

Lobbying for Fiduciary Principles *or* Stories about Sausage Making

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From Precepts to Practices

- Precepts are principles founded in law.
- Practices are applications of the precepts, founded in law and research.
- A Standard of Practices constitutes a body of knowledge as to what is required for a person or organization to meet recognized expectations

Fiduciary Principles in Practice

- Professional codes of ethics
- Common law
- **Federal and state law**
- **Agency guidance**

What does this mean in terms of Dodd-Frank reform?

“Courts rarely provide specific definitions of fiduciaries or fiduciary relationships.... In contrast, legislatures define fiduciary relationships and fiduciary duties more specifically....

“...In such cases, the courts follow the legislatures’ intent.”

– Tamara Frankel, law professor
in *Fiduciary Law*

Financial Planning Assn'n v. SEC

A Case of Statutory Interpretation

Two exemptions from IA registration were at issue:

202(a)11(C) **Any** broker [emphasis added by appellate court]...whose performance...is solely incidental to the conduct of his business as a broker...and who receives no special compensation therefor;

202(a)11(F) such **other** persons [emphasis by court] not within the intent of this paragraph...

D.C. Appellate Court found:

SEC failed to

- “[R]espect the unambiguous textual limitations” of the law; and
- “[F]lout[ed] six decades of consistent SEC understanding of its authority under (F).”

“[T]he court’s duty is to give meaning to each word of a statute...”

-- D.C. Appellate Court in *FPA*

Tools of Statutory Construction

Federal courts will look to:

- Plain language of the law
- Structure
- Overall Statutory Scheme
- **Problem Congress sought to resolve**
 - “[T]o achieve a high standard of business ethics in the securities industry” [SEC v. Capital Gains]
 - “[T]o protect the public from...frauds...and to safeguard the honest investment adviser” [1940 committee report]

Key Trends

- Statutory law usually trumps common law in court
 - Reduced fiduciary case law, i.e. binding arbitration upheld in securities disputes (*Shearson v. McMahon*, 1987)
 - However, new reliance on common law – Dodd-Frank Act (Title X) cites *Barnett Bank v. Nelson*, other cases in limiting federal preemption (2010)
- Congress increasingly active in defining fiduciary standard and its scope (Dodd-Frank Act)
 - SEC authority to interpret fiduciary standards limited

Dodd-Frank and Fiduciary Standard

Key Expanding Provisions (the Good News)

- Municipal broker-advisors subject to fiduciary duty
- SEC may issue new disclosure rules for brokers selling investment products or services to retail investors concerning
 - *Financial incentives received by broker*
 - *Proprietary products or limited selection*
- SEC may ban or limit sales practices, conflicts, compensation schemes of brokers, advisors
- **SEC may prescribe fiduciary duty for brokers**

Dodd-Frank and Fiduciary Standard

Key Limiting Provisions (the Bad News)

- Broker fiduciary duty limited to
 - *Personalized investment advice to retail investors*
 - *No ongoing duty of care and loyalty after provision of advice*
- Not available to clients of private funds
- Sale of proprietary, limited product selection not, in and of itself, a breach of fiduciary duty
- Receipt of commission for sale of securities not, in and of itself, a breach of fiduciary duty
- Harmonization of BD, IA enforcement

Dodd-Frank Reform

Post 2011 Broker*

Fiduciary Changes

Fiduciary if:

