ADVISERS, BROKERS, AND ONLINE PLATFORMS: HOW A UNIFORM FIDUCIARY DUTY WILL BETTER SERVE INVESTORS

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The differences between Investment Advisers and Brokers have long confused retail investors. Despite different governing statutes, many investors are still left wondering as to which services each provides and to which legal standard they are subject. Adding to this problem has been the rise of online and mobile platforms for investing that offer many of the same services and compensation structures as Advisers and Brokers, yet subject investors to a third distinct level of legal protection. This Note identifies the problems inherent in the current system and explores several possible solutions that could reduce consumer confusion and potential investor harm with minimal impact on market efficiency. In the end, this Note identifies the need for new legislation governing all financial advisers, which creates a unified fiduciary standard across all three forms of financial adviser as the optimal solution. This Note illustrates the precedent for such an extension of fiduciary obligations as well as how this standard must be tailored to best balance the interests of both investors and financial advisers.

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I. INTRODUCTION

The continuing rise of online retail investment activity, in terms of both the number of trading platforms and the number of customer brokerage accounts,[1] has continued to fuel the ongoing debate as to how far fiduciary duties should extend within the securities industry. Traditionally, judicial decisions interpreting the Investment Advisers Act of 1940 (the "IAA") have found that it creates a fiduciary duty for Investment Advisers ("Advisers") to advance their clients' best interests and to continually monitor their accounts.[2] Conversely, the Securities Exchange Act of 1934 (the "SEA") requires only that Securities Brokers ("Brokers") provide "suitable" advice

[1] *See* ISABELLA FONSECA ET AL., THE STATE OF ONLINE BROKERAGE PLATFORMS (2015).

[2] *See* Benjamin P. Edwards, *Fiduciary Duty and Investment Advice: Will a Uniform Fiduciary Duty Make a Material Difference?*, 14 J. BUS. & SEC. L. 105, 106 (2014). *See also* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

to retail consumers.[3] These different standards affect the advice that investors receive and may also impact the securities that they choose to purchase.[4] Online investing activity tends to be run holistically through brokerage firms as "discount brokers"[5] rather than through individual full-service Advisers and Brokers. This fact only adds to the confusion for ordinary investors, who already struggle to understand the differences between these two standards and which standard is applicable to their financial Adviser.[6] Further, these online Brokerage firms exacerbate the problems of consumer protection inherent in the current system, which holds Brokers to a lower legal standard and rewards them with commission based compensation.

Despite the judicial trend, examined in Part II of this Note, of gradually extending fiduciary duties to Brokers who are in a particular position to take advantage of unsophisticated clients,[7] many now advocate for a uniform fiduciary standard governing both Brokers and Advisers.[8] This Note seeks to take this line of argumentation one step further by presenting the relatively novel idea that any uniform fiduciary standard should extend not only to all financial advisers, including Bro-

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3 *See* Edwards, *supra* note 2, at 108.

4 *Id.* at 106.

5 Many scholars refer to the online and mobile trading-related services of brokerage firms as "discount brokers," but for the purposes of this Note it is necessary to separate out the specific online and mobile services from any potential other services offered by discount brokers. Hence, this Note will refer to online and mobile trading services as "online platforms" rather than discount brokers.

6 *See* Gary A. Varnavides, *The Flawed State of Broker-Dealer Regulation and the Case for an Authentic Federal Fiduciary Standard for Broker-Dealers*, 16 FORDHAM J. CORP. & FIN. L. 203, 215 (2011). *See also* U.S. SEC. & EXCH. COMM'N, STUDY ON INVESTMENT ADVISORS AND BROKER-DEALERS 101 (2011), [hereinafter SEC STUDY], http://www.sec.gov/news/studies/2011/913studyfinal.pdf [perma.cc/4A95-CZAG]

7 *See generally* United States v. Skelly, 442 F.3d 94 (2d Cir. 2006); United States v. Szur, 289 F.3d 200 (2d Cir. 2002); Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981).

8 *See* Edwards, *supra* note 2, at 118.

kers, but also to all of their investing platforms, and in particular their online and mobile platforms. Part III examines the existing and proposed regulatory standards, ranging from contract law to fiduciary duties, to uncover the problems they pose in terms of consumer confusion, the potential for harm to investors, and market efficiency. Drawing on this analysis, the resulting recommendation in Part IV of this Note advocates for a unified fiduciary standard across all financial advisers, including online platforms. A standard varying only in degree with the level of service being provided will best increase investor protection, decrease confusion, and maintain market efficiency.

II. BACKGROUND ON FIDUCIARY DUTIES AND COMPENSATION STRUCTURES FOR FINANCIAL ADVISERS, BROKERS, AND ONLINE PLATFORMS

A. Evolution and Extension of Fiduciary Duties from Advisers to Brokers

Historically, Brokers and Advisers served different roles. From the first half of the mid-twentieth century, Brokers tended to act as order facilitators or executors, providing advice only when it was "incidental to the performance of brokerage services."[9] On the other hand, Advisers have historically always provided ongoing investment advice, such as in portfolio selection and management.[10]

These initial differences in responsibility resulted in distinct compensation structures. Advisers have typically been compensated with annual management fees, asset-based fees, or a percentage of the assets managed (i.e., ongoing management/advice based compensation).[11] Brokers, on the other hand, have been compensated with commission-based fees

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[9] Arthur B. Laby, *Selling Advice and Creating Expectations: Why Brokers Should Be Fiduciaries*, 87 WASH. L. REV. 707, 726, 729–30 (2012).

[10] *Id.* at 726.

[11] *See* Edwards, *supra* note 2, 106–07.

(i.e., transaction-based compensation).[12] Additionally, Brokers and Advisers are subject to different governing statutory authorities. Advisers are governed under the IAA of 1940, while Brokers largely fall under the SEA of 1934.

Given these different roles, compensation structures, and governing authorities, early court decisions unsurprisingly reached two distinct legal duties for Brokers and Advisers. Although the IAA of 1940 does not expressly provide for a federal fiduciary duty, courts have previously held that section 206 of the IAA establishes "federal fiduciary standards," which govern the conduct of Advisers.[13] Importantly, based on the Supreme Court's ruling in *SEC v. Capital Gains Research Bureau*, the Securities and Exchange Commission (the "SEC") has determined that Advisers' fiduciary duties include a duty of "good faith, and full and fair disclosure of all material facts."[14] The SEC has also stated that a duty of loyalty is fundamental to the federal fiduciary standard and "requires an adviser to serve the best interests of his clients."[15] Serving their clients' best interests includes selecting suitable securities for their account and taking into consideration the price and management fees of those securities.[16] In this way, the fiduciary duty prevents incentives for Advisers to recommend equally suitable but more costly securities. The fiduciary duty also obligates them to continually monitor their clients' accounts.[17]

Since the IAA explicitly excludes Brokers from falling under the scope of "Investment Adviser," courts have interpreted

[12] *Id.* at 106.

[13] Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 16–17 (1979); Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 471 n.11 (1977); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191–92, 194 (1963). *See also* Edwards, *supra* note 2, at 108.

[14] SEC STUDY, *supra* note 6, at 22. *See generally SEC v. Capital Gains Research Bureau*, 375 U.S. at 181.

[15] SEC STUDY, *supra* note 6, at 22.

[16] *See* Edwards, *supra* note 2, at 106.

[17] Christine Lazaro, *The Future of Financial Advice: Eliminating the False Distinction Between Brokers and Investment Advisors*, 87 ST. JOHN'S L. REV. 381, 382 (2014).

this Act to bar Brokers from liability for advice given to investors unless they were "specially compensated" for their advice or gave advice that was not "solely incidental" to a Broker's business of trade execution.[18] Courts have expounded a broad judicial interpretation of "solely incidental" as "in connection with the sale of a product."[19] Alternatively, courts have a narrow interpretation of "special compensation," as compensation "received specifically in exchange for giving advice, as opposed to some other service,"[20] and where "the compensation takes a form other than a commission or analogous transaction-based compensation received for the sale of a product."[21] These two definitions create a high bar for investors to overcome in order to hold Brokers accountable to fiduciary duties under the IAA.

Instead, under most circumstances, the legal obligations Brokers have to their clients derive, at least initially, from the SEA, which requires Brokers to register with the SEC and to join self-regulating entities such as the Financial Industry Regulatory Authority ("FINRA").[22] As a result, "in most instances, FINRA Rules define the scope of a Broker's obligations to her clients."[23] Of particular importance is FINRA Rule 2111, also known as the "Suitability Rule," which directly governs the advice Brokers may give their clients.[24] The Suitability Rule requires that the Broker's recommendation must be merely suitable for the client.[25] Specifically, Rule 2111 states:

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18 Thomas v. Metro. Life Ins. Co., 631 F.3d 1153, 1166 (10th Cir. 2011); Wiener v. Eaton Vance Distribs., Inc., No. 10-10515-DPW, 2011 WL 1233131, at *2 (D. Mass. Mar. 30, 2011). *See also* Edwards, *supra* note 2, at 112.

19 *Thomas v. Metro. Life Ins. Co.*, 631 F.3d at 1162.

20 *Id.* at 1165.

