

# SEC Set to Propose New Fiduciary Standards for Brokers and Investment Advisers

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## ***More Than They Could Chew?:*** **SEC Set to Propose New Fiduciary Standards for Brokers and Investment Advisers**

Investment advisers have long advocated that broker-dealers be subject to the same fiduciary rules as they are. With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, it seems investment advisers have won that battle. But have they lost the war?

Investment advisers currently are held to a "fiduciary standard", which the SEC interprets as a duty to put their clients' interests before their own, by providing disinterested advice and disclose any material conflicts of interest to their clients. In contrast, the standards for broker-dealers currently are more lenient, generally requiring them to make recommendations that are "suitable" for their clients.

The Act does mandate that the SEC study the effectiveness of existing standards of care for broker-dealers and then, if the SEC deems it appropriate, to make rules setting such a standard. These new rules will apply to individualized investment advice to "retail customers" (meaning those who use investment advice primarily for personal, family, or household purposes). In light of recent comments of SEC Chair Mary Schapiro, it is a near certainty that broker-dealer fiduciary standards will be adopted in the near future.

However, rather than merely imposing the existing fiduciary standards for investment advisers on broker-dealers, the Act instead authorizes the SEC to set a whole new fiduciary standard for both groups. While the Act mandates that standards for broker-dealers be "no less stringent" than those for investment advisers, it also encourages the SEC to "harmonize" the standards applicable to both groups. Recent comments and releases regarding the Act make it clear that the SEC intends to adopt a uniform standard for investment advisers and broker-dealers that, at a minimum, requires broker-dealers to act in the best interest of the customer without regard to the financial or other interest of the broker-dealer and to disclose any material conflicts of interest.

The devil is in the details, of course, and no details are yet available. Still, what the SEC has released to date gives strong hints that the SEC intends to try to create a new standard that bridges state, federal, and national accreditation standards. If that is the case, the SEC may look to a different federal fiduciary standard that already applies to many investment advisers and has a strong, national body of interpretation: namely, the fiduciary standard found in ERISA.

If the ERISA standard were used, key provisions could include:

- Personal liability - ERISA fiduciaries are personally liable for acts or omissions that violate the ERISA fiduciary standards.
- Duty of loyalty – ERISA fiduciaries must act in the sole and exclusive benefit of participants and beneficiaries.
- Prudent expert standard – ERISA fiduciaries must act “with the care, skill, prudence, and diligence under the circumstances that a prudent person in like capacity and familiar with such matters would use in a similar enterprise with like aims”.
- Prohibited transactions – ERISA fiduciaries must avoid, for example, transactions a fiduciary knows or should know benefits a plan fiduciary, unless there is an applicable exemption.

Since the period for comments closed only a few days ago, there will be some lag time before the first draft of “the details” is released by the SEC. At this time, however, broker-dealers should begin to evaluate the impact fiduciary standards might have on their business, and keep an eye on the SEC website for the opportunity to comment on “the details” as they are released.