WARBURTON CAPITAL MANAGEMENT

15 East 5th Street
Suite 3675
Tulsa, Oklahoma 74103

Ph 918 794 3000
Fx 918 794 3130

info@warburtoncapital.com

www.warburtoncapital.com

The Standard of Care for Investment Advice

TD AMERITRADE Institutional

CONSULTATIVE WEALTH MANAGMENT

TD AMERITRADE Institutional

Committed To Your Success.

JANUARY 2010

The Standard of Care for Investment Advice

Drawing a Clear Line of Distinction Between Fiduciary and Suitability

Inside This Paper

EXECUTIVE SUMMARY

Many investors are confused about the differences between registered representatives and independent Registered Investment Advisors (RIAs) and the standard of care they think they deserve from each when managing their investment portfolios.

With the constant development of new products from the broker-dealer community, the line between offering fee-based advice (and having to act in a fiduciary capacity) and suggesting investments that are deemed suitable for a client can become blurred. From the point of view of the investor, the role their financial advisor is playing can be more than a little confusing.

A report by The RAND Institute for Civil Justice in 2008 found that 63% of investors believe registered representatives are required to act in the best interests of the client (they aren't), and 70% believe that registered representatives must disclose any conflicts of interest (generally, they don't).

TD AMERITRADE Institutional believes it is time for Congress and the regulatory authorities to help clear up the confusion.

The need for regulations supporting investors' best interests

Although some proponents of regulatory reform would like all individuals providing financial advice to function as fiduciaries, we believe that the broker-dealer model and the independent RIA model both play important roles in our financial system and serve the unique needs of investors. However, for the two models to co-exist, a clear line of distinction needs to be drawn between them so investors can more easily understand the differences between the two. We believe it is time to re-examine the legislation regulating the provision of investment advice.

RIAs are governed by the Investment Advisers Act of 1940 (the Advisers Act), which has been interpreted to mean that they are to be held to a fiduciary standard with respect to managing a client's financial matters (i.e. they are required to act in the client's interest first). Registered representatives are primarily governed by the Securities Exchange Act of 1934 and FINRA (the Financial Industry Regulatory Authority) rules, which effectively require that investment recommendations they make to their clients be suitable for that particular client and that they provide their services in a just and equitable manner.

Most people would probably agree that individualized advice is not provided in a pure transactional relationship (e.g., a simple direction to a broker to purchase or sell a particular security), and that as a result a fiduciary obligation cannot and should not be ascribed to this type of relationship. However, for any relationship that involves the provision of ongoing investment advice and an understood level of trust that the advisor is acting in the client's best interest, a fiduciary obligation is warranted. Care must be taken to resist applying a universal fiduciary standard for all broker-dealer business models to avoid imposing standards that are impossible or costly to meet and would restrict investor choice and drive up costs to investors for services they do not want.

Regulatory reform to address the needs of today and tomorrow

TD AMERITRADE Institutional has been advocating for some time that regulators and policy makers need to recognize that the financial world that existed at the time that the Exchange Act and the Advisers Act were created has significantly changed. It is time to reshape our regulations so they more accurately reflect the investor needs of today and tomorrow, and the needs of all financial professionals who operate within the confines of these regulations. Specifically, there is an enormous need to:

- Provide a clearer definition of the types of services offered by the various types of financial professionals so investors can make informed decisions;
- Clearly differentiate among (i) non-advisory broker-dealer activities such as clearing, (ii) the sale of products to retail clients through broker-dealers (which we believe should be done in the best interest of the client when delivered on a personalized basis, with appropriate conflict of interest disclosures), and (iii) the provision of ongoing, personalized investment advice; and
- Deliver an appropriate standard of care for investors *dependent on the type of professional relationship and the services they request.*

The proposed Investor Protection Act of 2009 introduced in the House of Representatives provides the opportunity to redefine the financial regulatory landscape. However, much needs to be considered regarding the reshaping of the standard of care for financial advice to ensure greater investor protection while still preserving investor choice. This paper will address the obstacles financial service professionals face in rebuilding investor confidence and offers education and possible solutions to benefit the investing public and the long-term stability of the financial services industry.

WHY NOW IS THE TIME TO RESTORE INVESTOR CONFIDENCE

In the last 18 months the very foundation of our economy was shaken to its core. The S&P 500 lost $8 trillion of market value from the October 2007 peak to the March 2009 low, and the unemployment rate has soared. The financial services sector has undergone monumental changes as a number of former household company names have either consolidated, constricted in size and scope, or simply gone out of business. And, most distressingly, exposed investor fraud has rocked the trust of the American people.