21 *Id.*

22 Securities Exchange Act of 1934, 15 U.S.C. §78o (2012).

23 Edwards, *supra* note 2, at 110.

24 FINRA MANUAL RULE 2111, FINRA (May 1, 2014) [hereinafter *FINRA Manual Rule 2111*], http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=9859&print=1 [perma.cc/JYG3-S43M].

25 Lazaro, *supra* note 17, at 382.

> A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.[26]

Crucially, the Suitability Rule does not expressly require a Broker's advice to be in the best interests of his or her client.[27] However, cases have consistently held that when interpreting the Suitability Rule, "a Broker's recommendations must be consistent with his customer's best interests."[28] Hence, what seemed like a clear statutory distinction between the obligations of Advisers and Brokers has been blurred by administrative and judicial intervention.

In addition to possible fiduciary duty liability under the IAA and the fiduciary-esque Suitability Rule, Brokers can be made fiduciaries on a state-by-state basis. California, for example, has generally imposed fiduciary duties on Brokers.[29] Moreover, courts have also imposed fiduciary duties on Brokers who exercise discretionary control over their customers'

[26] *FINRA Manual Rule 2111*, *supra* note 24.

[27] *See* Edwards, *supra* note 2, at 111.

[28] Faber, Exchange Act Release No. 34-49216, 82 SEC Docket 453, 458 (Feb. 10, 2004). *See also* Belden, Exchange Act Release No. 34-47859, 80 SEC Docket 563, 565 (May 14, 2003); Howard, Exchange Act Release No. 34-46269, 78 SEC Docket 338, 339 (July 26, 2002), *aff'd*, 77 Fed. Appx. 2 (1st Cir. 2003); Epstein, Exchange Act Release No. 34-59328, 95 SEC Docket 285, 294 (Jan. 30, 2009).

[29] *See* Twomey v. Mitchum, Jones & Templeton, Inc., 69 Cal. Rptr. 222, 235–36 (Ct. App. 1968); Hobbs v. Bateman Eichler, Hill Richards, Inc., 210 Cal. Rptr. 387, 403 (Ct. App. 1985).

accounts.[30] Courts have been willing to make such an extension of fiduciary duties because customers who voluntarily transfer discretionary authority to buy and sell securities without first obtaining their consent plainly establish the same trust-based relationship that is the foundation of other similar fiduciary obligations.[31]

Some state courts have gone even further, holding that Brokers owe fiduciary duties to customers whose accounts they enjoy de facto control over. These courts, such as that in *Leib v. Merrill Lynch*, examine a multitude of factors specifically including age, education, intelligence, investment experience of the customer, whether the Broker is socially or personally involved with the customer, whether the customer approved of the transactions, and how frequently the Broker and customer communicate about the account in order to determine de facto control.[32] Essentially, courts look for conditions that create the same type of trust-based relationship that exists in other instances of fiduciary duty. Examining each factor, courts are more likely to find that a Broker assumed control over an investor's account for investors who are particularly young[33] or old,[34] less intelligent, uneducated, or inexperienced with regard to financial matters.[35] Courts are also more likely to find de facto control where the Broker is socially or personally involved with the investor,[36] and where

[30] United States v. Skelly, 442 F.3d 94, 98 (2d Cir. 2006). *See also* United States v. Szur, 289 F.3d 200, 211 (2d Cir. 2002); SEC v. Zandford, 535 U.S. 813, 823 (2002); Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 953 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981).

[31] *See* Edwards, *supra* note 2, at 115.

[32] *Leib v. Merrill Lynch*, 461 F. Supp. at 954–55.

[33] Kravitz v. Pressman, Frohlich & Frost, 447 F. Supp. 203, 206 (D. Mass. 1978); *Leib v. Merrill Lynch*, 461 F. Supp. at 954.

[34] Hecht v. Harris, Upham & Co., 430 F.2d 1202, 1206 (9th Cir. 1970); *Leib v. Merrill Lynch*, 461 F. Supp. at 954.

[35] Marshak v. Blyth Eastman Dillion & Co., 413 F. Supp. 377, 380–82 (N.D. Okla. 1975); *Kravitz v. Pressman*, 447 F. Supp. at 211.

[36] *Kravitz v. Pressman*, 447 F. Supp. at 211; *Hecht v. Harris*, 430 F.2d at 1206.

the Broker performed many transactions without the investor's prior approval.[37] Conversely, courts have found that investors who have knowledge of financial matters,[38] who maintain an arms-length business relationship with their Broker,[39] and who speak with their Broker frequently regarding the status of their account or the prudence of particular transactions[40] have retained control over their account.[41]

A final instance where courts have extended fiduciary obligations to Brokers is when "special circumstances" exist, such as a customer with impaired faculties.[42] These special circumstances often relate to instances where the Broker is in a position to exercise effective control over the customers' account. Hence, once more, a trust-based relationship exists, entitling the client to heightened legal protection.

Two important features are identifiable from these prior cases. First, both courts and regulatory bodies have consistently been willing to extend fiduciary or fiduciary-like obligations to Brokers, particularly when they are in trust-based positions of control with respect to their clients' accounts, similar to those of Advisers. Second, the mixed bag of fiduciary duty imposition on Brokers often leaves questions regarding the scope of a Broker's fiduciary obligations for any given transaction. These at times conflicting principles have led many scholars to argue for a uniform fiduciary standard that applies to both Advisers and Brokers.[43] They also raise serious questions about the role that fiduciary duties should play in the

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37 *Kravitz v. Pressman*, 447 F. Supp. at 211; *Hecht v. Harris*, 430 F.2d at 1209–10. *See also Leib v. Merrill Lynch*, 461 F. Supp. at 954–55.

38 *Marshak v. Blyth*, 413 F. Supp. at 380–82; *see generally* Shorrock v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1997-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,251 (D. Or. 1977).

39 *Shorrock v. Merrill Lynch*, [1977–1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 1, 11–12, 21–25.

40 Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 337 F. Supp. 107, 112–13 (N.D. Ala. 1971), *aff'd*, 453 F.2d 417 (5th Cir. 1972).

41 *Leib v. Merrill Lynch*, 461 F. Supp. at 954–55.

42 *See* De Kwiatkowski v. Bear, Stearns & Co., 306 F.3d 1293, 1308 (2d Cir. 2002).

43 *See* Edwards, *supra* note 2, at 118.

world of online and mobile investing, where brokerage firms often act in a manner similar to that of individual Brokers.

B. Relationship Between Brokers and Online Investment Platforms

As an issue of first impression for the courts, there have been no cases that have held a brokerage firm, or other similar financial advisory entity, liable for breach of fiduciary duty based purely on the subject matter of their online and mobile investment platforms.[44] Unlike Brokers who are governed under the SEA and referenced under the IAA, online and mobile investing did not exist in the 1930s and 1940s and thus there is no mention of them in either act.[45] Although the statutory language does not expressly preclude the inclusion of mobile or online platforms under its provisions, as the common law and statutory law currently stand, there is little to no evidence that the legal basis used for extending fiduciary duties to Brokers is similarly present for online platforms. The question then becomes, are there any circumstances under which a court would be willing to make such an extension of fiduciary duty? To answer this, any similarities between Brokers, whom courts have been willing to extend fiduciary duties to under certain circumstances, and their online or mobile investment platforms generally must first be examined.

Broadly speaking, Brokers and online investing platforms serve the same function. Namely, they facilitate securities transactions by providing both the necessary information incidental to the transactions and the means to execute them. As with Brokers, online platforms typically take compensation in the form of a commission-based fee, rather than a management fee or a percentage of the underlying assets value. Both of these factors are evidence of similarities between online platforms and Brokers in ways that would likely exempt them from fiduciary obligations.

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[44] *See* Williams v. Scottrade, Inc., No. 06-10677, 2006 WL 2077588, at *1, *5 (E.D. Mich. July 24, 2006).

[45] *See* Investment Advisers Act of 1940, 15 U.S.C. § 80b-2 (2012); Securities Exchange Act of 1934, 15 U.S.C. § 78o (2012).

In fact, online platforms require investors to sign investor agreements, which effectively exempt the online platforms from fiduciary obligations.[46] These agreements additionally state that, unlike Advisers and Brokers, online platforms do not provide any "advice" or "recommendations."[47] Yet in some instances the investor can input various search criteria, which amounts to virtually asking the online platform for advice or recommendations based on the multitude of inputs provided by the investor.[48] Online brokerage search or strategy features often include additional disclaimers against providing advice or recommendations.[49] But they are strikingly similar to how investors historically have provided information to their Brokers—information that Brokers then use as a basis for their advice or securities recommendations. In fact, many online platforms do have services which allow customers to communicate directly with Brokers about their accounts as well as notification and email components that "socially and personally" engage with the customer about products, services, and trainings.[50]

[46] *Brokerage Account Agreement*, SCOTTRADE, https://www.scottrade.com/documents/alt/111_BrokAccAgreement.pdf [perma.cc/JW2G-4WH4]. *See also Williams*, 2006 WL 2077588, at *4–5.

[47] *Brokerage Account Agreement*, *supra* note 46, at 2; *Williams*, 2006 WL 2077588, *4–5.

