Stop Fighting Over "Fiduciary"

By Bob Veres

With all the arguments and lobbying around the fiduciary standard, I think the profession is in danger of forgetting the big picture. The fight over the "fiduciary" label is really just one more battle in a long war between professionals and sales agents.

Over the years, professionals have repeatedly created bright-line distinctions that separate those who want to enhance the lives of their clients with their expertise from those who want to pose as professionals — so they can more efficiently gather assets and sell products that mostly benefit them and their employer.

And each time, the sales agents and their brokerage employers have very effectively blurred those lines.

An early example was "fee-only" — which, for a few years, clearly distinguished advisors who helped clients build sound portfolios from those who mostly sold sleazy tax shelters. Then the brokerage industry came up with the term "fee-based," and did a terrific job of muddying the distinction.

Now, consumers looking for a wealth management professional who charges fees will walk into a broker's office and inquire about compensation; when the broker says that he's "fee-based," the consumers relax and feel like they're entering into a genuine professional relationship.

In the present skirmish, SIFMA is actually claiming that it has always supported a fiduciary standard. Yet in the next breath, the organization says that the standard should be "harmonized" (read: completely rewritten) so that it is rules-based rather than principles-based, permits brokers to act on conflicts of interest so long as they are disclosed in small print on page 39 of the client agreement, and generally conforms to the sales culture's existing rules on suitability.

If SIFMA wins this round, how are consumers to know that this is a complete rewrite of centuries of established case law?

LOST CAUSE

In my view, the fiduciary battle should be abandoned as a lost cause. Otherwise, there's a real danger the brokerage industry will use its enormous wealth to emasculate an important legal distinction.

If you don't think this battle is lost, consider that the SEC and Congress are asking for proof that a fiduciary advisor provides a better cost-benefit relationship for consumers than a wirehouse broker.

If they were serious about the question, all they'd have to do is ask: Which firms are offering cushy seven-figure jobs to regulators after they leave the SEC?

Can advisory firms, who watch every penny of client assets, afford that kind of salary? Who is casually tossing millions of dollars into congressional campaign coffers to buy access? Where do they think all that extra money comes from?

If the fiduciary battle is lost, the question becomes: Where are the real professionals going to find their next bright-line distinction? I think this time around, advisors should try several approaches at once.

3 DISTINCTIONS

First, let's push for clarity in the terminology. We (and they) call it the brokerage industry, right? No matter what they have on their business cards, employees of a brokerage firm should be characterized as brokers, and should be required to identify themselves as such to consumers who walk in the door.

Advisors who register with the SEC under the Investment Advisers Act should be required to describe themselves as advisors. They can also call themselves financial planners or investment professionals or wealth managers, or any of these other names, but the simple broker/advisor distinction would help consumers identify a professional who is required to live up to the un-rewritten fiduciary standards.

It will take a lot of time and lobbying before the SEC starts requiring this nomenclature, but in the meantime, we can ask journalists to be a little more careful about the way they characterize the different players. Way too many reporters, in the

consumer media and also in trade media, use the terms "broker" and "advisor" carelessly, often calling wirehouse reps "advisors" in their articles.

Some of this is out of ignorance. I recently talked with a young trade reporter who was astonished to hear that brokers working for wirehouse firms were not registered as RIAs.

FIDUCIARY OATH

Second, let's create some clarity around who does (and who doesn't) put the client's interests first.

The best way I know to do this is to adopt advisor Harold Even-sky's "fiduciary oath," or a similar document that NAPFA advisors are required to sign. You can find Evensky's version online — at bit.ly/1zka2iE — but you're free to create your own.

Make sure you can hand your clients a signed commitment promising to put their best interests first, to act with the prudence, skill, care, diligence and good judgment of a professional; to not mislead them; and to provide conspicuous, full and fair disclosure of important facts.

The document would also promise to avoid conflicts of interest and manage, in the client's favor, any unavoidable conflicts.

You sign this, and then, if you're in a competitive situation, invite the prospect to take a version of this fiduciary oath to the brokers down the street and ask them to sign it. If they refuse, ask why.

I would hope, as this practice takes hold, that consumer reporters would ask brokerage firms why they won't allow their brokers to sign such an oath.

Meanwhile, advisors can create an even clearer distinction. We would start by reaching a consensus on how to define a professional.

These standards should appropriately include minimum education standards, the fiduciary oath, compensation guidelines, appropriate disclosures, and standards of practice and procedures similar to what fi360 has created around fiduciary behavior.

Then create an organization, or use an existing organization, that will only accept people who meet those standards.

If 20,000 real professionals are willing to accept those standards — possibly adapting their practices to meet them — and join that organization, consumers would be less confused about who is and is not providing professional advice. The message should be: If you, Dear Consumer, work with a member of this organization, you're dealing with a professional. If not, guard your wallet.

LOBBYIST QUICKSAND

The beauty of these approaches is that they don't require an expensive lobbying campaign that the professionals are destined to lose anyway. Instead of waiting for Congress and the SEC to do the right thing, professional advisors can separate themselves unilaterally from the brokers who desperately want to be viewed as advisors because it makes their sales job so much easier.

These distinctions might also lure the honest brokers, and people who want to get out of sales and provide advice, over to the professional side of the fence.

No doubt, after a lot of hard and diligent work, the brokerage world will find ways to muddy up these waters once again. I have no idea how they'll do this, but we'd be fools to underestimate their tenacity and creativity when it comes to protecting their executive bonus pools. The war rages on.

Financial Planning; December 2014