FINANCIAL ADVISOR DEFINITIONS

Registered Investment Advisor:
Provides independent financial advice and typically receives a fee for that advice; governed by The Investment Advisers Act of 1940; legally obligated to act in the interests of their client (act as a fiduciary).

Registered Representative:
Facilitates securities purchase and sale transactions for their clients, usually for a commission; primarily governed by The Securities Exchange Act of 1934 and FINRA rules; required to ensure investment recommendations are suitable for the client, to provide best execution of client orders and to provide services in a just and equitable manner.

The sum of these events has resulted in Americans losing confidence in our financial markets and the companies that serve them. The silver lining is that out of crisis comes opportunity, and now is the time to start rebuilding investor confidence. Restoring their trust is critical to both the viability of our industry and the long-term stability and growth of our nation. To start, we need to help investors answer the question, "Who is my financial professional and what am I actually getting from him or her?"

The repeal of what is commonly referred to as the Merrill Rule[1] in 2007 was intended to provide investors with a standard of care from those providing investment advice—regardless of the type of firm providing that advice. It was also expected to help clear up investor confusion about what they were actually getting from their financial professional—a suitable point-in-time recommendation or ongoing investment advice delivered in their best interest. Unfortunately, the evidence indicates that, two-plus years since the repeal of the Merrill Rule, the landscape is as cloudy as ever for the investing public.

THE NEED FOR DRAWING A CLEAR LINE OF DISTINCTION

Although some proponents of regulatory reform would like all individuals who provide financial advice to function as fiduciaries, we believe that the broker-dealer model and the RIA model both play important roles in our financial system and serve the unique needs of investors. However, for the two models to co-exist, a clear line of distinction needs to be drawn between the two professions so investors can more easily understand the differences between the two.

"I believe you have to make a clear line down the middle between who is a fiduciary and who is a salesperson," says Tom Bradley, president of TD AMERITRADE Institutional. "Financial services firms need to do a better job of explaining the difference."[2] In accordance with the proposed Investor Protection Act, we believe that with clear up front disclosures of the corresponding duties and obligations of the two types of financial professionals, investors will be armed with the information they need to make informed decisions about their advice needs.

According to a recent survey, a majority of RIAs believe that the broker-dealer model is legitimate as long as consumers receive proper warnings and registered representatives are restrained in how much financial advice and planning they can offer. However, over 75% of RIAs are not confident that the corporate demands of the wirehouse model will inherently lead to wirehouse brokers acting in the best interests of their clients.[3]

Many investors are still confused about the term investment advice and the different types of professionals who can provide it. As an advocate for the investor, and having an interest in the well-being of the financial services industry as a whole, it is our position that there are three major issues that, if resolved, can help rebuild investor trust:

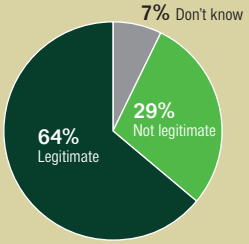
- The regulations governing the activities of RIAs and registered representatives need to be re-assessed to reflect the realities of today's business models;
- The standard of care applicable to purveyors of investment advice ("fiduciary" or "suitability") needs to be clearly defined and the investing public educated; and
- The legislators and regulators must fully understand the RIA business model.

Before we suggest resolutions to the above issues, we will provide some background on how we arrived at where we are today.

RIA Sentiments

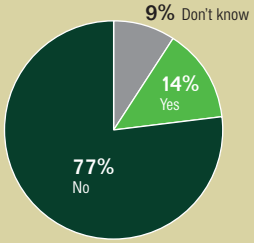
Legitimacy of Broker-Dealer Model

Question: Is the broker-dealer model legitimate as long as consumers receive the proper warnings and stockbrokers are restrained in how much financial advice they can offer?



Wirehouse Brokers Acting in Clients' Best Interest

Question: In general, due to corporate demands of wirehouse brokerages, do wirehouse brokers act in the best interest of their clients based on objective fiduciary criteria of statute, case law and regulatory opinion letters?



Source: TD AMERITRADE Institutional RIA Sentiment Survey, January 2009.