[48] *See generally Trader Tools*, OPTIONSXPRESS, https://onlineint.optionsxpress.com/toolbox/ [perma.cc/9KLB-EAPQ] (demonstrating online and mobile trading tools available on optionsXpress, such as "Idea Hub™," "Screener℠," "StrategyScan," "Dragon," "Trade Calculator," "Pricer," and "Position Analyzer," all of which allow their clients to apply various trade inputs in exchange for feedback from the online platform).

[49] *See Strategy Screener Guide*, CHARLES SCHWAB 11 (last accessed Oct. 9, 2017), https://client.schwab.com/Areas/MvcGlobal/Global/ModPdf Handler?domainCode=0&path=%2FTradeSource%2FContent%2FDocuments%2FStrategyScreenerGuide.pdf&name=StrategyScreenerGuide.pdf.

[50] *See generally Trader Tools*, *supra* note 48; *Free Webinar*, OPTIONSXPRESS, http://www.optionsxpress.com/free_education/webinars.aspx [perma.cc/8FW6-TLHL]; *How We Can Help*, OPTIONSXPRESS, https://onlineint.optionsxpress.com/login/login.aspx?SessionID=&start_page_client=/OXNetTools/toolbox/Dragon/Dragon_stock.aspx&r=1 [perma.cc/ 9KLB-EAPQ].

Even without the investor's later input, online platforms collect information including the age, education, and investment experience of clients during account creation. Further, online platforms in effect communicate and involve themselves with their clients' transactions through the information they choose to display most prominently online. Decisions on how and where to display certain securities instead of others can reasonably be said to influence the decisions of some inexperienced or uneducated investors. Therefore, looking to *Leib v. Merrill Lynch*, the same potential for de facto control is present for online platforms as it is for Brokers, even if the investor technically maintains the final decision.[51] The trust-based relationships created by de facto control mirror those of accounts granting discretionary control and are thus the basis for expanding fiduciary duties.[52]

Finally, few restrictions exist on who can sign up for online investing platforms.[53] For example, Charles Schwab only requires a permanent U.S. residence address, a social security number or tax identification number, and an employer's name and mailing address (if applicable) to open an individual brokerage account.[54] Thus it is readily apparent that both Brokers and online platforms could face the kind of "special circumstances," such as the impaired faculties of a customer, that have led courts to extend fiduciary duties in the past.[55]

Although it has never been litigated, it can be reasonably assumed that courts might hold online investing platforms to the same Suitability Rule applied to individual Brokers. Based on precedent, this would mean that, in many jurisdictions, online platforms would be held to a standard that re-

[51] Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 953 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981).

[52] *See* Edwards, *supra* note 2, at 114–115.

[53] *Open an Account*, CHARLES SCHWAB, http://www.schwab.com/public/schwab/investing/accounts_products/accounts/brokerage_account [perma.cc/7L8H-L2QG].

[54] *Id.*

[55] *See* De Kwiatkowski v. Bear, Stearns & Co., 306 F.3d 1293, 1308 (2d Cir. 2002).

quires recommendations to be in their clients "best interests."[56] However, despite the similarities between Brokers and online platforms, online platforms are currently subject to contract law obligations created in their investor agreements rather than to any standard of care.[57] The addition of another form of financial Adviser offering similar, if not the same, services yet is subject to a third legal standard only exacerbates the problems of consumer confusion, potential investor harm, and market inefficiencies.

III. CURRENT PROBLEMS FACING ONLINE INVESTOR PROTECTION

A. Courts' Current Approach to Protecting Online Investors

Arguably the largest problem facing any extension of fiduciary duty to online brokerage platforms (including online trading and investing websites, mobile apps, etc.) is the fact that these online platforms' obligations are currently governed under contract law rather than any fiduciary or fiduciary-esque standard of care. Some brokerage firms do offer "fiduciary accounts," but these are accounts operated by the accountholder's own fiduciary and in no way obligate the brokerage firm to any fiduciary relationship with the accountholder.[58] Moreover, courts have never extended fiduciary duties or any duty of care to the online platforms of brokerage firms.[59] One reason for this dichotomy between

[56] Faber, Exchange Act Release No. 34-49216, 82 SEC Docket 453, 458 (Feb. 10, 2004). *See also* Epstein, Exchange Act Release No. 34-59328, 95 SEC Docket 285, 294 (Jan. 30, 2009) (finding that the defendant, in the context of mutual fund recommendations, "abdicated his responsibility for fair dealing when he put his own self-interest ahead of the interests of his customers"); Belden, Exchange Act Release No. 34-47859, 80 SEC Docket 563, 565 (May 14, 2003); Howard, Exchange Act Release No. 34-46269, 78 SEC Docket 338, 339 (July 26, 2002), *aff'd*, 77 Fed. Appx. 2 (1st Cir. 2003).

[57] *See* Williams v. Scottrade, Inc., No. 06-10677, 2006 WL 2077588, at *5 (E.D. Mich. July 24, 2006).

[58] *See Brokerage Account Agreement*, *supra* note 46, at 2.

[59] *See Williams*, 2006 WL 2077588, at *5.

Brokers and online platforms is the effect of their differing contractual agreements with accountholders.

Online platforms shield themselves from fiduciary liability by requiring new accountholders to sign standard industry-wide agreements stating that the brokerage firm does not make any recommendations or offer investment advice. For example, the "Scottrade Website Terms and Conditions" states:

> Scottrade provides self-directed investors with discount brokerage services. Scottrade does not make recommendations or offer investment advice of any kind. Scottrade provides the content of the Website for informational, educational and noncommercial purposes only. Although Scottrade may provide data, information and content relating to investment approaches and opportunities to buy or sell securities, including mutual funds and exchange-traded funds, you should not construe any such information as investment, financial, tax, legal or other advice. You alone will bear the sole responsibility of evaluating the merits and risks associated with the use of any data, information or content on the Website before making any decisions based on such data, information or content. In exchange for using such data, information or content, you agree not to hold Scottrade or its third-party content providers liable for any possible claim for damages arising from any decision you make based on information made available to you through the Website.[60]

These terms are straightforward when viewed in light of the IAA and SEA. They clearly state that Scottrade only supplies brokerage services, which do not inherently require fiduciary duties under the SEA or IAA.[61] The agreement also explicitly states that Scottrade "does not make

[60] *Scottrade Website Terms and Conditions*, SCOTTRADE, https://www.scottrade.com/disclosures/terms-conditions.html [perma.cc/HQM6-876Z].

[61] *See* Investment Advisers Act of 1940, 15 U.S.C. § 80b-2 (2012); *see generally* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180,186–87 (1963); Thomas v. Metro. Life Ins. Co., 631 F.3d 1153*,* 1060–61, 1166 (10th

recommendations or offer investment advice of any kind," which is at the heart of the IAA versus SEA fiduciary duty distinction.[62] Further, their agreement even repeats that the user should "not construe any" information provided by Scottrade (which is solely "educational" and "noncommercial") "as investment, financial, tax, legal, or other advice."[63] Finally for good measure, the Scottrade agreement (as typical for the industry) includes a separate "Disclaimers and Limitations of Liability" section, which states that the user *expressly* agrees that, among other things, "no advice or information, whether written or oral, whether obtained by you from Scottrade, from a Scottrade employee or agent or through or from the website, shall create any warranty not expressly stated in these terms and conditions."[64] These terms evidence a clear intent by brokerage firms to favor contractually agreed upon rights and obligations and to prevent any extension of a fiduciary or fiduciary-like duty of care to their online investing related activities.

Despite these straightforward terms which disclaim liability, accountholders have attempted to use the courts to extend a general fiduciary duty to brokerage firms, including their online platforms, but to no avail.[65] In *Williams v. Scottrade*, the court dismissed the Plaintiff's claims of breach of fiduciary duty for two reasons.[66] First, Scottrade's Brokerage Account Agreement with the Plaintiff made clear that Scottrade did not advise the Plaintiff or make decisions for them with respect to their investments.[67] Hence under the holding of *Leib v. Merrill Lynch* (as discussed above), the court found that

Cir. 2011) (holding that broker-dealers only fall under the fiduciary protections of the IAA under limited circumstances); Wiener v. Eaton Vance Distribs., Inc., No. 10-10515-DPW, 2011 WL 1233131, at *10. (D. Mass. Mar. 30, 2011); Edwards, *supra* note 2, at 114–15.

[62] *See generally* Laby, *supra* note 9, at 722, 726, 729–30; *Scottrade Website Terms and Conditions*, *supra* note 60.

[63] *Scottrade Website Terms and Conditions*, *supra* note 60.

[64] *Id.*

[65] *See* Williams v. Scottrade, Inc., No. 06-10677, 2006 WL 2077588, at *1, *5 (E.D. Mich. July 24, 2006).

[66] *Id.* at *4–5.

