

Not All Brokers/Advisors Are Created Equal—Make Sure Your Client Receives Investment Advice from a Fiduciary

By Ronald A. Fatoullah

When it comes to investments, there are two primary parties who are able to offer investment advice to individuals, investment advisors ('advisors') and investment brokers ('brokers') who work for broker-dealers. Most individuals think that the advice they receive from brokers and advisors is similar, but there is actually a huge difference in the standards that brokers and advisors must adhere to. Advisors must adhere to the 'fiduciary standard' and must put their clients' interests ahead of their own. Brokers only have to adhere to the 'suitability' standard, which is far less stringent. And to further complicate the situation, sometimes 'brokers' call themselves 'advisors'.

This is a dirty little secret that most of our clients, and their elder law, estate planning and special needs attorneys, may not be aware of. Brokers, who oftentimes manage the life savings of our clients, aren't automatically fiduciaries, and don't necessarily have to act in the best interests of our clients. Brokers can put their own needs before the needs their clients, as long as they abide by the 'suitability standard.' And, just because an investment is suitable, doesn't mean it's good for the client.

So, brokers can advise their clients to invest in certain investment products that might pay them a larger commission, even if their clients will receive a smaller return, as long as the investments are suitable. For example, assume a broker is deciding on advising a client to purchase Fund 'A' which pays her a 5% commission or Fund 'B' which pays her a 1% commission. If both investments are suitable and Fund 'B' would be best for the client, the broker can nevertheless advise her client to purchase Fund 'A' and still adhere to the suitability standard. It is imperative that you, the attorney, assist your clients by advising them to use advisors/brokers that will always put their clients first, and adhere to the fiduciary standard at all times.

A 2015 report by the White House Council of Economic Advisers found that hidden commissions and fees cost investors about \$17 billion a year in retirement accounts alone.¹ Can you imagine the savings to our clients if they received conflict-free financial advice from a fiduciary who managed *all* of their assets, both retirement as well as non-retirement?

Also, one must be aware of the "hybrid advisor." A hybrid advisor is an individual who is both a broker (a registered representative associated with a broker-dealer), and an investment advisor representative of a registered investment advisor (RIA). This is where things get truly get confusing to the client. Hybrid advisors are both RIAs *and* broker dealers. The RIA/advisor is held to

a fiduciary standard, while the broker is only held to the suitability standard. Therefore, the hybrid advisor might act with a fiduciary standard when managing certain assets and with a suitability standard when managing other assets. And, when asked if he or she is a fiduciary, the hybrid advisor might respond in the affirmative.

Although this response may be technically correct, it may be misleading. Our clients need to be educated and should ask their advisors if they are fiduciaries on *all* of the investments being managed for them and at *all* times.

I've witnessed too many brokers who were swayed by upfront commissions to the detriment of their clients. For example, we've all likely dealt with elderly clients who were sold inappropriate annuities. Annuities with surrender charge periods of up to 10 years sold a couple of months before the client wanted to transfer those funds into a Medicaid asset preservation trust!

The Department of Labor (DOL) Fiduciary Rule ("Rule"), was approved during the Obama Administration.² But unfortunately, the Rule was ultimately vacated by the Fifth Circuit Court of Appeals on March 15, 2018. The Rule sought to extend the existing fiduciary standard promulgated by ERISA to all financial professionals who work with retirement plans or provide retirement planning, including brokers. The Court of Appeals found that the Rule was "unreasonable" and was "an arbitrary and capricious exercise of administrative power."³

Predictably, when initially proposed, the Rule had been met with a significant amount of opposition from the financial planning industry. Many other groups representing broker-dealers claimed that the lost commissions and the added compliance burden made the Rule overly onerous. However, there were also many proponents of the Rule, arguing that the Rule would increase transparency in the industry and would prevent broker-dealers from abusing their position by charging their clients excessive front-loaded commissions without their client's knowledge. Advocates of the Rule felt that the duty of care owed by a broker should be no different than that of an attorney or accountant, both of which are held to the fiduciary standard.



Ronald A. Fatoullah

Although the Rule is now effectively dead, there are those that posit that the all of the hype surrounding the Rule has left positive lingering effects on the industry. Investors have become more savvy with regards to fees and are now more aware that they should seek out conflict-free advice. Many brokers are taking a closer look at their compensation policies and investment strategies and embracing a more transparent and client-centric approach.

One additional advantage of this organic shift within the industry is that it applies to retirement and non-retirement products alike, as opposed to the actual Rule that was only applicable to retirement accounts. This new industry trend is of great importance to us as elder law, estate planning and special needs attorneys, who should advise their trustee/executor/fiduciary clients to only hire advisors who are fiduciaries themselves. This will more likely satisfy the client's own fiduciary duty as a trustee or executor, something that may be brought into doubt if they were to invest with a firm that owes them and their beneficiaries no fiduciary duty.

There is little hope of a revival of the Rule due to the current administration's overt aversion to added regulations, but there are several states, New York included, that are looking at implementing regulations similar to those of the Rule on the state level. There is also some hope that the SEC's Best Interest proposed regulation would accomplish many of the same goals that the Rule had attempted to accomplish. The Best Interest regulation, while stopping short of referring to it as a fiduciary standard, requires that advisers and broker-dealers adhere to a standard of care that is substantially similar.⁴ This is good news for those who were proponents of the

DOL Rule because this would extend to all securities as opposed to just retirement products. The SEC proposed regulation is likely to be met with fierce opposition (much like the DOL rule), so only time will tell if the SEC regulation will actually be implemented.

In the meantime, as advocates for the best interests of our clients, we must continue to raise awareness of the potential pitfalls of using brokers that are operating in a non-fiduciary capacity and we should recommend that they seek out advisors/brokers who are fiduciaries so that they may enjoy the transparency and accountability that the DOL rule sought to implement.

Endnotes

1. U.S. Department of Labor, WHITE HOUSE FACT SHEET: STRENGTHENING RETIREMENT SECURITY BY CRACKING DOWN ON CONFLICTS OF INTEREST IN RETIREMENT SAVINGS, <https://www.dol.gov/newsroom/releases/ebsa/ebsa20160406-0> (last visited Nov 7, 2018).
2. 81 F.R. 20945 (2016).
3. *Chamber of Commerce of the USA v. United States Department of Labor*, No. 17-10238 (5th Cir. 2018).
4. 83 F.R. 21574 (2018).

Ronald A. Fatoullah, Esq. is the principal of Ronald Fatoullah & Associates, elder law, estate planning and special needs attorneys in New York City and Long Island. Mr. Fatoullah is also a partner in AdvicePeriod along with his son, Josh. Thank you to Joseph Breningstall, JD from the offices of Ronald Fatoullah & Associates for his contribution to this article.

[Like what you're reading? To regularly receive issues of *Elder and Special Needs Law Journal*, join NYSBA's Elder Law and Special Needs Section \(attorneys and law students only\).](#)

MEMBER BENEFIT

Learn more about Communities
SCAN HERE >>



COMMUNITIES

CONVERSE, CONNECT AND COLLABORATE

COMMUNITIES FEATURE:

- Member-to-member communications
- Member profiles
- Shared document libraries
- Collaborative workspaces
- Individual privacy settings
- Flexibility in timing and format of discussion messages

To be an active part of the Intellectual Property Section community, you can interact through email, the web or your mobile device.

Visit: **<http://communities.nysba.org>**

