Harmonization of the Best Interest Standard

Issue and Current Status

Fiduciary duty includes both a duty of care and a duty of loyalty. Collectively, these duties require a fiduciary to act in the best interest of the customer and to provide full and fair disclosure of material facts and conflicts of interest. Today, broker/dealers and investment advisers are regulated by different laws. Generally speaking, brokers are subject to a "suitability standard," whereas investment advisors are subject to a higher "fiduciary standard." Concerns have long been raised that the differing standard can confuse investors and lead to inconsistent definitions and interpretations under existing law.

Recognizing these inconsistencies, in 2010 Congress adopted Section 913 of the Dodd-Frank Act, which gave the Securities and Exchange Commission (SEC) the authority to adopt a uniform fiduciary standard of conduct for both broker/dealers and investment advisors and directed the SEC to study this issue. Section 913 further gave discretion to the SEC to establish a fiduciary standard.

While the SEC did commission a study and issued a report on the matter, progress on development of a standard slowed to a halt. The U.S. Department of Labor (DOL) stepped in by proposing rules, first in 2010 and again in 2015. The DOL's Conflict of Interest rule, finalized in April 2016, applied a fiduciary standard on all retirement accounts, regardless of whether they were brokerage or investment advisory accounts. However, on March 15, 2018, the Fifth Circuit Court of Appeals vacated the DOL Conflict of Interest rule *in toto*.

Under the leadership of SEC Chair Jay Clayton, on April 18, 2018, the SEC issued a package of regulatory proposals related to the standards of conduct applicable to investment professionals. The package includes (1) a proposal to enhance the standard of conduct owed by broker-dealers to their clients; (2) a proposal to create a new disclosure form intended to help clients understand the nature of their relationship with their investment professional; and (3) proposed regulatory guidance designed to clarify the fiduciary standard applicable to investment advisers.

With the vacatur of the DOL rule, state legislatures have begun to step in to fill the void raising concerns that broker-dealers and investment advisers will face divergent standards under various regulatory regimes, including not only from federal regulators, but also from the 50 states.[1]

LPL Position

LPL has long supported regulations requiring that investment advice be in the investor's best interest; we have consistently voiced our support for standards that will protect investors by helping to ensure that they receive investment advice and recommendations that are fair and appropriate for their particular investment, savings and financial needs.[2] We also believe it is important that financial institutions and professionals provide clear disclosures regarding the nature of their services, their fees and

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[1] In addition to the Department of Labor, a number of states have adopted or are presently considering legislation that imposes general fiduciary obligations upon investment activities or require disclosures for non-fiduciary investment recommendation and financial planning relationships. *See, e.g.,* Act Protecting the Interests of Consumers Doing Business with Financial Planners, 2017 Conn. Legis. Serv. P.A.17-120 (H.B. 6992) (enacted July 5, 2017); Financial Planners – Investments – Fiduciary Duties, 2017 Nevada Laws Ch. 322 (S.B. 383) (effective July 1, 2017); 2017 New York Assembly Bill 2464 (introduced Jan. 20, 2017) (relating to mandating greater levels of disclosure by non-fiduciaries that provide investment advice); 2018 New Jersey Senate S735 (introduced Jan. 12, 2018) (requiring certain disclosures by non-fiduciary investment advisers).

[2] Letter from David P. Bergers, General Counsel, LPL Financial to U.S. Dep't of Labor (March 17, 2015) (addressing Proposed Extension of Fiduciary Rule Applicability Date); Letter from David P. Bergers, General Counsel, LPL Financial to U.S. Dep't of Labor (Jul. 21, 2015) (addressing Proposed Definition of the Term "Fiduciary" and Related Proposed Prohibited Transaction Exemptions); Letter from Stephanie L. Brown, Managing Director, General Counsel, LPL Financial to Elizabeth M. Murphy, Sec.'y, U.S. Sec. and Exch. Comm'n (Aug. 30, 2010) (addressing comments on File No. 4-606: Study Regarding Obligations of Brokers, Dealers, and Investment Advisers).

compensation, and material conflicts of interest so that investors can make informed choices about investment services and products.

At the same time, we have urged that such standards and requirements be adopted in a way that preserves investor choice and access to a wide range of investment and financial services. Harmonized standards will reduce investor confusion and costs, facilitate compliance, and promote holistic investment services, advice and planning. This will result in better savings and investment outcomes for all Americans, regardless of whether they are saving through a tax-qualified retirement account or a taxable account, and regardless of whether they receive advice from a broker-dealer or an investment adviser.

We are very supportive of the SEC's efforts, and we urge the SEC to move forward expeditiously with its rule proposals so that consumers and the industry may have certainty as soon as possible. As the prudential regulator for broker-dealers and investment advisers, the SEC is best positioned to engineer such a comprehensive rule. Further, the SEC has the mechanisms to both adopt and enforce such a standard of conduct, and a clear interest in protecting all retail investors.

We will continue to work with the SEC on its rule proposals while also engaging proactively with state legislatures. In this regard, we emphasize the need for a single standard of conduct; it is untenable for financial advice to be subject to conflicting standards from the SEC, the states, and possibly even cities and counties. We need a clear harmonized best interest standard.

We look forward to our continued partnership with Congress, our regulators, and our industry partners to craft such a standard that will work in concert with existing obligations to protect American investors. LPL will continue to push for a thoughtful resolution of this complex issue so that we may end the lingering uncertainty for our advisors and our collective business.