[1] SEC Rule 202(a)(11) under the Investment Advisers Act of 1940 became known as the Merrill Rule because Merrill Lynch had the largest number of fee-based brokerage accounts that were at the heart of the original rule.

[2] "Watch out for Regulatory Minefields," *InvestmentNews*, June 5, 2009.

[3] TD AMERITRADE Institutional RIA Sentiment Survey, January 2009.

HOW WE GOT HERE: AN OVERVIEW OF THE MERRILL RULE

Historically, broker-dealer firms could offer investment advice only if that advice was solely incidental to their brokerage business, and only if they did not receive special compensation for the investment advice. In other words, a registered representative could offer incidental advice on a particular securities transaction for which the firm would be paid a commission. Any special compensation, such as fee-based compensation, required that they were registered as an investment advisor under the Advisers Act. Registering under the Advisers Act would subject the registered representative and broker-dealer to the same fiduciary obligations that RIAs are required to uphold.

The Securities and Exchange Commission (SEC) gave strict interpretation to these rules until 1999 when it proposed Rule 202(a)(11)-1 of the Advisers Act—what became known as the Merrill Rule. The Merrill Rule provided an exemption to broker-dealers offering certain types of fee-based advisory and brokerage services from the definition of investment advisor and, therefore, from the registration and fiduciary requirements of the Advisers Act. The exemption stemmed from the 1995 "Report of the Committee on Compensation Practices" commissioned by the SEC in response to concerns about conflicts of interest in the broker-dealer industry. Known as the Tully Report, it highlighted fee-based brokerage accounts as a best practice because they would reduce the likelihood of abusive selling practices and unsuitable transaction recommendations. The broker-dealer industry operated under this temporary rule, and considerably expanded its fee-based brokerage business until 2005, when the rule became final—and highly controversial.

The fine print

In its final form, the Merrill Rule stated that a broker-dealer would not be considered an investment advisor if any advice provided was solely incidental to the brokerage services provided and specific disclosures were made to the customer. The required disclosures read as follows:

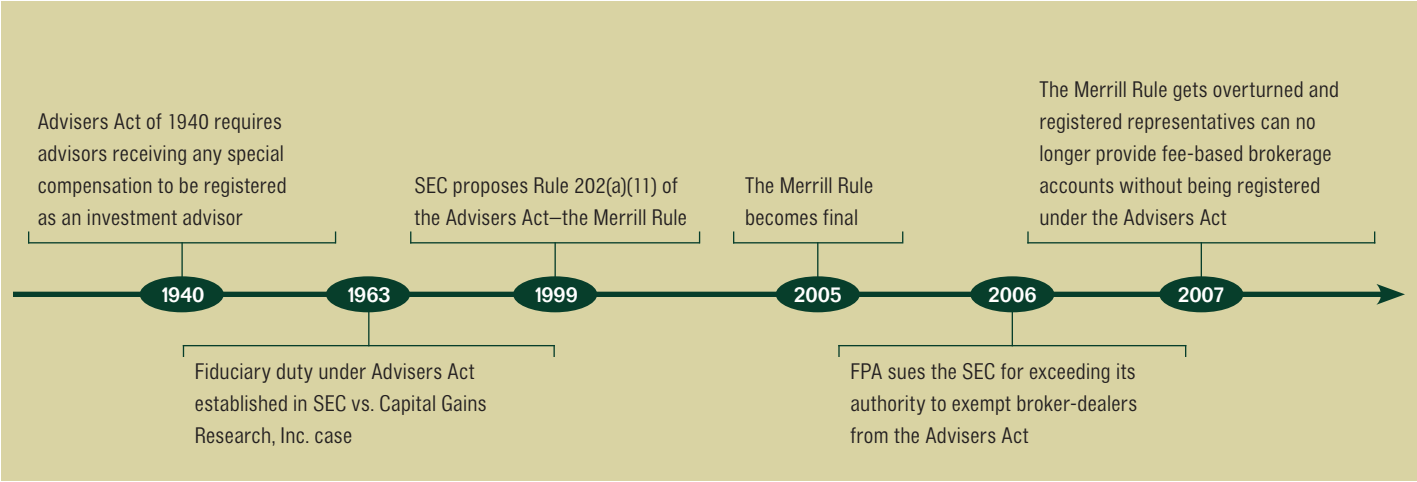
> "Your account is a brokerage account and not an advisory account. Our interests may not always be the same as yours. Please ask us questions to make sure you understand your rights and our obligations to you, including the extent of our obligations to disclose conflicts of interest and to act in your best interest. We are paid both by you and, sometimes, by people who compensate us based on what you buy. Therefore, our profits, and our salespersons' compensation, may vary by product and over time."

