



American
Bankers
Association®

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Three Themes for Today

- The New Ship of Administration is Still Turning
- New Initiatives to be Aware Of
- “The New Fiduciary”

Still New Administration

- Nominations – Key Financial Agencies Filled; A Few Pending
 - SEC – Chair Jay Clayton and a full Commission
 - CFTC – Chair Christopher Giancarlo and two Commissioners
 - DOL – Secretary Alexander Acosta
 - FRB – Chair Powell and VC Supervision Quarles, four vacancies
 - OCC – Comptroller Otting
 - FDIC – McWilliams nomination awaiting Senate vote, potential for two vacancies

Still New Administration

- Treasury Response to Executive Order 13772 - core principles of financial regulation
 - Report on Banking – June 2017
 - Report on Capital Markets – October 2017
 - Report on Asset Management – October 2017
 - Report on Fintech pending

Still New Administration

- The Table Is Set
 - New principals have expressed receptivity to revisiting rules
 - Some proposals issued
 - Real work ahead

For Your Attention

Tax Cuts and Jobs Act of 2017

TCJA Provision	Description of Change
Individual Income Tax Rates	Seven tax brackets: 10%, 12%, 22%, 24%, 32%, 35%, and 37%. <i>Sunsets in 2026.</i>
Standard Deduction	Increases standard deduction to \$24,000 for joint filers (and surviving spouses), \$18,000 for heads of household, and \$12,000 for individual filers, adjusted for inflation. <i>Sunsets in 2026.</i>
Personal Exemption	Repeals deduction for personal exemptions. <i>Sunsets in 2026.</i>
Itemized Deductions	Limits state and local taxes capped at \$10,000. Exception tax on rental property. <i>Sunsets in 2016.</i>
Miscellaneous Itemized Deductions	Suspends deductions of miscellaneous itemized deductions. Treasury expected to release guidance on how suspension affects trustee and other expenses that are deducted to arrive at AGI, as defined in 26 IRC 67(e). <i>Sunsets in 2026.</i>
Estate, Gift, and Generation-Skipping Transfer (GST) Tax	Doubles basic exclusion amount for estate, gift, and generation-skipping transfer taxes, beginning for tax years after 2017. <i>Sunsets in 2026.</i>
Recharacterization of IRA Contributions	Repeals the rule allowing recharacterization of IRA contributions and conversions.

For Your Attention

- S. 2155 – The Economic Growth, Regulatory Relief and Consumer Protection Act
 - Section 303 – Immunity from suit for disclosure of financial exploitation of seniors
 - Section 203 – Volcker rule reform
 - Section 402 – Supplemental leverage ratio adjustment for custody banks

For Your Attention

- SEC Exam Priorities 2018
 - Critical market infrastructure
 - Retail investors, seniors and retirement investors/savers
 - Cybersecurity
 - AML programs, and
 - Remember, more investment adviser exams
- FINRA Competency Exams
 - Increases from 2 to 7 years the time a registered individual can stay at a regulated financial services affiliate without re-taking qualification exams.
 - Securities Industry Essentials™ exam
 - Effective October 2018 – only available prospectively

For Your Attention

- FINRA Preventing Financial Exploitation
 - New Rule 2165, *Financial Exploitation of Specified Adults*
 - Allows temporary holds on disbursement of funds or securities from an account of specified adults when broker has “reasonable basis” to believe financial exploitation has occurred or will occur
 - “Specified adult”: natural person age 65 and older; or natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests
 - Amendments to Rule 4512, *Customer Account Information*
 - Members must make reasonable efforts to obtain name and contact information of a *trusted contact person* upon opening of or updating information on a non-institutional customer account
 - Effective February 5, 2018

For Your Attention

- SEC Guidance on RIA Custody Rule
- Guidance on Inadvertent Custody
 - RIA may have custody due to agreement between client and custodian that grants adviser broader access to client funds or securities than the adviser's own agreement with the client contemplates
- No Action Letter
 - RIA may have custody if client grants RIA limited power in a Standing Letter of Instruction to disburse funds to one or more third parties as specifically designated by the client.
 - Lays out ways for RIA to obtain no action relief, which requires certain efforts on the part of the custodian.
- Industry groups seeking additional flexibility and guidance

For Your Attention

- FDIC Recordkeeping Rule
 - Largest ~30 depository banks must “maintain” information on underlying owners entitled to pass-through deposit insurance
 - Alternative recordkeeping for these accounts
 - For omnibus deposits (e.g., from trust companies): (1) account owner can hold records; (2) “Pending reason” in files
 - For formal rev and irrev trusts: (1) unique identifier of *grantor* if transaction account; (2) “Pending reason” in files
 - Effective: April 1, 2017. Compliance: April 1, 2020

For Your Attention

- OCC Fiduciary Powers Manual
 - OCC approval requirements
 - National bank fiduciary powers exercisable in any state
 - OCC statement on “fiduciary” and “trust”: *“Fiduciary powers and services are commonly known as trust powers or services. Accordingly, the terms ‘fiduciary’ and ‘trust’ are used interchangeably.”*

