In those situations, Congress determined that the brokers providing such advice should be subject to the same standards as RIAs. They recognized that functionally equivalent behavior should be subject to the same regulatory standards. The SEC staff came to the same conclusion in 2011 when, pursuant to Dodd-Frank, it studied harmonization of RIA and broker regulation.

I respectfully suggest that the SEC revise the proposed Best Interest Standard by deleting the proposed standard for brokers and applying, instead, the already existing fiduciary standard to brokers who provide retail advice to their clients. Congress has already determined that this is the preferred approach. Doing so would end the confusion and unfairness caused by a two-tiered regulatory framework and provide investors the protection they expect and deserve.

I have been in the financial services industry for over 40 years acting as both an attorney and the president or CEO of five different asset management firms. It is time to truly harmonize the standards applicable to those who seek the privilege of giving advice to clients by extending the tried and true fiduciary standard to all such advice-givers.

Sincerely,

Scott MacKillop

Scott A. MacKillop
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