

## Financial Services Professional Liability

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## S.E.C. SAYS UNIFORM FIDUCIARY STANDARD OF CARE IS TOP PRIORITY

As many of you know from our prior articles, the Dodd-Frank Act of 2010 directed the S.E.C. to study and evaluate the effectiveness of the existing legal and regulatory standards of care applied to broker-dealers and investment advisers. In 2011, the Staff of the S.E.C. submitted to Congress a detailed report, recommending a new uniform fiduciary standard of conduct for both broker-dealers and investment advisers when providing personalized investment advice to retail investors. Since that recommendation, the S.E.C. has not formally adopted or rejected the Staff's recommendation.

On March 21st, in a speech before the Consumer Federation of America's Consumer Assembly, Mary Jo White, the Chair of the S.E.C., offered further guidance on her position on the issue: "In order to more fully inform the commission's decision on this matter, I have directed the staff to evaluate all of the potential options available to the commission, including a uniform fiduciary standard for broker-dealers and investment advisers when dealing with retail customers, and other measures that may be more targeted and achievable in the shorter term." White stated the issue is a "priority" and stated "it is very important and we need to move forward to a decision." While acknowledging its importance, White has still not taken a definitive stance on the rule itself. In her March speech, however, White questioned whether having a different standard for brokers and investment advisers is appropriate: "Whenever you have substantially similar services regulated differently, I believe it is necessary to consider carefully whether the regulatory distinction makes sense."

The issue will ultimately be decided by the five-person S.E.C. Commission, comprised of White, Luis Aguilar, Daniel Gallagher, Kara Stein, and Michael Piwowar. While Commissioner Aguilar has expressed support for the rule, Commissioner Gallagher has been the rule's most outspoken skeptic. As recently as March 2014, Commissioner Gallagher expressed his doubts about the likelihood of the S.E.C. adopting a uniform fiduciary duty rule, stating "[a]t this point, I'm not sure we need to use [the Dodd-Frank authority]...I'm not sure, quite frankly, a majority of the commission believes that or believes we should use it in any way." In addressing the pressure from White to make a decision about the fiduciary rule, Gallagher stated: "I start from the position that it's not necessary until someone proves it out." Commissioner Piwowar has also expressed similar doubts about the need for a uniform fiduciary rule in a February 2014 interview with InvestmentNews, stating "it's not clear to me that [investor confusion is] enough to justify engaging in rule making." (See <http://www.investmentnews.com/article/20140127/FREE/140129911>, last visited 4/29/14) Commissioner Stein—a democrat who joined the Commission in August 2013 after playing an integral role in drafting the Dodd-Frank Act—has not taken a public stance on the issue but many expect her to be in favor of some form of a uniform fiduciary standard. With the Commission seemingly split on the issue, White's most recent comments suggest that the issue will be resolved in 2014—whether for or against a uniform fiduciary standard remains uncertain.

If you have any questions or need additional information concerning the proposed uniform fiduciary standard of care, please feel free to contact Andrew J. Dorman at [ADorman@reminger.com](mailto:ADorman@reminger.com) or Brian P. Nally at [BNally@reminger.com](mailto:BNally@reminger.com), or a member of Reminger's Financial Services Professional Liability practice group.

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