THE COMMITTEE FOR THE FIDUCIARY STANDARD

January 12, 2018
Submitted Electronically to rule-comments@sec.gov

The Honorable Jay Clayton
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers

Dear Chair Clayton:

We are writing today to urge the SEC to consider the issue of misleading titles and advertising, as a part of its deliberations regarding when and where fiduciary duty should apply. We represent the Steering Group of The Committee for the Fiduciary Standard, a non-partisan, all-volunteer group of investor and fiduciary advocates. The broader Committee consists of approximately 1,100 investment fiduciary practitioners across the U.S. In this comment letter, we focus on the issue of misleading titles and advertising. We have previously submitted substantive comments as the SEC proposes new regulation with regard to the fiduciary duty.[1]

CONSUMER CONFUSION ABOUNDS

It is no secret that, over the years, the brokerage industry has morphed away from the use of the traditional "stockbroker" or "registered representative" titles and toward those titles that emphasize that an advisory relationship exists, such as "financial advisor" or "wealth manager." Hence, it is not surprising that investors are confused about the nature of the services offered by their financial professionals. In survey after survey, consumers have indicated that they do not understand the key distinctions between the duties, services, and compensation models of investment advisers and broker-dealers. Consumers attribute their confusion in large part to the brokers' use of titles such as "financial advisor" and "financial consultant." This confusion is exacerbated by advertisements from broker-dealer firms, such as those that claim:

- "Our Clients' Interests Always Come First"[2]
- "Our financial advisors are committed to putting your investing needs, wants and priorities first."[3]
- "We address every dimension of your life and your goals—investments, business, passion and legacy—to develop a plan that's truly personalized for you. It's precisely what you need today, and always. Advice. Beyond investing."[4]

[1] The Committee for the Fiduciary Standard's comment letter on fiduciary standards is dated November 8, 2017, and is available at https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2676156-161459.pdf.
[2] The first "Business Principal" of Goldman Sachs, from their web site, retrieved Dec. 22, 2017.
[3] Merrill Lynch web site, retrieved Dec. 22, 2017.
[4] UBS web site, retrieved Dec. 22, 2017.

The SEC has continued to note the problems caused by the inappropriate use of titles. In 2012 the SEC Investor Advisor Committee highlighted this problem, stating: "In addition, many broker-dealers use titles such as financial adviser for their registered representatives and market themselves in ways that highlight the advisory aspect of their services … Although they are subtler and more difficult to measure than the harm that results from outright fraud, these types of harm can nonetheless have a significant impact on investors' financial well-being."[5]

THE SEC SHOULD ACT TO LIMIT THE USE OF TITLES THAT DENOTE A RELATIONSHIP OF TRUST AND CONFIDENCE TO THOSE WHO ARE HELD TO A FIDUCIARY STANDARD

We acknowledge that the "…statutory broker-dealer exception" is a recognition by Congress that a broker-dealer's regular activities include offering advice that could bring the broker-dealer within the definition of investment adviser, but which should nonetheless not be covered by the Act; however, that exemption was narrowly defined as advice "solely incidental to the sale."

We are also aware that terms such as ''financial advisor'' and ''financial consultant'' are among the many generic terms that describe the day-to-day functions of variously registered or licensed persons in the financial services industry. *However, the wide-scale use of misleading titles does not justify their continued use. If anything, this systemic use of misleading titles is contrary to the public interest and should be prohibited.*

Separate studies by the Public Investors Arbitration Bar Association (PIABA), released in March 2015, "Major Losses Due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of A Fiduciary Duty"[6], and by the Consumer Federation of America, released in January 2017, "Financial Advisor or Investment Salesperson: Brokers and Insurers Want to Have it Both Ways"[7], show that while many organizations market themselves to the public as trusted 'advisors' or related terms, it is a different story when it comes to defending that position in arbitration hearings. In that context, suddenly they are just salespersons and owe the client no fiduciary duty.

