

UPDATE ON THE UNIFORM FIDUCIARY STANDARD

By Andrew J. Dorman and Brian P. Nally
Reminger Co., L.P.A.

INTRODUCTION

Our discussion of the uniform fiduciary standard may remind some of Yogi Berra's famous quote—it's like déjà-vu all over again—or the famous Bill Murray movie *Groundhog Day*. It has been nearly five years since Congress passed the Dodd-Frank Act and we are still discussing whether a uniform fiduciary standard will be adopted and, if so, what it will look like. In fact, our first article—*To Be, or Not to Be (A Fiduciary): The Dodd-Frank Act's Uniform Fiduciary Duty*—was published on July 30, 2013 and discussed the existing regulatory framework that treats brokers and investment advisors differently and how Section 913 of the Dodd-Frank Act may lead to the enactment of a uniform fiduciary standard. Nearly two years later, we are still discussing the same issues. But the first quarter of 2015 involved some major developments on this topic, including FINRA's regulatory guidance, President Obama's public comments, Mary Jo White's first public declaration in favor of a uniform fiduciary standard, and the Department of Labor's release of its new definition of a "fiduciary" under ERISA. This article will address these recent developments and their anticipated impact.

RECENT DEVELOPMENTS

On January 6, 2015, FINRA released its annual Regulatory and Examinations

Priorities Letter and included an interesting section on Recurring Challenges.¹ The first identified challenge was characterized as "putting customer interests first," and FINRA explained that its regulatory approach may disregard the existing regulatory framework and opt for a uniform fiduciary standard: "Irrespective of whether a firm must meet a suitability or fiduciary standard, FINRA believes that firms best serve their customers—and reduce their regulatory risk—by putting customers' interests first. This requires the firm to align its interests with those of its customers." This language was not used in FINRA's 2014 regulatory priorities,² and indicates FINRA's regulatory shift toward a fiduciary standard notwithstanding the S.E.C.'s delays in formally adopting the uniform fiduciary standard.

Momentum for the uniform fiduciary standard continued in February when President Obama endorsed the Department of Labor's change to its definition of "fiduciary" under ERISA: "Today, I'm calling on the Department of Labor to update the rules and requirements that retirement advisors put the best interests of their clients above their own financial interests. It's a very simple principle: You want to give financial advice, you've got to put your client's interests first."³

Possibly the most important development came in March during the

SIFMA Conference. Chairwoman of the S.E.C., Mary Jo White, for the first time expressed her opinion that the S.E.C. should implement the uniform fiduciary standards among the brokers and advisers.⁴ Chairwoman White's stance aligns her with Commissioners Aguilar and Stein, and would provide a majority vote in favor of the uniform fiduciary duty. Commissions Gallagher and Pinowar are expected to oppose any vote on the uniform fiduciary duty.



The following month, the DOL released its Notice of Proposed Rulemaking. According to the DOL, the new rule is designed to require the best interest standard across a broader range of retirement advice with a particular focus on advice provided to self-directed IRAs and 401(k)s. Under DOL's proposed definition, any individual receiving compensation for

providing advice that is individualized or specifically directed to a particular plan sponsor (e.g., an employer with a retirement plan), plan participant, or IRA owner for consideration in making a retirement investment decision is a fiduciary. Interestingly, a fiduciary could be a broker, registered investment adviser, insurance agent, or other adviser. And being a fiduciary simply means that the adviser must provide impartial advice in their client's best interest.⁵

Yet another domino fell this month when news spread that Commissioner Gallagher—the staunchest critic of the uniform fiduciary standard on the S.E.C. Commission—is resigning.⁶

IMPACT OF RECENT DEVELOPMENTS

With the above developments, especially Chairwoman White's public stance in favor of a uniform fiduciary standard, adoption of a uniform fiduciary standard appears to be more likely than ever. Whether financial professionals are offering advice to retirement accounts or retail brokerage accounts, the standard seems to be shifting quickly toward a fiduciary one. This shift, paired with FINRA's noted regulatory approach to measure firm conduct under the fiduciary standard, should trigger action by broker-dealers and financial professionals to review their sales practices, products, disclosures, supervision, and other business activities to comply with FINRA's regulatory focus and the expected developments from the S.E.C and Department of Labor.

About the Authors: Andrew J. Dorman (Chair) and Brian P. Nally (Member) are attorneys in the Financial Services Professional Liability practice group of Reminger Co., L.P.A., with offices in Ohio, Kentucky, and Indiana.

¹ See <http://www.finra.org/sites/default/files/p602239.pdf>.

² See <https://www.finra.org/sites/default/files/Industry/p419710.pdf>

³ See <http://www.thinkadvisor.com/2015/02/23/obama-endorses-dol-fiduciary-redraft-girds-for-fig>;
<http://www.investmentnews.com/assets/docs/CI99098414.PDF>

⁴ See <http://www.wsj.com/articles/sec-head-seeks-uniformity-in-fiduciary-duties-among-brokers-advisers-1426607955>

⁵ See <http://www.investmentnews.com/assets/docs/CI99098414.PDF>

⁶ See <http://www.bloomberg.com/news/articles/2015-05-12/sec-s--gallagher-said-to-resign-as-commissioner-after-four-years>