

3 July 2013

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Duties of Brokers, Dealers, and Investment Advisers (File No. 4-606)

Dear Ms. Murphy:

CFA Institute¹ appreciates the opportunity to comment on the SEC's request for data and other information relating to the duties of brokers, dealers, and investment advisers. Having commented previously on the respective standards of care applicable to broker-dealers and investment advisers, we welcome the opportunity to provide additional input as the SEC considers this ongoing issue.

CFA Institute represents the views of investment professionals before standard setters, regulatory authorities, and legislative bodies worldwide on issues that affect the practice of financial analysis and investment management, education and licensing requirements for investment professionals, and on issues that affect the efficiency, integrity and accountability of global financial markets.

Executive Summary

On a number of prior occasions, CFA Institute has expressed concerns about the different standards of care currently required of broker-dealers and investment advisers, when they provide the same services to clients. We remain committed to a position that those who provide personalized investment advice to retail investors should be held to a single fiduciary duty standard, regardless of the title of the service provider. That standard should be consistent with, and no less than, the current fiduciary standard that requires investor interests to put first.

Discussion

Congressional Intent

The Investment Advisers Act of 1940 envisioned a separate regulatory structure for investment advisers, the interpretation of which has held such advisers to a fiduciary duty standard. The Securities and Exchange Act, on the other hand, sets out requirements for broker-dealers who

¹ CFA Institute is a global, not-for-profit professional association of more than 117,000 investment analysts, advisers, portfolio managers, and other investment professionals in 139 countries, of whom nearly 109,000 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 138 member societies in 60 countries and territories.

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operate under a suitability standard. When these Acts were created, broker-dealer activity was primarily confined to execution of transactions and did not encompass the range of services offered by brokers, including providing advice to the extent they do today. Thus, by creating separate regulatory schemes for these two service providers, Congress clearly envisioned two different standards for their respective activities. Only if it was “incidental” to its services were broker-dealers allowed to provide advice without violating their applicable duty of care.

Over time, the range of services offered by many broker-dealers has evolved and now extends far beyond execution-only, often including advice relating to retirement planning and investing. This “blurring of the lines” between adviser and broker-dealer providing similar “investment advice” is further exacerbated by advertisements and the descriptions often used by broker-dealers referring to themselves as trusted financial advisers, often using such titles in formal and informal communications with clients. The key confusion in each of these communications is the references to some permutation of “advice” being provided by brokers.

In the interest of fairness and integrity of markets, we do not believe that Congress ever intended a difference in standards for providing the same services. Instead, it is clear that Congress and the SEC have fully embraced two distinct standards of care that apply for two distinct activities. As described above, current industry practice has greatly confused the issue.

Therefore, we encourage the SEC to restore the Congressional intent by clarifying through regulations that the originally-mandated fiduciary duty standard applies in the provision of personalized investment advice, particularly in the case of retail investors, regardless of whether the provider is a registered investment adviser, a broker-dealer or other type of investment professional.

Market Trust and Investor Protection

Fiduciary duty is the applicable standard of care for the providing of investment advice by advisers registered under the Investment Advisers Act of 1940. While defined through case law, this standard typically requires elements of prudence, loyalty and care. The standard typically requires a true adviser to put its clients’ interests first. In contrast, broker-dealers must abide by a suitability standard, which is generally conflicted with the client interest and is viewed as a lesser standard of investor protection than fiduciary duty. The differences between these two standards thus can be significant.

It is readily acknowledged among most stakeholders in the industry that retail investors are generally unaware of the legal and practical differences in these two standards of care. This has been further complicated by the advisory-type services being advertised by broker-dealers, as nearly indistinguishable from registered advisers. In this way, broker-dealers have encroached a bit on the goodwill of the higher standard of care without incurring the costs of having to adhere to the higher ethical standard.

CFA Institute does support allowing investors a full array of investment options and services, but they must be offered on a level playing field and without a loss of important protections. The

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SEC staff recognized this when, in its 2011 Study², it stated that when receiving the same or substantially the same services, investors should receive the same or substantially the same protections.

Our CFA membership, numbering over 100,000, feels strongly about this issue. In our 2012 Global Market Sentiment Survey, members noted that mis-selling of investment products was their primary concern. A corollary to this highlights the need to correlate the selling of products with the appropriate standard of care. More direct and to the point, a July 2009 CFA Institute member had 80% of respondents strongly supporting/supporting a single fiduciary standard of care for all professionals providing financial advice.

Single Fiduciary Standard

We recognize the SEC's need to consider a range of alternatives in deciding upon the substance of a fiduciary duty standard that would apply to both advisers and broker-dealers when providing personalized investment advice to retail investors. We recognize the different business models under which broker-dealers and advisers operate and that a truly uniform fiduciary standard that is applicable to both will require some adjustments. Moreover, the episodic nature of advice within the brokerage relationship presents some unique monitoring and enforcement complications.

Even so, we agree with the clear recommendation in the SEC staff study to implement a uniform fiduciary standard. We also note the language of the Dodd-Frank Act that expressly calls for such standard that "shall be no less stringent than the standard applicable to investment advisers under Sections 206(1) and 206(2) of the Advisers Act when providing personalized investment advice about securities." We believe the SEC should remain true to that directive and are concerned that many of the scenarios and assumptions presented in this current Release may result in a new type of fiduciary approach that would dilute the more rigorous fiduciary standard under which advisers operate today.

For example, one of the alternatives being considered focuses on a disclosure-based approach. While we believe that disclosure of conflicts of interest is an important component of the relationship between service providers and their clients, it certainly is not enough when providing personalized investment advice. Disclosure alone is seldom a substitute for assessing the actions performed in the light of prudence, loyalty and care, regardless of the disclosure. In other words, while it is helpful to alert clients to potential conflicts of interest, it alone does not meet the bigger duty to the client that is contained in a true fiduciary duty standard of care. The SEC should be cautious in adopting any standard of care that would thus depart from the basic premises on which the fiduciary standard is based.

² Staff of the US SEC, Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Jan. 2011).

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We strongly encourage a clear and transparent standard that imposes true fiduciary responsibilities that can be tracked and appropriately enforced over time. Any lessening of the current standard or a complicated, meandering of its application should be avoided. We encourage the Commission to create an industry task force to include investor representatives to sort through the many nuances of such a task.

Retail investors should be able to understand and count on a standard whereby anyone providing them with personalized investment advice will put the interests of those investors first. At a time when investor confidence needs restoration, any dilution of such a fundamental standard for the retail investor would be an unfortunate step in the wrong direction and an abrogation of longstanding policy.

Conclusion

CFA Institute strongly supports the adoption by the SEC of a single fiduciary duty standard of care for all financial service providers who provide personalized investment advice to retail investors, and believes that this standard should be as stringent as the one under which investment advisers already operate. To allow different standards of care for the provision of like services not only violates the “level playing field” principle, but would also serve as an injustice toward retail investors and the industry.

Should you have any questions about our positions, please do not hesitate to contact Kurt N. Schacht, CFA at kurt.schacht@cfainstitute.org or 212.756.7728; or Linda L. Rittenhouse at linda.rittenhouse@cfainstitute.org or 434.951.5333.

Sincerely,

/s/ Kurt N. Schacht

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