However, given that some broker-dealer firms were offering fee-based brokerage accounts and using terms like "customized advice" and "personal connection" in their marketing materials to consumers; how could this be taken to be anything but investment advice? Yet, with the Merrill Rule, that's exactly what the SEC was telling investors—this is not advice.

The Merrill Rule overturned—a step in the right direction

From the time the Merrill Rule was introduced in 1999, those in the financial planning and RIA community objected to the position that registered representatives were allowed to hold themselves out as financial consultants or investment advisors, and engage in providing investment advice without having to abide by the terms of the Advisers Act. To many, this seemed patently unfair and instilled an unnecessary level of confusion in the minds of investors about the differences between RIAs and registered representatives.

The Financial Planning Association (FPA), along with TD AMERITRADE Institutional and a number of industry groups, lobbied heavily over the years to have the Rule modified to create a more level playing field for all of those in the investment advice arena, and increase clarity for investors. In 2006 the FPA, on behalf of its members and the investing public, sued the SEC alleging it exceeded its authority to exempt broker-dealers offering fee-based brokerage accounts from complying with the Advisers Act. In March 2007 the U.S. Court of Appeals in Washington, DC, agreed and the Merrill Rule was overturned. Registered representatives could no longer provide fee-based brokerage accounts without registering under the Advisers Act (i.e., without acting as a fiduciary).[4] Did this repeal clear the air on who can provide investment advice? Did it go far enough in helping investors understand the different roles registered representatives can play within their own firm? Did it clarify for investors the extent of the responsibility they were actually getting from their financial professional? We don't think so.



[4] The Financial Planning Association v. Securities and Exchange Commission, No. 04-1145 (D.C. Cir, March 30, 2007).

TO REBUILD, WE NEED TO DEFINE INDUSTRY STANDARDS FOR INVESTORS

In today's financial world, many consumers and even some financial professionals are still confused about what constitutes financial advice and who can legitimately provide it. In 2007, The RAND Institute for Civil Justice conducted several focus groups and found that the interchangeable titles (i.e. advisor, financial advisor, financial consultant) and "we do it all" advertising made it difficult to discern broker-dealers from RIAs.[5] "Consumers are confused about the differences between various types of investment services providers, and who can blame them?" said Barbara Roper, Director of Investor Protection for the Consumer Federation of America. "Although registered representatives have an obligation to provide certain disclosures to investors when they are acting in an advisory capacity, from the perspective of the consumer, there isn't much difference between a registered representative and an investment advisor."[6]

Results of a survey conducted by TD AMERITRADE Institutional in 2006[7] support Roper's statement:

- 47% of investors believe "stockbrokers" are required to disclose all conflicts of interest *(they aren't)*; and
- 74% did not understand that while "investment advisors" have an obligation to act in an investor's best interest in all aspects of the financial relationship, "stockbrokers" are not typically held to the same standard.

A report by The RAND Institute[8] in 2008 found similar results:

- 63% of investors think registered representatives are required to act in the best interests of the client *(they aren't)*; and
- 70% believe that registered representatives must disclose any conflicts of interest *(generally, they don't)*.

Broker-dealers and RIAs continue to be governed by different laws with different standards (the Exchange Act and the Advisers Act, respectively), but the investor's distinction between the two is often misunderstood. It is time to examine the legislation regulating the provision of investment advice.

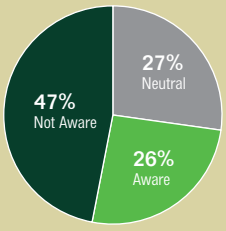
A TIME FOR FINANCIAL REGULATORY REFORM

Few will argue against the need for financial regulatory reform given the events of the recent past and the changing landscape of financial services. The evolution of our securities markets, the increased spectrum of needs of investors and the roles of the professionals who serve them all point to the need for thoughtful reform. The Exchange Act and the Advisers Act, enacted in 1934 and 1940 respectively, do not take into account the evolution of securities markets or the growth of the investment advice business over the past seven-plus decades. Both laws were brought into existence at a time when there was no possible way to envision the advent of computers or the Internet—and the tremendous influence these would have on the financial world—or the incredible diversity and complexity of financial instruments that have been developed over the years. It is unreasonable to expect that our modern-day financial system can, or should, be governed by such out-dated laws.