[67] *Id.* at *5.

there was no exercise of discretionary authority by the Broker over the Plaintiff's account.[68]

However, the court took a second step, concluding that "even if Scottrade owed Williams and its other customers a fiduciary duty, its duty could be modified by contract."[69] Based on the similarities between individual Brokers and their online platforms discussed in Part II of this Note, the court's second line of reasoning was essential. This Note argues that the duties traditionally applied to Brokers should be extended to their online platforms, which share many of the same functions, services, payment schemes, and relationships with clients. Since courts have extended the Suitability Rule, and in many cases even fiduciary obligations to Brokers,[70] one could reasonably conclude that these same, or some similar, standards should be extended to brokerage firms' online platforms. Thus, to prevent such an outcome, the court in *Williams v. Scottrade* conceded that even if brokerage firms generally, or their online platforms specifically, owe fiduciary obligations to their clients, these duties may be modified by a contract.[71] The result of cases such as *Scottrade* has been the industry-wide use of standard-form online brokerage agreements with strict terms that are governed under contract law during any legal challenge and substantially reduce liability for the brokerage firm.[72]

[68] *Id.*

[69] *Id.*

[70] Faber, Exchange Act Release No. 34-49216, 82 SEC Docket 453, 458 (Feb. 10, 2004). *See also* SEC v. Zandford, 535 U.S. 813, 822–23 (2002); United States v. Skelly, 442 F.3d 94, 98 (2d Cir. 2006); United States v. Szur, 289 F.3d 200, 211 (2d Cir. 2002); Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 953–54 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981); Epstein, Exchange Act Release No. 34-59328, 95 SEC Docket 285, 294, 300 (Jan. 30, 2009); Belden, Exchange Act Release No. 34-47859, 80 SEC Docket 563, 565 (May 14, 2003); Howard, Exchange Act Release No. 34-46269, 78 SEC Docket 338, 339 (July 26, 2002), *aff'd*, 77 Fed. Appx. 2 (1st Cir. 2003).

[71] *Williams*, 2006 WL 2077588, at *5.

[72] *See Brokerage Account Agreement*, OPTIONSXPRESS 1, 19–20, 38 (July 2016) https://onlineint.optionsxpress.com/static/pdf/brokerage_ac-

For online investors, a consumer protection system based in contract law may not be any worse than the mixed-bag fiduciary and semi-fiduciary systems that currently govern Brokers. Hence, the question becomes: what problems regarding investor protection, consumer confusion, and market efficiency does the current contract-based system create?

B. Problems Facing the Current Contract-Based Approaches

A problem common to most negotiation contexts is the imbalance of bargaining power and its impact on the parties' rights and obligations.[73] Unlike a blanket rule such as a 'best interests' standard, contract-based rights and obligations are bargained for.[74] However, in the context of a well-saturated market in which many investors are relatively powerless (i.e., comparatively lacking in financial and legal resources) against a few powerful suppliers of online brokerage services, the bargaining power is distributed heavily in favor of the brokerage firms. The result has been an effective 'take it or leave it' policy: virtually every brokerage firm provides potential accountholders with the same (or substantially similar) terms as those in the above Scottrade agreement, and customers are required to agree to these terms in order to use their services.[75] In theory, if the investor disagrees with the terms, they are free to go elsewhere. The problem is that these industry-wide standard liability disclaimers make it so there is not really anywhere else to go. Therefore, generally, the investors who exclusively utilize online trading platforms have the lowest level of legal protections compared to the higher fiduciary

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count_agreement.pdf [perma.cc/8ED8-KEVU]; *Brokerage Account Agreement*, *supra* note 46, at 2, 13; *Client Agreement*, TD AMERITRADE 1, 8 (2017) https://www.tdameritrade.com/retail-en_us/resources/pdf/AMTD182.pdf [perma.cc/WEC6-WT5S].

[73] Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 5 (2000).

[74] *Id.* at 32 (discussing the "bargain theory" of contracts).

[75] *See generally Brokerage Account Agreement*, *supra* note 72; *Brokerage Account Agreement*, *supra* note 46; *Client Agreement*, *supra* note 72.

and suitability protections afforded to clients of traditional Brokers and Advisers.

Effectively, for their online services, brokerage firms are able to use the unequal bargaining distribution to better shield themselves from liability related to information that they provide than they would be able to if the accountholder was working directly with one of their individual Brokers or Advisers. An example of this can be found in the TD Ameritrade client agreement. Under section 13 titled "Advice," TD Ameritrade informs prospective investors that, not only will it act as a broker-dealer not subject to the IAA, but also that "any research, analysis, news, or other information made available by [TD Ameritrade] does not constitute an individualized recommendation by [TD Ameritrade] to buy or sell a particular security."[76] As stated previously in this Note, courts have interpreted the IAA to potentially allow Broker liability for advice that was not "solely incidental" to the business of trade execution, which is broadly defined as "in connection with the sale of a product."[77] Wide-ranging research, analysis, news, and other information on various securities provided to investors by Brokers create the possibility of a judicial determination that such advice is beyond the scope of being solely incidental to trade execution. Yet by using their bargaining advantage to modify their duties to investors via contract, as allowed under *Scottrade*, TD Ameritrade has prevented any such judicial determination with respect to information provided on their online platforms by disclaiming such information as not constituting a recommendation or advice. Hence, TD Ameritrade has more effectively barred extensions of IAA duties to its online platform than it would likely be able to for its individual Brokers acting under similar circumstances.

However, in some ways this decreased brokerage liability for online platforms may be advantageous to accountholders. For example, decreased liability for brokerage firms may in-

[76] *See Client Agreement*, *supra* note 72, at 8.

[77] Thomas v. Metro. Life Ins. Co., 631 F.3d 1153, 1162 (10th Cir. 2011).

centivize them to decrease the costs of transaction commissions performed online. Decreased trade commissions may result in higher gains for online users and can open financial markets to a larger number of people. However, these potential gains are not without costs.

Increased incentives to trade are not inherently beneficial to the average investor. It can be reasonably assumed that the inherent risk of any given transaction does not change with the cost of its transaction commission. Additionally, for commission-based brokerage firms, revenues increase as the volume of trades increases. By shielding themselves from liability via contract, brokerage firms have made it lucrative to incentivize trading regardless of the possibility that this may expose their accountholders to increased risk. This is particularly problematic for new investors, who tend to have high risk factors due to their inexperience. And though many online and mobile trading platforms do offer strong educational tools, these materials are not mandatory prior to trading.[78] Therefore, the contractual liability shield for online trading is beneficial because it prevents unwarranted costs to brokerage firms that could result from litigation due to uninformed traders' own mistakes and actions in trading. However, this contradicts the heart of the court's reason for expanding fiduciary duties—namely, the creation of a relationship of trust between the client-trader and the Broker.[79]

Relationships of trust are established when a Broker exercises de facto control over a trader's account.[80] As described above, the *Leib v. Merrill Lynch* factors for de facto control include age, education, intelligence, and investment experience of the customer as well as the kind of contact and relationship between the Broker and customer, the frequency of

[78] *See Strategy Screener Guide*, *supra* note 49*; Educate*, OPTIONSXPRESS (Feb. 3, 2017, 3:25 PM), https://www.optionsxpress.com/MyAccount.aspx [perma.cc/9KLB-EAPQ].

[79] SEC v. Zandford, 535 U.S. 813, 822 (2002); United States v. Skelly, 442 F.3d 94, 98 (2d Cir. 2006); United States v. Szur, 289 F.3d 200, 211 (2d Cir. 2002); Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 954 (E.D. Mich. 1978) *aff'd*, 647 F.2d 165 (6th Cir. 1981).

[80] *See* Edwards, *supra* note 2, at 114.

communication between the customer and Broker regarding the account or specific transactions, and the number of transactions performed by the Broker without the customer's prior approval.[81] Age, education, and investment experience are typical, and often mandatory questions asked of potential accountholders during online platform registration. Although intelligence is not asked about directly, other questions such as education level and work experience can often provide some insight into an accountholder's financial intelligence. Additionally, many online platforms provide services that allow customers to communicate with Brokers about their accounts and specific transactions, but these often rely on the customer acting proactively as opposed to the Broker. However, brokerage firms often do actively send notifications and emails about the broader products, services, and trainings that they offer to their online accountholders, which could arguably be seen as engaging the customer on a more social and personal level.[82]

Brokerage firms may also be involved with their client's transactions exclusively through their online platforms. For example, trade tools such as "Idea Hub™" or "Position Analyzer" may not constitute "recommendations" or "advice" because of liability waivers, but are a form of contact with the accountholder at the very least.[83] The selection of "educational" and "informational" material and listed securities provided, as well as how this information is displayed, are choices that likely influence the trading decisions of many of their accountholders. These choices resemble the choices of individual Brokers in the information and recommendations that they provide to clients based on current and future market performance, as well as the age, education, intelligence, and financial experience of the customer. Hence, brokerage firms offer online services that in many ways resemble the substance and potential for de facto control that characterize Brokers. For

81 *Leib v. Merrill Lynch*, 461 F. Supp. at 954.

82 *Leib v. Merrill Lynch*, 461 F. Supp. at 954. *See also Strategy Screener Guide*, *supra* note 49; *Educate*, *supra* note 78 (including "Alert Manager," "Webinar," "Workshop," and "Live Help").

83 *See Toolbox*, OPTIONSXPRESS, (Feb. 3, 2017, 2:23 PM), https://www.optionsxpress.com/MyAccount.aspx [perma.cc/9KLB-EAPQ].

example, there is potential for an online platform to display fairly aggressive and risky securities and related information to uneducated and financially inexperienced customers because such securities offer higher commissions and fees. Courts might find that due to their customers' lack of financial acumen, the brokerage firm was in a position of de facto control over said customers' accounts and thus violated their duties to these customers by displaying securities ill-suited for them. Thus, in online platforms, this trust-based relationship exists where the brokerage firm knows the age, education, and experience of its users and through its contact and involvement with said users, these accountholders trust that the information supplied is accurate and at least reasonable.