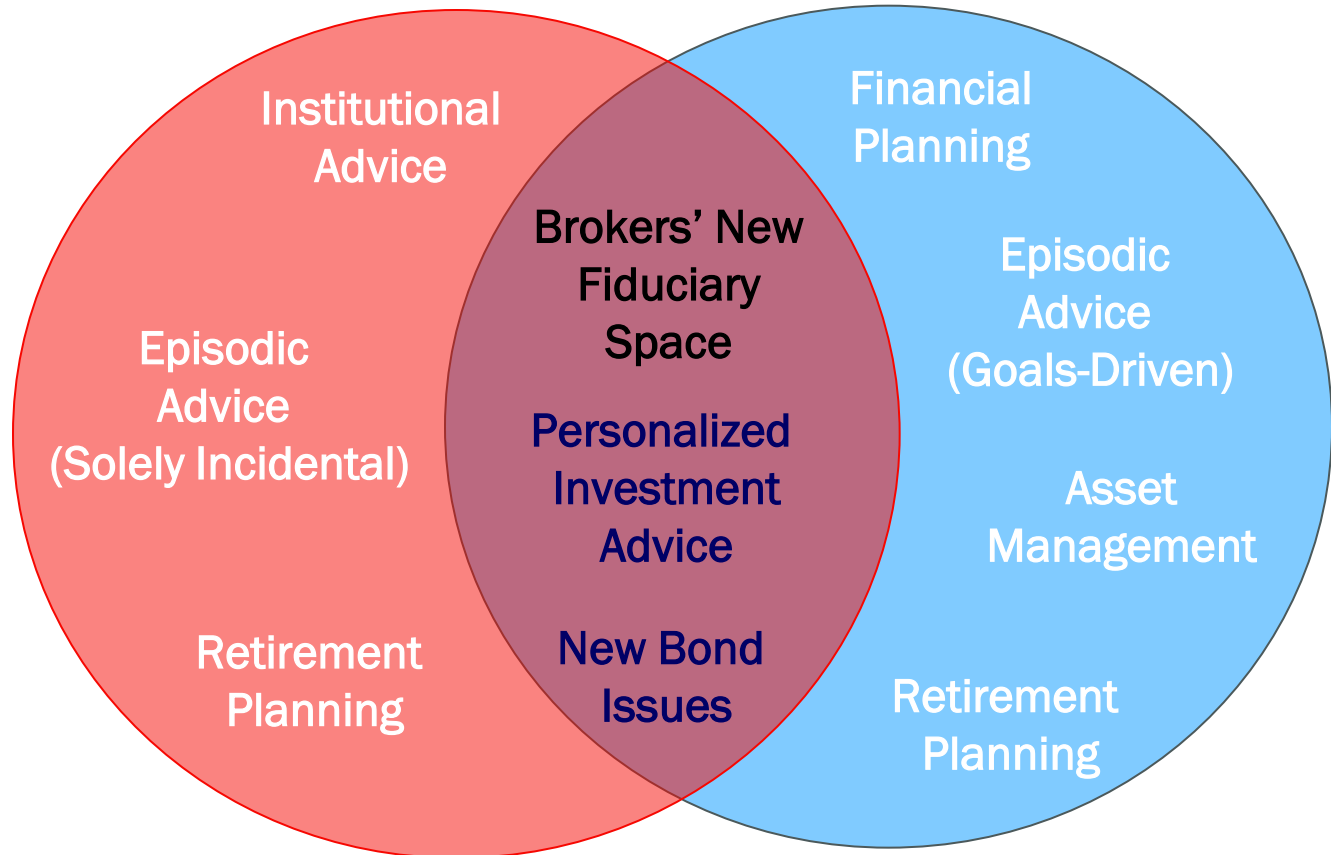
- Personalized investment advice
 - ‘Solely incidental’ advice
 - Compensated by commission
 - Advise on proprietary products
- Diluted duty of care, stronger duty of loyalty
 - Brighter line, broader reach, of fiduciary duty
 - Statutory clarification?
 - Diluted duty of loyalty

