

THE COMMITTEE FOR THE FIDUCIARY STANDARD

Some Frequently Asked Questions About Applying the Fiduciary Standard in a Brokerage Setting

Would enactment of fiduciary legislation mean broker/dealer registered representatives selling securities are somehow curtailed?

No. Broker/dealer registered representatives who simply want to sell products can continue to do that. They would not provide advice to customers. The relationship, title, disclosures should reflect a sales relationship as opposed to an advisory—and therefore fiduciary—relationship.

Are commissions permitted for brokers who have advisory (fiduciary) clients?

Yes. It's not the type of compensation but whether the duty to control investment expenses has been fulfilled. Compensation, of whatever variety must be reasonable and disclosed in writing. Commissions and/or fees can be used by investment advisors. However, conflict of interest may arise with any compensation structure. To manage that conflict in the client's best interest, the advisor should seek to mitigate, not simply disclose, the conflict.

Does the fiduciary standard for advisors at broker/dealers limit broker/dealers' ability to conduct other non-fiduciary business?

No. Holding brokers who provide advice to individual investors to the same fiduciary duty as investment advisors applies only to the investment advisory functions of the firm, not to other broker/dealer businesses. Other traditional broker/dealer functions such as trade facilitation, securities underwriting, institutional investment services etc., would not be prohibited by the extension of fiduciary status to brokers.

Where will the line be drawn between brokers and fiduciary advisors?

There is a clear difference between providing product information on the one hand and personalized advice on the other. If a client or customer tells a broker: "I want to buy 100 shares of AT&T," or asks, "Do you have any research about the merits of investing in AT&T?" This is "product" information and a broker sales relationship.

If the client or customer asks: "Should I buy AT&T?" This would indicate personalized advice, and therefore, the basis of a fiduciary advisor relationship.

Can a financial intermediary "switch hats" to serve as a non-fiduciary broker once a fiduciary (advisory) relationship with that client has been established?

No. Once fiduciary duty applies, there is a relationship of confidence and trust between a professional and the client. There is no going back to a broker sales relationship once the relationship is fiduciary. ***The fiduciary duty attaches to the entire relationship and the***

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whole scope of services being provided. It is not something that applies only at times, or can come and go, based on the transaction being executed.

Can the same broker act as a fiduciary advisor for some clients and as a broker for other clients?

Yes. A broker may have a separate, distinct brokerage-only clientele, as long as it is clear to brokerage customers that they are receiving sales or trade execution services, not advisory (fiduciary) services. This is an area where clear disclosures, and titles of broker/dealer registered representatives will play a key role. The broker must ensure that each client understands the nature of the services they are receiving and whether they are engaged in a fiduciary relationship—advice with all the accompanying fiduciary principles—or a sales or trade execution relationship.

Are self-directed broker/dealers considered fiduciaries?

No. “We don’t give advice, we take orders.” Taking orders is not a fiduciary task if the information provided by a broker is not specific to the individual (e.g. it is in the form of a general research information) and/or the service is in the nature of transactional support, such as online trading. Therefore, fiduciary duty should not be extended to these circumstances or functions. There is no “incidental advice” here.

What about the ongoing monitoring of advisory client’s portfolios?

It depends on the scope of engagement agreed to by the client. For clients who do not need or desire ongoing monitoring of their portfolios, a more limited scope of advice can be desirable. This might be called periodic or episodic advice. Here an analogy may be useful. It would be going to the doctor for a check-up. The doctor conducts a thorough exam, recommends the patient lose 10 pounds, take these vitamins and start an exercise plan. Call with any questions or concerns, but otherwise, come back in a year.

The fiduciary advisor establishes the ‘scope of engagement’ with the client. That may entail extensive or limited recommendations, an investment or an investment plan. The advisor can offer the client a choice of ongoing, comprehensive monitoring, periodic monitoring, a simple once a year check up, or even no ongoing monitoring. As in any professional service, the fee is determined by a variety of factors which could include the scope of the engagement, the professional skill and reputation of the advisor, and the complexity of the issue at hand.

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