However, this presents another serious problem for investor protection under the current contract-based system. If online brokerage platforms do exercise some de facto control over clients' accounts (i.e. if the information provided measurably impacts many users' decisions due to their trust in said information) where there is a liability waiver such as the Scottrade one above, then brokerage firms may have an incentive to provide information that is in the best interest of the brokerage firm rather than the investor. For example, brokerage firms may be encouraged to display highly volatile securities that require a greater frequency in attention and trading but that typically also involve an elevated degree of risk more prominently on their websites. In this way, brokerage firms could potentially increase trading, boosting their commission revenue without absorbing additional liability from the increased risk exposure to the investor.

Closely tied with the problems of investor protection that result from the current contract system for online platforms are problems related to consumer confusion. As discussed, the services provided by online platforms resemble those of Brokers in many ways and accordingly present the same potential issues of de facto control. Yet, under their investor agreements/liability waivers, they are not legal equivalents (i.e. online information is not considered advice or recommendations for the purposes of legal accountability). Further *Williams v. Scottrade* made it clear that investors are not afforded

the same legal rights, remedies, and protections under contract law as they are under the duty of care or fiduciary duty rules.[84] Although to someone experienced in reading consumer contracts the differences between Brokers and online platforms may be clear, to the uninitiated they are not. Moreover, many consumers do not even read standard-form electronic contracts[85] and even for those who do, the technical legal definitions of terms such as "fiduciary" and titles such as "broker-dealer" and "financial Adviser" under the IAA and SEA are hardly apparent to the average investor.[86] Investors already struggle to understand the differences in legal standard and primary services provided between the Investment Advisers and Brokers.[87] Adding a third level of legal protection for online trading only further increases consumer confusion as to the protections they are afforded, services they are provided, and which type of financial Adviser is best suited to their needs.

With elevated consumer confusion, the likelihood of investor harm will only increase. For example, an online investor who believes the information provided by their online trading platform is in their "best interest" or at least "suitable" and acts accordingly faces increased risk of abuse by the brokerage firm. This investor is also granted a lower level of protection than they would be under the fiduciary or suitability standard, and a lower level of protection than they expected. In many ways, the level of consumer confusion that impacts the amount of de facto control brokerage firms can potentially exercise. The more users that believe information from an online platform is "suitable" advice or advice in their "best interest,"

[84] Williams v. Scottrade, Inc., No. 06-10677, 2006 WL 2077588, at *4–5 (E.D. Mich. July 24, 2006).

[85] Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-From Contracts*, 43 J. LEGAL STUD. 1, 32 (2014) (finding that only one or two out of every 1000 retail software shoppers accessed the standard-form license agreement).

[86] *See* SEC Study, *supra* note 6, at 96.

[87] *See* Varnavides, *supra* note 6, at 215*; see also* SEC Study, *supra* note 6, at 94–101.

the more likely brokerage firms can use that information to their own advantage without facing increased liability due to their investor agreements' terms. Thus, the close relationship between consumer confusion and investor protection demonstrates that there is a risk of consumer harm as consumers attempt to discern between the distinct legal protections of the multiple similar services provided by Advisers, Brokers, and online platforms.

Related to the principles of consumer confusion and investor harm is market efficiency. Logically, as consumer confusion increases, resources are invested and allocated less efficiently.[88] For example, an investor who may be better suited for an Investment Adviser might instead select an online platform due to a lack of understanding of the differences between the two. These mistaken beliefs and subsequent improper choices may, for reasons previously discussed, result in harm to the investor that could otherwise be avoided. Moreover, the terms of online investor agreements are often such that an investor's mistaken beliefs about any services or information provided by the online platform are insufficient grounds for any claims or recovery against the brokerage firm. In contrast, the investor maintains some right to recovery under the fiduciary or suitability standards, regardless of the investor's beliefs, if the financial adviser's recommendation was not in the best interests of the investor or suitable for the investor. Effectively, consumer confusion increases the costs of information and trading, which in turn results in less informative prices (i.e. prices that differ from fundamental values).[89] When prices are less informative, markets allocate resources less efficiently.[90] Thus efficiency is critical to successful in-

[88] Hannah Brennan, *The Cost of Confusion: The Paradox of Trademarked Pharmaceuticals*, 19 MICH. TELECOMM. & TECH. L. REV. 1 (2015) (finding pharmaceutical trademarks create consumer confusion which diminishes market efficiency).

[89] LARRY HARRIS, TRADING & EXCHANGES: MARKET MICROSTRUCTURE FOR PRACTITIONERS 240 (2003).

[90] *Id.* at 206–07, 222–23

vesting, and inefficiencies in investment allocation are another major problem facing the current contract-based approach for online platforms.

The current contract-based approach, providing legal rights and obligations between investors and online investing platforms, presents three related, major problems. Namely, the current system decreases investor protection, increases consumer confusion, and decreases market efficiency. It can be said that brokerage firms have made substantial efforts to make clear the difference between online trading platforms, Brokers, and Advisers both in the terms of their investor agreements as well as in the tools and information they provide.[91] However, this does not mean the problems of consumer confusion and investor harm cannot still exist. Nor does it mean online platforms should inherently be subject to a lower level of judicial scrutiny simply because their investor agreements state they are not providing advice.[92] For example, despite the fact that the Suitability Rule never expressly states Brokers' advice must be in their clients' best interests,[93] courts have still consistently held that it must.[94]

However, there may be a difference between omitted terminology and expressly disclaimed terminology. The liability waivers in question explicitly state that the online platforms do not provide "advice" or "recommendations"[95] which is the essential similarity between Brokers and Advisers. Both Advisers and Brokers admittedly can provide investment advice, but on different terms. Brokers are shielded from liability for advice given to investors so long as they were not "specially compensated" for their advice and gave advice that was "solely

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[91] *See Brokerage Account Agreement*, *supra* note 46, at 2; *Scottrade Website Terms and Conditions*, *supra* note 60.

[92] *See Brokerage Account Agreement*, *supra* note 46, at 2.

[93] *See* Edwards, *supra* note 2, at 111.

[94] See *supra* note 28 and accompanying text.

[95] *See Brokerage Account Agreement*, *supra* note 46, at 2; *Scottrade Website Terms and Conditions*, *supra* note 60.

incidental" to a Broker's business of trade execution.[96] Yet despite the court's explicit disclaimer of Broker liability, unless there is a finding of special compensation or advice not solely incidental to trade execution, Brokers have been held liable for breaches of fiduciary and fiduciary-esque duties for the advice they have given under other certain circumstances.[97] Analogously, online investor agreements expressly disclaim liability for the information they provide since it is not advice.[98] Yet these agreements should not, on their own, bar the application of a higher standard of care nor waive liability for any potential advice or recommendations provided. What should determine the applicable judicial standard of review, is whether similar circumstances exist for online platforms that previously served as a judicial basis for expanding fiduciary duties to brokers, such as the potential for de facto control under the *Merrill Lynch* factors. Since, as discussed above, many of these key circumstances do exist for both online platforms and Brokers, courts should alleviate the problems posed by the current contract-based system by replacing it with a heightened standard of care (e.g., fiduciary or suitability).

C. Problems Facing a Suitability Rule for Online Platforms

As discussed, it is possible that courts could apply the Suitability Rule to online platforms as an issue of first impression in many districts. Applying a suitability rule to online platforms would alleviate some of the problems of the current contract system. Decreasing the levels of investor protection from three to two should decrease consumer confusion as to which level of protection they are receiving. In addition, ensuring that the securities recommended are suitable to the investor should also reduce the potential for harm to the investor.

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[96] Thomas v. Metro. Life Ins. Co., 631 F.3d 1153, 1164 (10th Cir. 2011). Wiener v. Eaton Vance Distribs., Inc., 2011 WL 1233131, at *2 (D. Mass. Mar. 30, 2011). *See also* Edwards, *supra* note 2, at 113.

[97] Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 953 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981).

[98] *See Brokerage Account Agreement*, *supra* note 46, at 2.

Moreover, suitability provides legal recourse (regardless of any mistaken beliefs) for the investor. Decreased confusion and harm, in turn, generally result in increased efficiency. However, many of the same problems will persist if a suitability rule is applied to online platforms.

Two levels of protection would remain, namely the fiduciary requirement of best interests of investors and the less stringent requirement of suitability to the investors' needs. Moreover, since the SEC has consistently held that suitability means in the clients' "best interests,"[99] confusion persists as to the differences, if any, that remain between the two standards. Scholars on this subject have made clear that investors struggle to understand the differences between Advisers and Brokers and the two standards applicable to each.[100] Hence, although eliminating the contract-based approach may reduce some consumer confusion, it is evident that much confusion will remain so long as two standards of review endure.

