



Consumer Federation of America

Simple Facts about Fiduciary Duty Lead to One Obvious Conclusion: Vote YES on Akaka-Menendez-Durbin Amendment

Investor advocates have identified passage of the Akaka-Menendez-Durbin amendment as the single most important step Congress can and should take to protect average Main Street investors. We believe that, presented with the simple facts, a majority in Congress will agree.

1) Investors can't distinguish between brokers and investment advisers.

Brokers typically call their salespeople financial advisers. They offer services that they call investment planning and retirement planning. In other words, they present themselves to the public as if the primary service they have to offer is investment advice. For years, the brokerage industry argued that this was not a cause for concern, because investors understood the differences between brokers and advisers. The RAND Study verified what investor advocates and state securities regulators had long maintained, that investors do not understand these basic differences and shouldn't be expected to in light of industry practices that promote that confusion.

2) Brokers and investment advisers both offer investment advice.

The two separate laws governing brokers and investment advisers were based on the fact that, at the time they were adopted, brokers and investment advisers performed two distinct functions. Investment advisers were in the business of giving advice about securities. Brokers were in the business of buying and selling securities on their customers' behalf. The different standards that applied – a fiduciary duty for investment advisers and a suitability standard for brokers – were designed to match these different functions. The RAND Study verified what had been obvious to most observers, that today there is a great deal of overlap in the functions performed by brokers and investment advisers. Specifically, both offer extensive investment advisory services.

3) Brokers are free to offer investment advice without meeting the appropriate standard.

If an investment adviser wants to sell securities (or insurance), the investment adviser must be appropriately licensed and regulated to do so. If a broker wants to give investment advice, the broker does not have to be regulated as an investment adviser. Most importantly, the broker does not have to recommend products he or she believes to be in the best interests of the customer. Instead, the suitability standard allows brokers to recommend products that are inferior (by virtue of higher costs, poorer performance, or because they are a poorer match for the investor) as long as the product is generally suitable, and the broker does not even have to disclose the conflicts of interest that might induce him or her to do so.

4) The SEC has studied the issue and concluded that disclosures alone cannot resolve investor confusion.

Although the SEC has been addressing related questions since the advent of the financial planning profession in the 1980s, it began a more detailed exploration of the issue as part of its fee-based brokerage account rule, which was first proposed in 1999. Sensitive to the blurring of the lines that had already occurred between brokers and investment advisers, a blurring of the lines that was further exacerbated by the advent of fee-based brokerage accounts, and concerned that investors might be confused, the agency proposed to require disclosures on brokerage advertisements and account statements designed to alert investors to the fact that the broker was not an investment adviser and did not have the same legal duty to the investor. When the SEC tested the disclosures with investors, however, the tests revealed that the disclosures were ineffective. Efforts to improve the disclosures did not resolve the problem. As a result, the Commission voted to commission the RAND Study to supply a factual basis on which to base a more fundamental change in policy.

5) The proposal contained in the Akaka-Menendez-Durbin amendment reflects these SEC findings.

Based on these four facts – 1) that investors are confused about the differences between brokers and advisers, 2) that brokers and advisers perform many of the same functions, 3) that brokers and investment advisers are held to different standards when they give investment advice, and 4) that investor confusion could not be dispelled through disclosure – most observers concluded that the time had come to harmonize the standards for investment advice by brokers and advisers. Toward that end, SEC Chairman Mary Schapiro, Commissioner Elisse Walters, and Commissioner Luis Aguilar have all called on Congress to adopt legislation holding brokers who give investment advice to the same fiduciary duty that applies to all other investment advisers. The Investors Working Group, which was chaired by former SEC Chairmen Arthur Levitt and William Donaldson, reached the same conclusion. That is also the position of the North American Securities Administrators Association, which represents the state securities regulators who enforce the law at the local level, and of a whole host of investor advocacy groups, including CFA, AARP, the Council of Institutional Investors, and Americans for Financial Reform.

Conclusion: Vote YES on the Akaka-Menendez-Durbin Amendment to End the Double Standard and Protect Investors

The fiduciary duty proposal in the Akaka-Menendez-Durbin amendment represents the culmination of years of study by the SEC. Based on the agency's findings, it directs the SEC to adopt rules to end the double standard that has allowed brokers to operate as investment advisers without having to meet the appropriate standards. It does so in the least intrusive manner possible, by directing the SEC to adopt rules imposing the duty under the Securities Exchange Act. And it includes provisions designed to make clear that it does not change the basic broker-dealer business model. It does not, for example, require brokers to charge fees for advice, prevent them from charging commissions for transactions, or prevent them from selling from a limited menu of products. This is a reasonable approach that respects differences between brokers and investment advisers while ensuring that investors are protected. We urge you to support this vital investor protection amendment.