



October 26, 2009

The Honorable Barney Frank
Chairman
Financial Services Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Spencer Bachus
Ranking Member
Financial Services Committee
U.S. House of Representatives
Washington, DC 20515

RE: Investor Protection Act, Section 103 (fiduciary duty)

Dear Chairman Frank and Ranking Member Bachus:

I write on behalf of the Securities Industry and Financial Markets Association (SIFMA)¹ in order to clarify our position on the above-referenced legislation and to respond generally to recent misrepresentations about our position that are being advanced by groups clinging to the status quo for the purposes of clouding the issues and avoiding a change in their regulatory status.²

SIFMA took seriously calls for responsibility by Congress and the President and decided to confront head on the question of investor confidence in the market. One of the most challenging policy questions raised by the Administration's white paper is the concept of a harmonized standard for broker-dealers and investment advisers. As we stated in our recent testimony,³ we

¹ SIFMA brings together the shared interests of more than 600 securities firms, banks and asset managers locally and globally through offices in New York, Washington, D.C., and London. Its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. SIFMA's mission is to champion policies and practices that benefit investors and issuers, expand and perfect global capital markets, and foster the development of new products and services. Fundamental to achieving this mission is earning, inspiring and upholding the public's trust in the industry and the markets. More information about SIFMA is available at <http://www.sifma.org>.

² See letter from the "Committee for the Fiduciary Standard" dated October 19, 2009 to the Chairman and Ranking Member of the Senate Committee on Banking and the House Financial Services Committee.

³ Testimony of John Taft, Head of U.S. Wealth Management, RBC Wealth Management, and Chairman of the Private Client Group Steering Committee of SIFMA before the U.S. House of Representatives Committee on Financial Services, October 6, 2009, available at <http://www.sifma.org/legislative/testimony/pdf/JohnTaft-Testimony-beforeHFSC.pdf>.

agree that the average individual investor who seeks personalized investment advice deserves the same protection regardless of whose door they walk through - someone registered under the Investment Advisers Act or the Securities Exchange Act.

Accordingly, SIFMA continues to strongly recommend that Congress should direct the SEC to develop and implement a uniform, federal fiduciary standard for financial professionals for the purpose of increasing the standard of care for broker-dealers and investment advisers when they provide personalized investment advice to individuals. SIFMA is not proposing what specifically that standard should be, but rather that the SEC should promulgate such a standard based on traditionally recognized, fundamental fiduciary duties – including, among others: put investors’ interests first, act with prudence, don’t mislead clients, provide clear disclosure, and avoid or appropriately manage conflicts.

Some claim their support for a so-called “authentic” fiduciary standard. No such standard currently exists under federal or state law. Some also claim that a federal fiduciary standard devised under this statute would be a “watered-down” standard because we are advocating for it. This too is pure fallacy.

The silver lining of all of this most recent chatter is that it highlights the critical question:

Which is better for investors – the status quo state law-based fiduciary standard that varies from state to state, or a uniform, harmonized, evenly-applied, federal fiduciary standard?

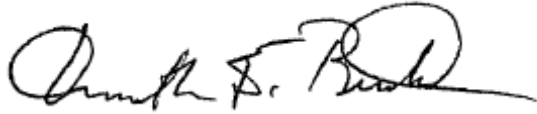
The answer is clearly a federal fiduciary standard. The current state common law of fiduciary is an outdated patchwork system that has resulted in numerous, conflicting, uneven, unharmonious standards across the 50 states. State courts are all over the map in deciding whether a fiduciary duty exists, and if so, what duty is owed.⁴

Thus, the current standard applicable to investment advisers is inherently indeterminate and unacceptably unspecified. It’s hardly a “standard” at all – and certainly not a “standardized” one that is uniformly and equally applied. The current common law-based set of fiduciary standards can serve as a model for a Congressional effort to create a national standard, but it cannot serve as the national standard because of its uneven application and enforcement.

⁴ Among the dozens of cases that address this issue, there are few unifying principles or rules of thumb than can be drawn from them. *Compare Farmland Indus. v. Frazier-Parrott Commodities, Inc.*, 871 F.2d 1402, 1411 (8th Cir. 1989) (In Missouri, fiduciary duties may arise out of a financial professional-customer relationship); *with Lefkowitz v. Smith Barney, Harris Upham & Co.*, 804 F.2d 154, 155 (1st Cir. 1986) (stating that “a simple [financial professional]-customer relationship does not constitute a fiduciary relationship in Massachusetts.”); *and with Brown v. California Pension Administrators & Consultants, Inc.*, 52 Cal. Rptr. 2d 788, 796-97 (Cal. App. 1996) (stating that where a financial professional provided investment advice to his customer, the relationship was one of principal-agent, and therefore, fiduciary duties applied). *See Robinson v. Merrill Lynch*, 337 F. Supp. 107, 111 (N.D. Ala. 1971) (“The [fiduciary] relationship of agent and principal only existed between [broker and customer] when an order to buy or sell was placed, and terminated when the transaction was complete”), and *Baker v. Wheat First Securities*, 643 F. Supp. 1420 (S.D. W.Va. 1986) (stockbroker does owe a fiduciary duty to his client, but the scope of the broker's duties owed depends on a detailed consideration of other factors).

We can and should enhance investor protection by improving upon the status quo. That is why SIFMA is calling for federal fiduciary standard that is clear, well-defined and equally applied under SEC regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth E. Bentsen, Jr.", with a stylized, cursive script.

Kenneth E. Bentsen, Jr.
Executive Vice President, Public Policy and Advocacy