Investors will still face the potential for abuse under a suitability standard. Although requiring securities advice and recommendations to be suitable to the investor will set a higher bar, this alone will not automatically rid online platforms of the potential for investor harm. It is true that the SEC has consistently held the Suitability Rule to require that recommendations be in the investors' best interests.[101] However, since the language of the statute itself makes no such requirement,[102] such a standard may not consistently be applied. Online platforms, depending on the jurisdictions in which they are legally subject to suit, may be able to meet the requirements of suitability while still first satisfying their own interest. For example, two securities could be suitable for an investor but the online platform could place the one with a higher commission in a more visible or 'recommendation-like' area of the platform.

99 See *supra* note 28 and accompanying text.

100 *See* Varnavides, *supra* note 6, at 215; *see also* SEC STUDY, *supra* note 6, at 94.

101 See *supra* note 28 and accompanying text.

102 *See* Edwards, *supra* note 2, at 111.

As with the current contract-based system, there also remains the potential for de facto control under a suitability standard. This supports the application of a higher fiduciary standard. If many securities are suitable for an investor then, as evidenced in the example in the preceding paragraph, brokerage firms may organize their platforms to present most prominently the suitable securities that best advance their own financial gains rather than those of investors. Again, the choice in platform arrangement is similar to how Brokers select which securities to recommend. Further, online platforms store key information about the investor's education, age, and investment experience. The level of contact and involvement between the investor and the broker-dealer will depend on the set-up and interactivity of the online platform. Thus, depending on the case-by-case application of the *Leib v. Merrill Lynch* factors, a court could reasonably find instances of de facto control under a suitability standard. In the example provided in this section, de facto control is tied to potential investor abuse (i.e., unnecessarily paying higher commissions).

Finally, if confusion and potential investor harm still exist, resource allocation will not be at its most efficient. Thus, there remains a potential need for a unified fiduciary standard to resolve these remaining issues.

D. Problems Facing a Unified Fiduciary Standard

As discussed, Advisers are under a fiduciary obligation to serve the best interests of their client.[103] The law, in many instances, requires Brokers to recommend securities that are in their clients' best interests,[104] and in all others, for the recommendation to be suitable to their clients' needs.[105] Online platforms have thus far never been subject to either standard of care but, rather, the court in *Scottrade* held that a broker-dealer for a nondiscretionary online account has no fiduciary

[103] SEC STUDY, *supra* note 6, at 22; *see also* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194; Edwards, *supra* note 2, at 106.

[104] See *supra* note 28 and accompanying text.

[105] *See* Lazaro, *supra* note 17, at 382.

duty and that, even if fiduciary duties did exist in such context, they could be modified by contract (i.e., investor agreements).[106] Yet these varying outlets for investors often share similarities in the services that they provide and in their compensation structures.

To summarize the preceding discussion, Brokers and Advisers both provide advice and recommendations regarding securities. The main difference is, of course, that Brokers' advice is not subject to a fiduciary standard so long as it is solely incidental to a trade's execution and is not specially compensated for.[107] In fact, despite the disclaimers in online investor agreements stating that their online platforms do not provide advice,[108] the information they do provide is at the very least "in connection with the sale of a product," which mirrors the requirements for "solely incidental" advice.[109]

Moreover, the SEC adopted a rule in 2005 that addresses the application of the IAA. The rule includes a provision which provides that the exercise of investment discretion is not solely incidental advice under the IAA or the rule.[110] It can be argued that brokerage firms exercise such investment discretion when determining which information to display on their online platforms, particularly if the information displayed varies depending on the investor in question. It can also be argued that the platform itself, which represents the brokerage firm, is exercising investment discretion on behalf of the brokerage firm when it provides securities in response to investor inputs for any of its given analytical or idea generation tools.

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[106] Williams v. Scottrade, Inc., No. 06-10677, 2006 WL 2077588, at *4–5 (E.D. Mich. July 24, 2006).

[107] Thomas v. Metro. Life Ins. Co., 631 F.3d 1153, 1164 (10th Cir. 2011); Wiener v. Eaton Vance Distribs., Inc., No. 10-10515-DPW, 2011 WL 1233131, at *2 (D. Mass. Mar. 30, 2011); *see also* Edwards, *supra* note 2, at 113.

[108] *See Brokerage Account Agreement*, *supra* note 46, at 2; *Brokerage Account Agreement*, *supra* note 72, at 19–20; *Client Agreement*, *supra* note 72, at 8.

[109] Thomas v. Metro. Life Ins. Co., 631 F.3d 1153,1162 (10th Cir. 2011).

[110] Certain Broker-Dealers Deemed Not To Be Investment Advisers, 17 C.F.R. pt. 275 (2005).

As online platforms, like Brokers, often receive commission-based compensation, the investment recommendations received through the former will be tainted by the same problematic incentives that accompany recommendations made by Brokers.[111] Applying the *Leib v. Merrill Lynch* factors, Brokers, Advisers, and online platforms could all present the possibility for de facto or discretionary control over clients' accounts. With these key similarities, the differences between Advisers, Brokers, and online platforms become difficult for the average investor to discern.[112] It is no surprise that both the SEC and numerous scholars have pushed for a unified fiduciary standard.[113]

A unified standard would solve the problems related to consumer confusion that result from having three distinct, yet at times overlapping, investment service providers with substantially differing legal protections. As of 2010, 88% of Advisers were also registered with FINRA as Brokers, 18% of all brokerage firms were also registered as Advisers, and 37% of FINRA registered brokerage firms had an affiliated Adviser.[114] The unified fiduciary standard would include both duties of care and loyalty,[115] and, thus, the unified fiduciary standard would be clear that no matter which type of financial adviser is solicited (i.e., an Adviser, Broker, or online platform), the advice and information provided must be in the investors' best interests.

A unified fiduciary standard would also substantially reduce the potential for investor abuse. Advisers must consider the management fees and prices of securities when advising

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[111] *See* Edwards, *supra* note 2, at 106; *Client Agreement*, *supra* note 72, at 1.

[112] *See* Varnavides, *supra* note 6, at 215; *see also* SEC STUDY, *supra* note 6, at 9.

[113] *See* Edwards, *supra* note 2, at 118*; see also* SEC STUDY, *supra* note 6, at 101.

[114] SEC STUDY, *supra* note 6, at 12; *see also* Lazaro, *supra* note 17, at 401–02, 412.

[115] SEC STUDY, *supra* note 6, at 106–07, 110–11; *see also* Lazaro, *supra* note 17, at 409.

clients of appropriate investment opportunities.[116] Further, in order to fulfill the duty of loyalty, Advisers must also disclose or eliminate all material conflicts of interest.[117] Hence, if Brokers and online platforms were also under the same legal obligations, they would no longer be able to recommend securities that were equally suitable to others with lower total commissions.

So too would a unified standard resolve issues of applicability of de facto control. Instead of courts having to examine case-by-case for de facto control under the *Leib v. Merrill Lynch* factors, such control is allowed and anticipated under the fiduciary obligations set by IAA section 206(3) so long as certain requirements are met.[118] Further, should any financial adviser abuse the trust that the de facto control over the investor's account establishes, the investor is provided a guaranteed right of remedy (i.e., a breach of fiduciary duty).

However, a unified fiduciary standard ignores market realities.[119] Since "different clients have different needs and expectations,"[120] a one-size-fits-all regulatory approach could negatively impact market efficiency. For example, a unified fiduciary standard that requires ongoing monitoring of and advice for clients' accounts by all financial advisers could potentially result in a fairly uniform compensation structure that mirrors the current compensation structure of Advisers. However, investors who trade rarely or do so based on their own research would desire to make commission payments tied to each transaction rather than to an annual flat management fee or a percentage of assets managed, which would likely be unwarranted given the level of service being provided to them. It is likely that these investors would be willing to accept a lower standard of protection in return.

116 Edwards, *supra* note 2, at 106.

117 SEC STUDY, *supra* note 6, at 112–13; Lazaro *supra* note 17, at 409.

118 Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(3) (2012) (requiring Brokers to both disclose, in writing, the capacity in which they are acting and obtain consent from their client before they can enact any purchase or sale of securities involving their account).

119 Lazaro, *supra* note 17, at 384.

120 *Id.* at 384.

As a practical matter, it would be extremely costly, if not impossible, for online brokerage firms to ensure that all of the information provided on an online platform is in each individual client's best interests and that each online account is constantly monitored. This burden, if legally mandated through fiduciary obligations, could result in cost shifting to investors, which, as outlined in the preceding paragraph, would make trading inefficient for consumers and reduce potential margins for gain.

These efficiency and practical concerns have led some, including the SEC, to suggest what may be classified as a semi-unified standard.[121] Although the SEC has proposed a unified standard where all financial advisers, including Brokers, are subject to the fiduciary duties of care and loyalty,[122] it maintained several key distinctions in the rights of customers against Brokers and Advisers.[123] First, the SEC determined that commission-based compensation would not violate the fiduciary duty of loyalty in its proposed standard.[124] Second, the SEC's standard would not bind Brokers to the continuing duties of loyalty and care after providing investment advice.[125] This is a major departure from the case law, which holds that fiduciary obligations bind Advisers such that they must provide ongoing advisory and monitoring services.[126] In fact, the SEC effectively suggests that its unified standard would not require Brokers to provide ongoing advice because, unlike Advisers, Brokers would not have continuing duties of loyalty and care under the SEC's proposed unified fiduciary standard.[127]

The SEC's semi-unified standard is designed to better balance investors' practical needs and desires for access to low-

[121] *See id.* at 409–10.