The New Fiduciary

- Fiduciary
 - Everyone wants to be one
 - Nobody wants to be one

The New Fiduciary

	Trustee, Executor, Guardian, Custodian Under Uniform Gifts to Minors Act	Investment Adviser
Source of Duties and Remedies	Common law. State statutes. Federal banking laws and regulations.	<i>SEC v. Capital Gains Bureau</i> , 375 U.S. 18 (1963). Federal securities laws and regulations, including the Investment Advisers Act of 1940.
Duty of Care / Administration	Among other things, a fiduciary must: (1) administer the account in accordance with its terms, purposes, and interests of beneficiaries; (2) administer the account prudently using reasonable care; and (3) incur only reasonable costs of administration.	Advisers must provide investment advice that is consistent with the client's investment objective(s) and have a reasonable, independent basis for its recommendations.
Duty of Loyalty	A fiduciary must act and administer an account solely in the best interests of the beneficiaries. Conflicts only may be waived in the governing document, by statute, by court order, or by waiver from all beneficiaries. For example, bank fiduciaries may not use affiliated investment products sponsored by a bank or its affiliates, unless authorized by the governing document, statute, court order, or by a waiver from all beneficiaries after full disclosure of the conflict. Even when the duty of loyalty is waived by statute, court order, or waiver of all beneficiaries, fiduciaries must still comply with their many other duties, including the duty to invest prudently.	

The New Fiduciary

	Trustee, Executor, Guardian, Custodian Under Uniform Gifts to Minors Act	Investment Adviser
Remedies Available to Clients Due to Breach of Duties	<p>A full range of remedies may be available to clients:</p> <ul style="list-style-type: none"> • Reduction/Denial of Trustee's Compensation and Fees • Trustee's Payment of Damages, including Interest • Information and accounting • Injunction • Increase in Trustee's Bond • Removal of Trustee • Appointment of a Receiver or Successor Trustee • Court Setting Aside Acts of Trustee • Court Direction to Trustee for Specific Performance • Court Supervision of Trustee Act's <p>Note: A court is not confined to a limited list of remedies but can mold the relief in equity to protect the client's rights.</p>	<p>Clients have limited private rights of action and no equitable remedies against advisers. Thus, as a practical matter they may only recover fees paid to the adviser. Clients may have other private rights of action under state law.</p>

The New Fiduciary

	Current Duties or Definition	Proposed Duties or Definition
Broker-Dealer	Broker-dealers generally not fiduciaries under the federal securities laws. Standard of conduct is to deal fairly with customers and to observe high standards of commercial honor and just and equitable principles of trade. Also subject to specific obligations, including suitability obligations, as well as requirements to disclose certain conflicts. In practice, required disclosures of conflicts more limited than with advisers and apply at different points in the customer relationship.	<p>Harmonized Standard of Conduct as Recommended in the Securities and Exchange Commission Study on Investment Advisers and Broker-Dealers:</p> <p>“The Commission should exercise its rulemaking authority to implement the uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers.”</p> <ul style="list-style-type: none"> • Generally: To act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice. • Duty of Loyalty: A uniform standard of conduct to eliminate or disclose conflicts of interest. SEC may prohibit certain conflicts and facilitate the provision of uniform and clear disclosures about the terms of relationship, including any material conflicts of interest. • Principal Trading: SEC may address through interpretive guidance or rulemaking how broker-dealers should fulfill the uniform fiduciary standard when engaging in principal trading. • Duty of Care: SEC may consider specifying uniform standards for the duty of care owed, through rulemaking or interpretive guidance. Minimum baseline professionalism standards could include, specifying what basis a broker-dealer or investment adviser should have in making a recommendation to an investor.
Investment Adviser	Investment advisers are fiduciaries under the federal securities laws. SEC has stated that the fiduciary duty of investment advisers includes a duty of loyalty and a duty of care (encompassing, among other things, a duty of suitability), with the duty of loyalty requiring investment advisers to act in the best interests of clients and to avoid or disclose conflicts.	

The New Fiduciary

- We Have an Unprecedented Opportunity
 - The DOL will likely have to start from scratch
 - The SEC is revisiting its approach to distinguishing between brokers and advisers
 - Industry has years of experience with service delivery and pricing
 - Banking agencies have a role
 - States have an interest
- Let's put our experience to use

The New Fiduciary

- “Fiduciary”: more variable than we can explain
 - Variables for fiduciary status
 - Customer agreement
 - Governing law
 - Investment vehicle (brokerage? IRA? qualified plan?)
 - Discretion level (full investment management? shared? customer directed? advisory?)
 - Where does it play out?
 - Customer relationship
 - The courts

The New Fiduciary

- What Can You Do?
 - Operate
 - Policies and procedures
 - Staff training
 - Documentation

The New Fiduciary

- What Can You Do?
 - Advocate – tell us:
 - What rules of the road work versus don't work
 - Where should the rules be black and white and where should they be flexible
 - What do customers understand and what don't they understand
 - What would allow you to reach more customers
 - Ways to clearly differentiate education versus advice

ABA Resources

- Thank you members
- “If your bank is a member, you are a member.”
 - aba.com
- Trust Letter transmogrifying to ABA Wealth Management and Trust e-bulletin
 - From paid subscription to member resource

Questions

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