A Modest Proposal: Prosecute Non-Fiduciaries Using Term ‘Advisor’

Dalbar CEO Lou Harvey reacts to Tibergien’s lament about ‘fiduciaries in name only’

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Intellectuals and thought-leader types in the financial realm tend toward unanimity when it comes to the debate over whether there ought to be a fiduciary standard for professional advice givers.

“If someone would like to seek advice on a specific financial product, or about their own overall situation, they should get it from a financial advisor working to the fiduciary standard who is familiar with their financial situation,” says Helaine Olen, author of a new book blasting the personal finance industry, called *Pound Foolish*.

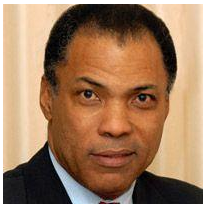
“I've seen way too many people hurt financially as a result of taking the counsel of salesmen promoting various financial products who don't have a legal responsibility to act in their customers' best interests,” Olen told AdvisorOne.

Yet the fiduciary standard may still seem inadequate, even among its staunchest promoters, for a variety of reasons, among them human moral failings, such as the propensity some have of skirting even clearly laid rules.

Pershing Advisor Solutions CEO Mark Tibergien’s articleFiduciary in Name Only, first published in Investment Advisor, has raised awareness of the potential inadequacy of the fiduciary label.

“I cringe when I see negative news stories involving a registered rep, trader, investment banker, hedge fund, wealth manager or financial planner…As head of a custodian that serves RIA firms and their clients, I suffer even stronger emotions when learning of an indictment or finding against a fiduciary advisor,” Tibergien wrote.

Tibergien seems to despair that regulations, however clear, fail to deter a large cohort of financial professionals “who choose to ignore them.” He calls on individual advisors to carefully monitor their own conduct under various potential conflicts he describes.



Responding to Tibergien's article, Dalbar CEO Lou Harvey (right) told AdvisorOne, "I believe that the article actually understates the severity of the problem and the steps that will be necessary to prevent further damage."

That is because the marketplace has come to recognize the value of fiduciary advice, thereby conferring a hugely attractive competitive advantage on those claiming to put client interests first.

"At a time when wearing the moniker of 'fiduciary' requires no more than paying for a short online course or printing a deceptive designation on a business card, there is little doubt that we will see the number of fraud cases continue to grow," Harvey says.

"Imagine, for example, if anyone could describe themselves as 'doctor' or 'attorney' but the real ones were 'fiduciary doctor' and 'fiduciary attorney,'" Harvey adds.

The solution, Harvey says, cannot be left simply to advisors monitoring themselves more carefully. Rather, the head of the Boston-based financial services consultancy proposes an exclusive "mark of distinction" that fiduciaries must earn:

"Such a standard would require investigating each designee and excluding those that fail to demonstrate a history of client commitment and no infractions of laws or regulations," Harvey says. "The fiduciary community must demand the education and skills to serve clients in the specific capacities for which they are engaged."

The heart of Harvey's proposal is to restrict the use of the word "advisor" (or "adviser") to fiduciaries alone, leading to prosecution for non-fiduciaries using that label.

"Such a simple action would eliminate the public confusion virtually overnight. Non-fiduciaries can continue to identify themselves as financial planners, brokers or any of the other titles that are in use today," Harvey concludes.

Meanwhile, the debate over whether to impose a uniform fiduciary standard on all financial professionals continues to intensify through governmental channels as well—as the SEC continues to draw comment on rules it will be drafting on the matter.

One comment posted on the SEC's website just today offered a ringing endorsement of a fiduciary standard from, of all quarters, a Merrill Lynch advisor—though brokers would be the most affected by a change from the current mandate of "suitability" to one requiring them to put their clients' interests ahead of theirs, with all that that entails in terms of legal liability.

Said the broker, John Chavies, of Dayton, Ohio:

"As an advisor with Merrill Lynch for over 20 years and having over 22 years of experience in the industry I strongly support a uniform fiduciary standard. Our industry has created confusion for consumers by [trying] to sit on both sides of the issue to reduce litigation risk. A move to a uniform standard would [promote] a more professional industry…"

Last month, after the SEC invited public comment, noted independent advisor Harold Evensky was among the first to respond, also in favor of a fiduciary rule change:

"The risk to the average investor in the current regulatory environment is not a 'Madoff' scheme that fleeces a relatively few investors of millions or billions of dollars. Rather, it is a system that allows financial professionals to position themselves as 'trusted advisers' and, as a result of that trust, provide recommendations that, while neither fraudulent nor unsuitable, may well be more expensive than an available alternative investment from the same firm."

Opinion on the public comment site is overwhelmingly in favor of a rule change, and comes overwhelmingly from those already engaged in fiduciary advice.