[122] SEC STUDY, *supra* note 6, at 107, 110–11.

[123] *Id.* at 133. *See also* Lazaro, *supra* note 17, at 409–10.

[124] *See* SEC STUDY, *supra* note 6, at 113.

[125] *Id.*

[126] *See* Lazaro, *supra* note 17, at 382, 409.

[127] *See* SEC STUDY, *supra* note 6, at 113. *See also* Lazaro, *supra* note 17, at 409.

cost investment products and services with the goals of reducing consumer confusion and increasing investor protections and market efficiency. Without mandatory duties to continually monitor investors' accounts or provide advice, and with the allowance of commission-based compensation, the infrequent investor can efficiently trade a reduced level of protection for a lower cost service. Similarly, online platforms would not face such high monitoring costs, and, as a result, less cost-shifting to the investor would occur.

However, this semi-unified standard is clearly a trade-off. So long as the fiduciary duties and related obligations imposed on financial advisers differ as to Advisers, Brokers, and online platforms, there will be consumer confusion. Under the SEC's semi-unified standard, investors will still struggle to understand which financial advisers have ongoing duties to monitor and provide advice and their corresponding compensation structures. The SEC does not discuss how the absence of an ongoing duty to monitor and provide advice would impact investor confusion.[128]

Moreover, section 913(g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, a regulatory reform act aimed at better protecting retail consumers and investors, required the SEC to consider a fiduciary standard no less rigorous than IAA section 206(1) and (2), but omitted reference to section 206(3).[129] Section 206(3) largely relates to the fiduciary obligations of financial advisers in positions of de facto or discretionary control over their client accounts.[130] It requires these financial advisers to disclose, in writing, the capacity in which they are acting and to obtain client consent before they can enact any purchase or sale of securities under the client's account.[131] The SEC has recommended that Brokers disclose

[128] *See* Lazaro, *supra* note 17, at 409–10.

[129] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 913, 124 Stat. 1376, 1828–29 (2010); Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (2012). *See also* Lazaro, *supra* note 17, at 410; SEC Study, *supra* note 6, at 119.

[130] Investment Advisers Act of 1940, 15 U.S.C. § 80b–6(3) (2012).

[131] *Id.*

conflicts of interest, but has also stated that they are not necessarily subject to the same notice and consent requirements of section 206(3).[132] Hence, the SEC's semi-unified standard again leaves potential for consumer confusion in regards to the duties of their specific financial adviser.

Situations of de facto and discretionary control are precisely the positions of investor vulnerability that courts have used to expand fiduciary obligations in order to better protect investors.[133] Yet, by subjecting Brokers and online platforms to a less stringent requirement that does not include notice and consent to the client, there remains a higher chance of investor abuse and harm by Brokers and online platforms, despite fiduciary obligations, than by Advisers.

A unified fiduciary standard presents many advantages over the current regulatory system in investing; however, it also presents major drawbacks. In order to reduce consumer confusion and harm as much as possible, a fully unified fiduciary standard loses a great deal in terms of market efficiency. It substantially reduces the choices for investment services and compensation schemes faced by investors. Such a standard also presents serious, and likely impractical, costs to investment service providers, who could end up shifting costs to the investors themselves. In the alternative, a semi-unified standard better balances market efficiency by maintaining consumer choice in investment services and fees but perpetuates confusion and thereby potential for harm. These apparent trade-offs between market efficiency and consumer confusion and protection seem to make a "perfect" solution impossible. However, the trade-off does not rule out the possibility of a better solution than those presented thus far.

[132] SEC Study, *supra* note 6, at 120. *See also* Lazaro, *supra* note 17, at 410.

[133] *See* Edwards, *supra* note 2, at 114–15; Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 953–55 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981) (stating that brokers who handle discretionary accounts, as opposed to brokers who handle non-discretionary accounts, become fiduciaries "in a broad sense").

IV. RECOMMENDATION: A TWO-STEP SOLUTION

A. Unify Advisers, Brokers, and Online and Mobile Platforms Under Fiduciary Duty

Advisers and Brokers today are not the same as those of the 1920s and 1930s.[134] The distinct separation between the services, products, and compensation schemes they offer has been blurred by time and circumstance.[135] As a result, more and more investors do not know of or understand the difference between Advisers and Brokers, both in terms of the roles they serve and the differing regulations that govern them.[136] The same can be said of Brokers and online platforms, which, though they offer similar services, products, and compensation schemes, are not bound by the same fiduciary duties since online platforms have not been subject to fiduciary duties or the suitability standard of FINRA Rule 2111.[137] But "simply because the services offered by brokers now overlap with the role of investment advisers in some circumstances does not mean the Advisers Act should apply to brokers" and that the Advisers Act should apply to online brokerage platforms.[138] Rather, what is necessary is a new, single legislation governing Advisers, Brokers, and online platforms—namely, a Financial Adviser Reform Act ("FARA").

As with the SEC's recommendations, FARA would be uniform in its application of the fiduciary duties of loyalty and care across all financial advisers.[139] This uniformity would eliminate the "false distinction" between investment service

[134] Lazaro, *supra* note 17, at 411.

[135] *See generally* Laby, *supra* note 9, at 727–35.

[136] Lazaro, *supra* note 17, at 411. *See also* Varnavides, *supra* note 6, at 215–16; SEC STUDY, *supra* note 6, at 101.

[137] *See* Williams v. Scottrade, Inc., No. 06-10677, 2006 WL 2077588, at *5 (E.D. Mich. July 24, 2006).

[138] Lazaro, *supra* note 17, at 413.

[139] *See* SEC STUDY, *supra* note 6, at 107–10; Lazaro, *supra* note 17, at 413.

providers by recognizing the overlapping services they offer.[140] In order to achieve this, FARA would need to either explicitly state that it applies uniformly to Advisers, Brokers, and online platforms, or that it applies to Advisers and Brokers, with online platforms considered Brokers. This uniform fiduciary standard would ensure that financial advisers take into consideration the fees, price, and other relevant information, such as the volatility of securities, to ensure that those recommended are in the "best interests" of the investor.[141] As a result, the frequency and likelihood of investor harm would decrease as financial advisers no longer have the incentives, or the ability, to offer equally suitable but more costly securities. Consumer confusion would also dissipate, as a uniform fiduciary standard would signal to all investors that, no matter their financial adviser, the advice and recommendations they receive will be in their best interests.

As an additional measure, FARA would go one step further than the IAA and SEA by actually defining "investment advice and recommendations" as professional or formal opinion regarding the purchase, sale, or similarly related transaction of financial instruments and securities after taking into account the investor's specific circumstances.[142] Importantly, FARA would define a "professional or formal opinion" as advice given by an Adviser, Broker, or online platform in the normal course of serving their clients or the exercise of discretionary authority to make investment decisions on behalf of an investor's account.[143] FARA would both reduce consumer confusion as to what constitutes advice or recommendations and ensure that the uniform fiduciary duty is consistently applied in the investor's favor by taking a broad approach to what constitutes investment advice and recommendations.

Liability for information presented online could be a concern for many online platforms under the FARA uniform fiduciary standard. As discussed, ensuring that all information

[140] Lazaro, *supra* note 17, at 413.

[141] Edwards, *supra* note 2, at 106–07. *See also* Lazaro, *supra* note 17, at 413.

[142] *See* SEC STUDY, *supra* note 6, at 125–26.

[143] *Id.*

presented on an online platform is in the interest of every user is impractical, if not impossible to ensure that all information presented on an online platform is in the best interest of every user. Therefore, FARA would make clear that, for online platforms only, any information presented on the personal account web page of an investor, as well as any information presented as advice or recommendations, must be in the investor's best interest. Information presented generally will not be subject to the uniform fiduciary standard. However, research tools and functions would be construed as investment advice and recommendations under FARA when they respond to inputs supplied by the investor with suggestions for securities or other financial instruments. In effect, these tools provide a professional or formal opinion regarding a transaction of financial instruments after taking into account the investor's specific circumstances.

Based on the definitions provided in the preceding paragraphs, both Advisers and traditional Brokers under FARA provide investment advice and recommendations to their clients when they suggest investing in particular securities based on information about or provided by their clients. Hence, the uniform fiduciary standard applies and the securities must be in the investor's best interests. For the uniform fiduciary standard to truly be uniform, it must apply to similarly situated online platforms. Research tools, when responding to investor inputs with securities suggestions, provide advice and recommendations in the same manner as Advisers and Brokers. Applying the uniform fiduciary standard to research tools will ensure that, no matter the form of financial adviser used, investors always receive securities recommendations that are in their best interests. This standard best balances the practical needs of the online platform to provide general information and educational tools against the investors' concerns regarding the level of legal protection being afforded and quality of advice and services rendered.