We reject the concern that "any list of proscribed names we develop could lead to the development of new ones with similar connotations." This presumes that the solution is restricted to a finite list of titles. The solution will be to approach the issue based on principles not rules.

Consequently, we propose that the SEC immediately address this issue in favor of the investing public by developing, implementing and enforcing the following simple, non-pejorative Use of Titles Policy.

Extensive research has demonstrated that consumers are easily misled by the multitude of titles utilized in the financial services industry. We recognize that there are two important but distinct and useful service offerings to the general public – brokers subject to the '34 Act and Investment Advisors subject to the '40 Act.

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[5] "(Draft) Recommendation of the Investor as Purchaser Subcommittee Broker-Dealer Fiduciary Duty," available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation.pdf.

[6] https://piaba.org/system/files/pdfs/PIABA%20Conflicted%20Advice%20Report.pdf

[7] https://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf

We believe commission-based sales activities serve important client needs and give investors options for how they wish to conduct their investment activities. Whether commissioned brokers provide investment ideas or execute trades, we support that they be permitted to pursue their business activities, so long as they are clear about their roles vis-à-vis their clients. Specifically, we recommend that the Commission require that any title they use clearly denote their role as salespersons. Titles can range from "salesperson" to 'broker" but may not include terms that suggest a level of advice beyond that of stimulating the sale of product.

Registered Investment Advisors are paid fees for their personalized advice and may use titles such as Advisor, Financial Advisor, Wealth Manager or Financial Planner.

Adding to the confusion are financial representatives registered as both securities brokers and investment advisers. They can act in one capacity with one client, and the other capacity with another client. Or, act in both capacities for the same client. How is an investor to know if that person is acting as a securities broker or an investment adviser at any given point in the relationship? They are two different roles, with different methods of compensation and different loyalties.

The issue is how the broker/advisor represents him or herself to a specific client. If it's as an advisor, then he or she should be held to the '40 Act for ALL subsequent dealings with that particular client. There is no retreat from a fiduciary relationship once that is established, from the investor's point of view – and so fiduciary protections must apply, or again, the relationship will be misleading.

If a person uses a title denoting a relationship of trust and confidence – i.e., a *fiduciary relationship* – without accepting at all times the fiduciary duties which flow therefrom, that person should be held to account. The use of such a title in such instances is a misrepresentation – i.e., designed to mislead the consumer. And the use of such title is intentional – i.e., it is designed to result in a commercial advantage to the user of the title. There is another name for "intentional misrepresentation" under the law – "fraud."

The Investment Advisers Act of 1940 allows an exemption from registration to brokers whose advice is 'solely incidental' to their role as securities brokers. We submit that if one calls oneself an "adviser" or "advisor" or related term, it is contradictory to then assert that advice is solely incidental.

In conclusion, there are very good reasons that the medical profession does not allow doctors to own the pharmacy. The profit motive is so powerful that it can cloud one's judgement and have doctors overprescribing medicines that the patient does not need and, therefore, endangering the patient's health. The financial advisory business is no different than the medical profession. Doctors (Financial or Investment Advisors) diagnose and prescribe. Pharmacists (Broker-Dealers) fill those prescriptions. Therefore, titles that clearly indicate to the public who is an advisor and who is a salesperson are critical to solving this complex issue.

Thank you for undertaking this issue that is so important to all Americans saving their hard-earned dollars for retirement. We are happy to meet in person or otherwise discuss this issue at your earliest convenience.

Sincerely,

The Committee for the Fiduciary Standard

Representatives of the Committee for the Fiduciary Standard's Steering Group named below:
Patricia Houlihan, Chair 703-796-0800
Clark M. Blackman II
Harold Evensky
Sheryl Garrett
Roger C. Gibson
Tim Hatton
Deena Katz
Kathleen M. McBride
Ron A. Rhoades
Ronald W. Roge
W. Scott Simon