* If SEC adopts fiduciary duty for brokers

Future Oversight of Investment Advice

**Securities Brokers
Non-Fiduciary Activity**

**Investment Advisers
Fiduciary Activity**



Now for the Sausage-making



YOUR GUIDE TO GLOBAL FIDUCIARY INSIGHTS

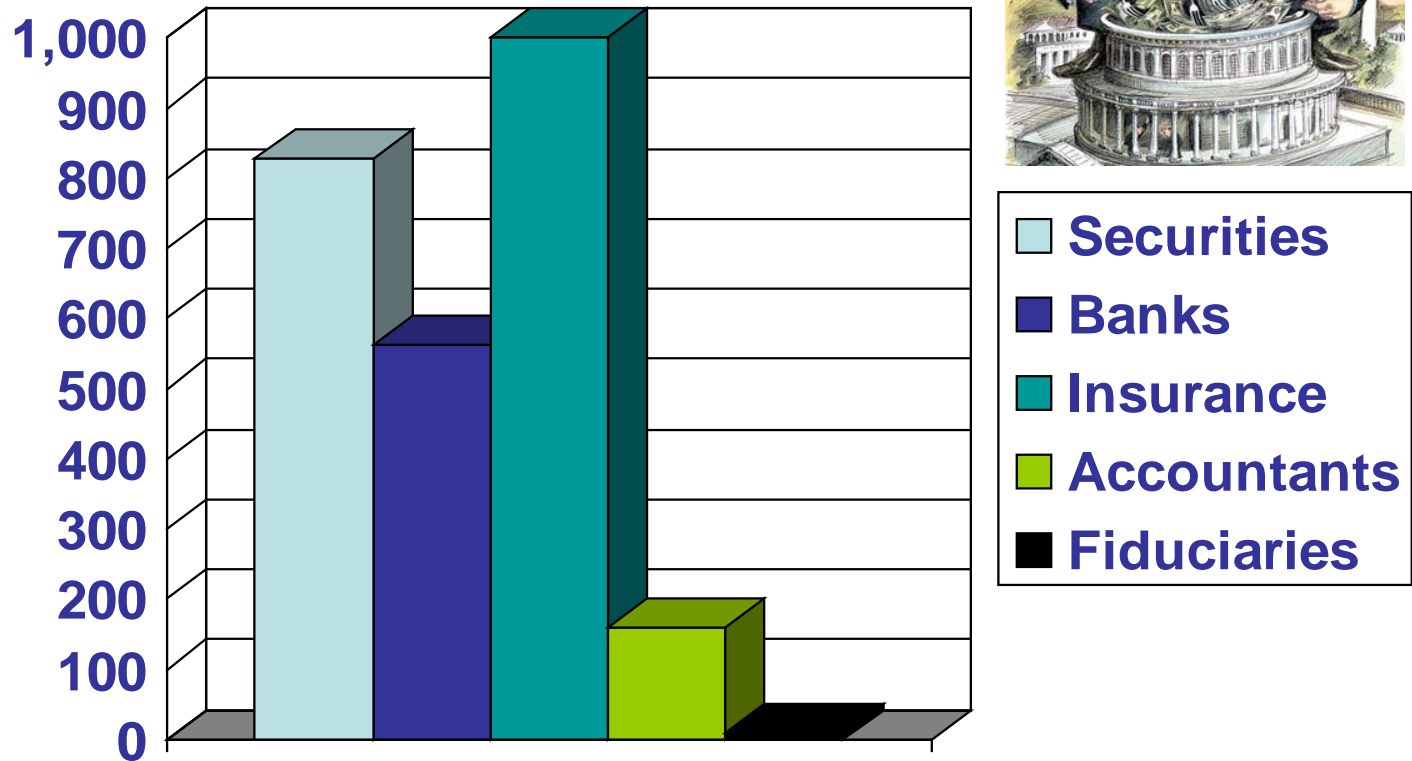


Lobbying Congress – the Basics

1. Much harder to pass a bill than kill one.
2. Speak with one voice.
3. Keep your message short, humanize it.
4. Look for path of least resistance.
5. Find a champion.
6. Ignore the noise.
7. A vote is a vote.
8. Be patient, set reasonable goals.

Boots on the Ground

of Registered Lobbyists – 2009*



* Source: Center for Responsive Politics

Lobbying Congress (cont'd.)