Investor Perceptions

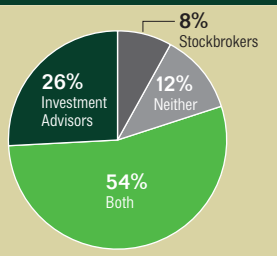
Disclosure Awareness

Question: How aware are you that stockbrokers are not required to disclose all conflicts of interest prior to providing financial advice?



Understanding Fiduciary Responsibilities

Question: Which of the following financial professionals have a fiduciary responsibility to act in the investor's best interest in all aspects of the financial relationship?



Source: "2006 U.S. Investor Perception Study." Commissioned by TD AMERITRADE Institutional.

[5] "Investor and Industry Perspectives on Investment Advisers and Broker-Dealers," The RAND Institute for Civil Justice 2008.
[6] From a press release announcing a new Investor Education Brochure, May 9, 2006.
[7] "2006 U.S. Investor Perception Study." Commissioned by TD AMERITRADE Institutional.
[8] "Investor and Industry Perspectives on Investment Advisers and Broker-Dealers," The RAND Institute for Civil Justice 2008.

But how should the financial system be reshaped? The repeal of the Merrill Rule led to a major effort by the SEC to tweak the regulations for investment advice. On some level, the whole episode may have only served to confuse the issue more; registered representatives were permitted to offer fee-based advice on certain types of brokerage accounts, and then they weren't. When they act as a registered representative, they are acting in a sales capacity and fall under the suitability rules of the Exchange Act and the FINRA rules of acting in a just and equitable manner. If they want to provide fee-based advice to their clients, they have to register under, and abide by, the fiduciary standards of the Advisers Act. If they want to manage a so-called hybrid model, they are governed by both Acts. This last scenario creates even greater confusion for the investors they serve, who now need to decipher which hat their representative is wearing—that of a salesperson or that of a fiduciary.

In fairness to all financial professionals, from all types of firms, Congress and regulators need to address this issue of an appropriate standard of care for investors that are receiving personalized investment advice. As SEC Commissioner Elisse Walter recently said:

> "I believe that regulation of a financial professional should depend on what she does, not what she calls herself or how she is paid. Investors should receive the same level of protection when they purchase comparable products and services, regardless of the financial professional involved."[9]

The silver lining is that out of crisis comes opportunity, and now is the time to start rebuilding investor confidence. Restoring their trust is critical to both the viability of our industry and the long-term stability and growth of our nation.

DEFINING "FIDUCIARY" AND "SUITABILITY"

For those who work in the broker-dealer and RIA communities, fiduciary versus suitability is a topic of great importance. While these terms may not mean much to investors on the surface, the bottom line is that investors do care and have the right to understand the difference. Blaine Aikin, CEO of fi360, an international leader on investment fiduciary responsiblity, says that "people don't generally know the difference (between a fiduciary obligation and a suitability obligation), but once they do, fiduciary is the one they prefer when getting advice. When you are entering into an advisory relationship, it is one dependent upon trust—trust that your advisor will do what is right for you, not what is right for them or the firm they work for."[10] Mr. Aikin goes further to say that:

> "Investors need to know and understand the nature of the relationship they have with a fee-based advisor and a transactional broker. The first should place investors' interests ahead of their own, while the second may not necessarily need to do so. One of the key things that differentiates the world of advice from the world of transaction is the fact that an investment advisor really does have a portfolio focus, whereas a broker, in the classic sense, has a securities focus. If that's the way they are setting up their services, and that's what a client is looking for, that's where you can begin to navigate in the world of suitability. You have an obligation as a broker to know your customer. Well, how well do you know your customer? Do you know them well enough that you can essentially prepare a financial plan, and that's the context in which you are making investment recommendations? If you do, then you're in the advice arena. Even if you aren't holding out as a fiduciary, you should govern yourself as though you are."

[9] Speech at the Mutual Fund Directors Forum Ninth Annual Policy Conference, May 5, 2009.
[10] Interview conducted with Blaine Aikin, May 13, 2009.

Divided we stand

There has also been a great deal of discussion from policy makers about establishing a universal standard of care for broker-dealers and RIAs—the so-called harmonization of these standards. But on the other side of the discussion are those who argue that there are fundamental differences between registered representatives and RIAs. These polarizing views are no more evident than at the SEC itself. For example, SEC Commissioner Elisse Walter stated:[11]

> "The Commission should consider imposing a uniform standard of conduct on all broker-dealers and investment advisors… and that standard should require all financial professionals to act as fiduciaries at all times… To appreciate fully what a fiduciary standard means, and what it really means to act in the best interest of an investor, it is absolutely necessary to drill down and determine what duties and obligations flow from a fiduciary standard. That is why I believe it is important that the Commission explain what a fiduciary standard requires."

Ms. Walter goes on to say that harmonizing legislation governing the activities of financial professionals would:

- Provide a clear Congressional statement that all financial professionals should be held to the same high standard of conduct;
- Provide a unified system of regulations for all financial professionals offering comparable securities products and services; and
- Preempt the stale arguments over the merits and demerits of the current state of the law.

RIAs and Registered Representatives Are Different

	RIAs	Registered Representatives
Primary Function	Advice	Facilitate securities sales and purchases for their clients
Employment Status	Typically an independent firm not owned by another	Typically an employee/contractor of another firm
Compensation	Typically charge a flat fee for advice or a percentage of assets under management	Usually commission-based
Key Responsibility to Client	Fiduciary—RIAs are legally bound to serve the interest of their clients	Ensure investment recommendations are suitable for the client
Regulation	RIAs are either overseen by the Securities and Exchange Commission (SEC) or state regulatory agencies	FINRA along with the SEC and state regulatory agencies

[11] Speech at the Mutual Fund Directors Forum Ninth Annual Policy Conference, May 5, 2009.

SEC Commissioner Luis Aguilar takes a different stance. Rather than harmonizing the regulations of broker-dealers versus RIAs, Mr. Aguilar believes:

> "The better way to frame the issue is to ask how broker-dealers who provide investment advice should be regulated. There is a reason that investment advisors are regulated differently than broker-dealer services. As broker-dealers increasingly provide advisory services to their clients, we should consider whether the higher standards and fiduciary duties of advisors should also be applied to these broker-dealers."
>
> "I have been listening to the current debate about what the standard should be for those that provide investment advice. I have heard a lot of standards offered including:
>
> - A professional standard for all financial intermediaries
> - A universal standard of care
> - A fiduciary-like standard
>
> It is not clear to me that any of these standards measures up to the fiduciary standard that currently exists, and there is great concern that these proposed standards may have the effect of diluting the existing high fiduciary standard that serves as an important investor protection."[12]

The discussions and opposing views at the regulatory level are a microcosm of those taking place across the entire industry. And now, so much is riding on how we specifically define fiduciary.

WHAT DOES IT REALLY MEAN TO BE A FIDUCIARY?

According to The Investment Adviser Association's *Standards of Practice*, "As a fiduciary, an investment advisor has an affirmative duty of care, loyalty, honesty and good faith to act in the best interests of its clients."

The Investment Adviser Association goes on to define what these fiduciary duties are as they relate to the advisory relationship. These generally include the duty to:

- At all times place the interests of clients first;
- Have a reasonable basis for its investment advice;
- Seek best execution for clients' securities transactions where the advisor directs such transactions;
- Make investment decisions consistent with any mutually agreed upon client objectives, strategies, policies, guidelines and restrictions;
- Treat clients fairly;
- Make full and fair disclosure to clients of all material facts about the advisory relationship, particularly regarding conflicts of interest; and
- Respect the confidentiality of client information.

This is the foundation upon which advisors registered under the Advisers Act rely, and most RIAs believe these are the duties that should govern all fee-based advisors.

[12] Speech at the Investment Advisers Association Annual Conference, May 7, 2009.

However, a new voice has emerged in the battle to define and defend fiduciary care for investment advice: the Committee for the Fiduciary Standard (the Committee). Comprised of influential and respected financial advisors and industry luminaries, the Committee has voiced a strong opinion on what it means to be a fiduciary. Their mission is to launch a consumer and media campaign to urge Congress to uphold an authentic fiduciary standard for the delivery of investment advice as it explores reforms of the way financial advisors are regulated. The Committee says its goal is to promote reform that includes a requirement that advisors follow five core principles comprising the authentic fiduciary standard:

1. Put the client's best interests first;
2. Act with prudence; that is, with the skill, care, diligence and good judgment of a professional;
3. Do not mislead clients; provide conspicuous, full and fair disclosure of all important facts;
4. Avoid conflicts of interest; and
5. Fully disclose and fairly manage, in the client's favor, unavoidable conflicts.