1. Much harder to pass a bill than kill one.

- Choose your battles carefully.
 - *Narrowly focused, controversial bills rarely pass.*
 - *Must-pass bills mean opportunity.*
 - *Dodd-Frank fiduciary provisions (2010)*

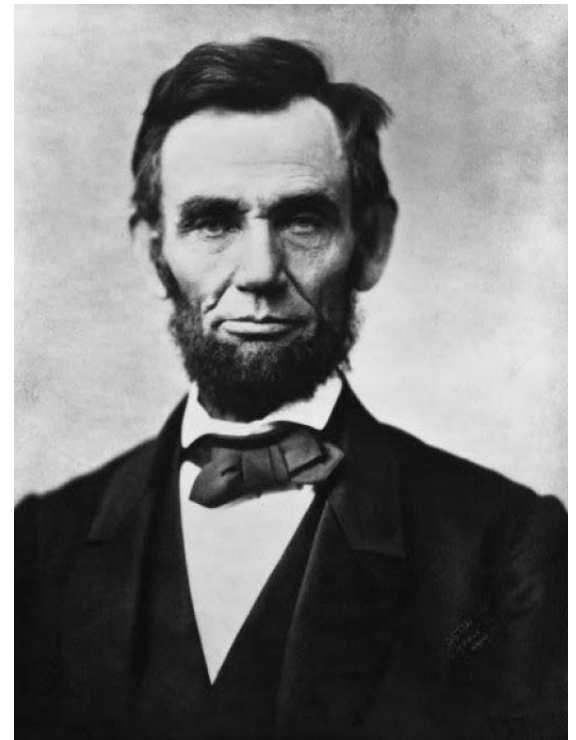
2. Speak with one voice.

- Fiduciary community must unite to win.
 - *Be willing to compromise on small issues; don't seek perfection*
 - *Don't be picky about your new friends.*

Lobbying Congress (cont'd.)

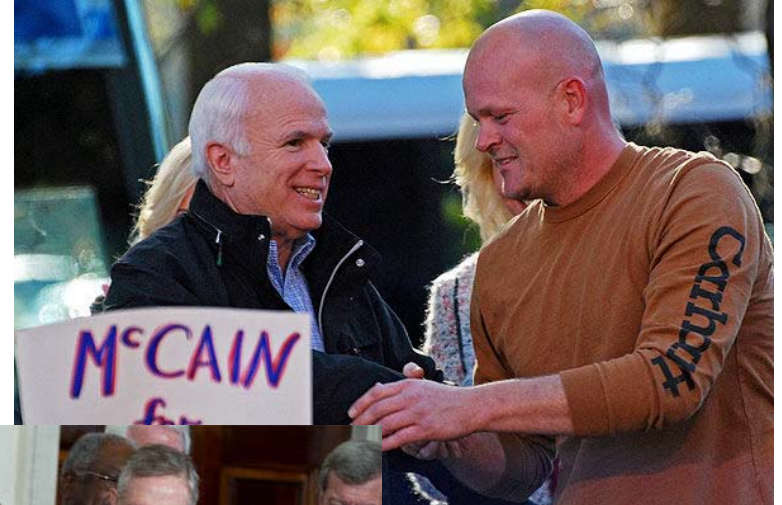
3. Keep your message simple and short; personalize it.

- Public confused by legal theories, understands concepts.
 - *Fiduciary = fairness, trust*
- Human stories more powerful than statistics.



“So you are the little woman who wrote the book that started this great war.”

– Abraham Lincoln, upon meeting Harriet Beecher Stowe, author of *Uncle Tom’s Cabin*



Personalizing policy issues has long been a part of American politics.

Lobbying Congress (cont'd.)

4. Look for path of least resistance.
 - A. RIA amendments (1996)
 - B. CFPB carve-outs (2010)
5. Find a champion.
 - A. Financial Planning Coalition – Sen. Kohl
 - B. SIFMA – Sen. Schumer

Case History – CFPB* Carve-outs

Oversight

- Mortgage and credit products (including reverse mortgages)
- Payday lenders
- Debt collectors

Exemptions

- Attorneys
- Auto dealers
- Accountants
- Insurance producers
- Investment advisers (state/federal)
- Real estate brokers
- Pawnbrokers
- Pension advisers
- Small banks
- Stockbrokers/commodities traders
- Tax preparers