It should be noted that RIAs typically provide their services on a continuous basis. Aikin supports this premise by stating:

> "The fundamental fiduciary duty to act prudently includes the obligation to continually monitor the investments, and the service providers, that have been chosen to meet the needs of investors. This duty to monitor requires the fiduciary to apply a consistent process to determine whether the investments and service providers are meeting their intended objectives. It entails a level of skill and attentiveness that goes well beyond what is generally required in non-fiduciary relationships."[13]

One thing is certain: creating a clear understanding of what services will be governed by fiduciary obligations is critical in defining the standard of care due to investors and how registered representatives and RIAs will be regulated in the future.

WHAT IS THE APPROPRIATE STANDARD OF CARE?

We maintain that what is right for investors is what matters most. Subjecting all registered representatives to a fiduciary duty on a broad basis could negatively impact investors by curtailing beneficial services registered representatives provide today or by significantly increasing costs to investors. We recognize the need for a proper standard of conduct given the various ways of servicing investors, but great care must be taken when finalizing the language of that standard to provide investor protection and preserve investor choice. The recent proposals from the Executive and Legislative branches of government and the ensuing industry activity have made it clear that change is coming—likely sooner than later.

President Obama's Administration, in the June 2009 white paper "Financial Regulatory Reform: A New Foundation," came out in favor of "the establishment of a fiduciary duty for broker-dealers offering investment advice and harmonizing the regulation of investment advisors and broker-dealers." The Administration also proposed that new legislation be enacted to "bolster investor protections and bring important consistency to the regulation of broker-dealers and investment advisors by:

- Requiring that broker-dealers *who provide investment advice about securities* have the same fiduciary obligations as registered investment advisors;
- Providing simple and clear disclosures to investors regarding the scope of the terms of their relationships with investment professionals; and
- Prohibiting certain conflicts of interest and sales practices that are contrary to the interests of investors."[14]

The Investor Protection Act of 2009 passed by the House of Representatives, and Section 913 of the Restoring American Finance Stability Act of 2009 introduced by Senator Christopher Dodd, provide the opportunity to redefine the regulatory landscape. Both are still a work in progress and leave much to be debated. These Acts, among other things, will help determine the way in which financial advisors deliver investment advice and who will govern these professionals. These debates are not only taking place in Washington but in board rooms and small businesses around the country.

[13] Interview conducted with Blaine Aikin, May 13, 2009.
[14] "Financial Regulatory Reform: A New Foundation—Rebuilding Financial Supervision and Regulation," June 2009.

A MEETING OF MINDS MAY BE ON THE HORIZON

Over the past year, those who had traditionally been hesitant to adopt fiduciary standards in the broker-dealer world appear to be modifying their stance:

- In March 2009, T. Timothy Ryan, President and CEO of Securities Industry and Financial Markets Association (SIFMA) testified before a Senate committee that he supports a "universal standard of care that avoids the labels that tend to confuse the investing public and expresses, in plain English, the fundamental principles of fair dealing that individual investors can expect from all of their financial services providers."[15]
- On May 5th, 2009, SEC Commissioner Elisse Walter told about 170 mutual fund directors gathered at the Mutual Fund Directors Forum's annual policy conference that "all financial professionals should be held to a fiduciary standard."[16]
- In May, 2009, Richard Ketchum, Chairman and Chief Executive of FINRA, said "We ought to move to a single standard, and I think it makes sense for it to be a fiduciary standard."[17]
- On July 17, 2009, SIFMA's position further evolved when their Executive Vice President, Randy Snook, testified before the House Financial Services Committee and announced SIFMA support for a new federal fiduciary standard for broker-dealers and RIAs who provide personalized investment advice.[18]

At the same time, others in strong favor of the standard have pushed the issue in Washington. The National Association of Personal Financial Advisors (NAPFA), the FPA and the Certified Financial Planner Board of Standards (CFP Board) joined forces to form the Financial Planning Coalition to represent the interests of financial planners on regulatory reform. In addition to advocating for separate and distinct regulatory oversight over the planning profession, their goals include ensuring that financial planning services are "delivered to the public with fiduciary accountability and transparency, serving the client's best interest first and always."[19]

It could be that we are starting to see a meeting of the minds on the standard of care due to investors. But questions still remain, specifically surrounding the definition of fiduciary duty and how to apply it based on the relationship between the financial advisor and the investor.