* Bureau of Consumer Financial Protection

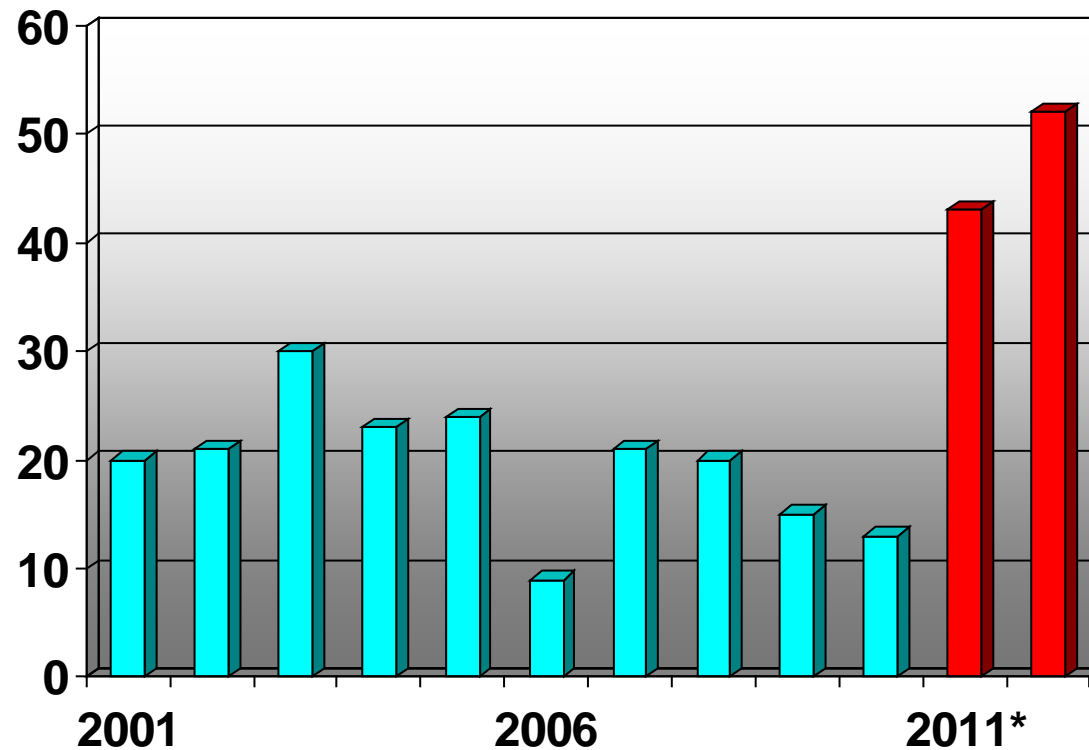


Lobbying Congress (cont'd.)

6. Ignore the noise.
 - A. (You tell your clients to ignore CNBC.)
 - B. Listen to your lobbyist, not the trades.
7. A vote is a vote.
 - A. Dem, Indy or Rep: 1 = 1.
8. Be patient.
 - A. Major issues take years to pass.

Agency Lobbying

SEC Rulemaking – 2001-2012*



*Note: Includes rules adopted 2001-2010 and estimated rules to be adopted in 2011-12; Data exclude administrative or technical rule changes.

Agency Strategies

1. Much harder to kill a rule than a bill.
2. Speak with one voice.
3. Technical messages better than simple ones.
4. Outside pressure from Congress may help.
5. Public relations of marginal benefit.
6. When all else fails, legislate or STB!

Case History -- ERISA

1. 1996

- A. RIAs dually registered with state and SEC.*
- B. ERISA required SEC registration for 3(38) investment managers.*
- C. NSMIA included 2-year sunset for state RIAs.*

2. 1997

- A. FP coalition filed bill, passed with SEC support, for preserving state RIA fiduciaries. (Sec. 38(B)(ii))*

3. 2003

- A. DoL adopted final rule permitting IARD filings to confirm investment management status. (29 CFR Part 2510)*

Questions