SEC Commissioner Aguilar says, "We need to be very careful about adopting any new standard simply because it's called a fiduciary standard. Many of the standards I have heard proposed are referred to as fiduciary standards but seem to be defining standards of suitability. There is only one fiduciary standard and it means that a fiduciary has an affirmative obligation to put a client's interests above his or her own. As a result, a fiduciary acts in the best interests of the client, even if it means putting a client's interest above his own."[20]

[15] *Financial Advisor*, April 2009.

[16] Speech at the Mutual Fund Directors Forum Ninth Annual Policy Conference, May 5, 2009.

[17] "FINRA Boss Calls For Fiduciary Standard For All Advisers," *InvestmentNews*, May 13, 2009.

[18] http://www.house.gov/apps/list/hearing/financialsvcs_dem/snook.pdf.

[19] "Planners Form Coalition to Press Reforms," *InvestmentNews*, January 8, 2009.

[20] Speech at the Investment Advisers Association Annual Conference, May 7, 2009.

WHERE DO WE GO FROM HERE?

Since the low point of the markets in March 2009, the economy has shown signs of life. Stock markets are up significantly; unemployment, although still increasing, appears to be slowing its ascent; and investors are starting to see the light at the end of the tunnel. As of the writing of this paper, many are saying the worst is in the rearview mirror and the recession is over. But the damage has certainly been done, and the weak links in the chain have been exposed.

TD AMERITRADE Institutional advocates that regulators and policy makers recognize that the financial world that existed at the time the Exchange Act and the Advisers Act were created has evolved and that it is time to reshape our laws and regulations so they more accurately reflect financial professionals' and investors' needs of today and tomorrow. The recent financial regulatory reform proposals seem to support this view.

As we've tried to highlight in this paper, there is an enormous need to:

- Provide a clearer definition of the types of services offered by various types of financial professionals so investors can make more informed decisions;
- Clearly differentiate among (i) non-advisory broker-dealer activities such as clearing, (ii) the sale of products to retail clients through broker-dealers (which we believe should be done in the best interest of the client when delivered on a personalized basis, with appropriate conflict of interest disclosures), and (iii) the provision of ongoing, personalized investment advice; and
- Deliver an appropriate standard of care for investors dependent on the type of professional relationship and the services they request.

Whether you are an investment advisor or a registered representative at a broker-dealer, the regulatory changes that are currently being discussed will impact the way you conduct business in the future.

Our world is changing, and it is happening now. It is incumbent on all of us in this profession to:

- Stay informed about the issues and the proposed solutions;
- Make our voices heard at the legislative level as well as with the various industry associations and trade groups; and
- Make sure our employers or service providers, such as custodians or broker-dealers, understand any concerns and are acting to help protect the interests of financial professionals and investors.

Most people would probably agree that no individualized advice is provided in a pure transactional relationship (e.g., a simple direction to a registered representative to purchase or sell a particular security), and that no fiduciary obligation can or should be ascribed to this type of relationship. For a relationship that entails a retail investor seeking professional advice on securities from a registered representative at a broker-dealer, we believe a best interest of the client standard should apply, with appropriate disclosures as to conflicts of interest. For any relationship that involves the provision of ongoing investment advice and an understood level of trust that the advisor is acting in the client's best interest, we believe a fiduciary obligation is warranted. Care must be taken to resist a universal fiduciary standard for all brokerage business models to avoid imposing standards that are impossible or costly to meet and would restrict investor choice, drive up costs to investors for services they do not want and water down the existing fiduciary standard that protects investors.

This is our opportunity and responsibility to restore investor trust and confidence. Tom Bradley, president of TD AMERITRADE Institutional observes:

> "This is the most exciting time ever to be in the financial services industry as the opportunities we have are significant. How we respond to these opportunities will determine our collective success. TD AMERITRADE Institutional can be counted on to be part of the solution, and we look forward to helping every client constituency weather the storms they will face so they may come out of this difficult period stronger and more resilient than ever. Let's together remake our industry in ways that restore the trust and confidence of the investing public; that ensure that regulators and legislators develop rules and laws that are appropriate for the different needs of the investing public; and make it clear to all that we are acting in the best interests of the consumer."