Unlike the SEC's proposed unified standard, FARA would maintain the notice and consent requirements of IAA section 206(3) in addition to mandating the disclosure of any material

conflicts of interest, and apply them to all financial advisers.[144] The anti-fraud and negligence elements of IAA sections 206(1) and (2) would also remain.[145] The two elements of the fiduciary duties of loyalty and care should inherently bar financial advisers from taking advantage of their clients' accounts over which they exercise discretionary or de facto control. However, investors should be afforded the full panoply of protections in this area, including those under section 206(3), to avoid any possibility of investor harm, since circumstances of discretionary or de facto control create the trust-based relationship that has been at the heart of courts' reasoning for expanding fiduciary obligations to Brokers.[146]

Finally, the FARA uniform standard should expressly include an unwaivable private right of action in federal court for violations of its terms or fiduciary duties.[147] This right of action would guarantee that investors, and in particular online platform users, are given a right to recovery that cannot be waived by any investor agreement they might sign. It would make clear to parties the relevant governing law in all circumstances, which further reduces confusion and potential harm.

FARA substantially reduces both confusion and the risk of investor harm by ensuring that Advisers, Brokers, and online platforms are subject to a single fiduciary standard. However, practicality and market efficiency concerns require that investors retain their ability to choose how they interact with their financial advisers. Under FARA, the level of service selected by the investor would determine any additional rights and obligations of the parties, as well as the potential compensation schemes.

B. Separate by Service

The inefficiency of a single level of investment service would likely outweigh the corresponding reduction in con-

144 *Id.* at 120; Lazaro, *supra* note 17, at 410.

145 Investment Advisers Act of 1940, 15 U.S.C. § 80b–6(3) (2012).

146 *See* Edwards, *supra* note 2, at 115.

147 *See* Lazaro, *supra* note 17, at 413–14.

sumer confusion and harm. Thus, FARA must carefully balance these often-competing concerns. Past attempts to make minor distinctions in possible services and products offered by each type of financial adviser have failed and have ultimately increased confusion, harm, and inefficiency.[148] Thus, FARA would instead embrace a more practical solution, mandating a base uniform fiduciary standard and imposing additional obligations specific to the type of service selected by the investor, regardless of the type of financial adviser used.

Under FARA, the investor, as is typical today, could select their desired service, such as transaction execution, but would subsequently be presented with a disclosure listing any additional FARA mandated rights and obligations (i.e., in addition to the uniform fiduciary standard) as well as the relevant compensation schemes.[149] The levels of service would resemble those currently provided, such as continuous monitoring and advice, transaction related advice, and trade execution. For example, an investor who desires full-time monitoring and advice by their financial adviser would be able to choose that service, either at account creation or with notice to their financial adviser. Their financial adviser would then present them with a FARA mandated disclosure explaining that their additional legislative protections include a duty of their financial adviser to continually monitor their account. The compensation schemes available for this service would resemble those of the traditional Adviser, such as a flat annual management fee, in order to best align the interests of the investor and financial adviser and prevent harm, neglect, or inefficiency. Alternatively, the independent trader who only desires trade execution could select that service when needed, which would trigger a FARA disclosure indicating that no additional rights and obligations above those of the uniform fiduciary standard would apply.[150] Further, the compensation scheme for such service would be a transaction-based commission.

[148] *See* Varnavides, *supra* note 6, at 215. *See also* SEC STUDY, supra note 6, at 94–95.

[149] Lazaro, *supra* note 17, at 413.

[150] It is important to note that under the FARA, pure trade execution at the request of the investor—i.e., without any advice or other services by

It is more difficult for an investor faced with three types of financial advisers to choose from that provide many overlapping services to discern the legal rights and protections specific to each type than for that same investor to understand that the protections are uniform across all financial advisers but vary to some extent with the service rendered. Further, investors' expectations regarding the relevant level of legal protection may vary with the levels of service rendered, and accordingly the FARA disclosures would conform with such expectations. Clearly tying additional rights and obligations to the differing services via disclosure forms would improve investor understanding of the system. In this way, the fundamental aspects of the investment service industry would remain unchanged (e.g., the types of services and providers) despite structural reform.

A unified standard across financial advisers that varies given the level of service provided balances the need to reduce consumer confusion and potential for investor harm with the realities of the market. These goals are often competing and thus involve trade-offs, making a truly uniform fiduciary standard impractical. The gains that a single standard would make in reduced confusion and harm would be lost if investors are no longer able to choose the level of service they desire. A unified standard that garners additional rights and obligations depending on the service selected would ensure that investors maintain their right to choose how to interact with their financial adviser while also providing investors clarification regarding the structure and legal protections applicable.

C. Likelihood of Enactment

Meaningful change in any industry is hard to accomplish, and that will be no less the case for FARA. In an industry where the two main governing statutes are from 1934 and

the financial Adviser—will always be presumed to be in the client's best interest. It would be too costly and impractical to require financial advisers to assess whether every requested transaction by an investor was in his or her best interest. Further, it would, in essence, grant the financial adviser discretionary control over their clients' accounts if they were effectively required to approve each transaction.

1940,[151] FARA will surely face criticism from those accustomed to the current regulatory system as well as those with competing reform proposals. Criticisms of FARA will most likely focus on the continuation of current compensation schemes and the additional cost and burden to financial advisers of a unified fiduciary standard.

To the first point, other reform oriented scholars have argued that a "proposed uniform standard is unlikely to make any material difference so long as the current commission structure remains in place."[152] Specifically, they argue that because Broker commissions are tied to the financial product rather than the amount of the transaction, their incentives are distorted in favor of recommending securities that maximize their commissions rather than their clients' return on investment.[153] These scholars argue that a uniform fiduciary standard would not eliminate these undesirable incentives on its own and that a flattened commission across all products is necessary.[154] In fact, these scholars might argue that under FARA, the misalignment of interests between the client and financial adviser would only increase since any financial adviser can accept commissions depending on the service provided.

However, these same scholars acknowledge that a uniform fiduciary standard would require Brokers to give advice without regard to their own compensation.[155] Further, the SEC has established that Advisers' fiduciary duties include a duty of loyalty that "requires an adviser to serve the best interests of his clients."[156] Serving their clients' best interests requires selecting suitable securities for the clients' accounts with due consideration given to the price and management fees of those

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151 Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2012); Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-5–80b-21 (2012).

152 *See* Edwards, *supra* note 2, at 121.

153 *Id.*

154 *Id.*

155 *Id.*

156 SEC STUDY, *supra* note 6, at 22.

securities.[157] The commission of a given security must be factored into its price or at the very least into the "fee" associated with it. Therefore, despite critics' claims, a uniform fiduciary standard would effectively eliminate any distorted incentives due to varying product commissions because financial advisers must account for commission when making recommendations that are in their clients' best interests. Moreover, since FARA has a uniform fiduciary standard across financial advisers, the commissions themselves would likely flatten even without such a provision within its terms. If every financial adviser is required to consider the commission of a security when determining whether to recommend it, those of equal suitability with higher commissions would be recommended less because they are costlier. With decreased demand comes decreased price, and the decreased price would likely be in the form of a lower commission since it was the factor arbitrarily making the product more expensive.

Despite the reasonable criticism of varied commissions by many scholars, the additional costs in terms of time, money, and political capital otherwise required to include a flattened commission clause within the FARA are unnecessary. FARA's uniform fiduciary standard across all financial advisers alone would be sufficient to eliminate the current misalignment of interests between investors and financial advisers and should even lead to naturally flattened commissions.

The second major criticism is that a uniform fiduciary standard would unreasonably burden financial advisers and that such costs would be passed on to consumers. This argument will be a prominent one made by industry players, including brokerage firms and financial advisers, accustomed to the status quo. Such industry players will argue that, historically, the varying level of protections that accompanied the different financial advisers allowed them to differentiate in price among varying levels of service. A unified fiduciary standard, on the other hand, would raise the costs of providing any "discount" services and these costs would be passed on to the investors. Thus, investors could lose more in payments to

[157] *See* Edwards, *supra* note 2, at 106.

their financial adviser than they would gain in reduced confusion and harm. However, this argument fails for two reasons.

First, the fiduciary obligations currently differ between financial advisers—*not* the level of service provided.[158] Under FARA, investors would retain the ability to select the level of service they desire, and different compensation schemes would be available based on that selection. Therefore, financial advisers and their firms would be free to effectively price differentiate between levels of service. For example, they could choose to offer lower cost commission-based compensation for transaction execution and higher cost percentage-of-assets-managed-based fees for long-term account management. FARA maintains the financial adviser's ability to offer "discount" services while also reducing consumer confusion and harm.

Second, a unified fiduciary standard does not require substantially different or additional analysis for financial advisers. Brokers currently under the Suitability Rule are already required to provide suitable securities to their clients. The main difference under a fiduciary standard is that Brokers could no longer recommend equally suitable securities with higher commissions since they must factor in the price and fees. Although this could reduce Broker revenues, it would not increase their costs because the analysis required is virtually identical. As for online platforms, their research tools function in largely the same manner as Brokers. Therefore, after the initial fixed cost of modifying the search engine's algorithms so that their results factor in the price and fees of securities, the effect of FARA should be minimal.

Online platforms may additionally argue that the unified standard under FARA would increase their litigation costs, and that these costs would in turn be passed on to investors. While it is true the current contract-based system for online

[158] *See generally* SEC STUDY, supra note 6, at 22; SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963); Lazaro, *supra* note 17, at 132; FINRA Manual Rule 2111, *supra* note 24 (prescribing and defining the customer-specific suitability obligation); Williams v. Scottrade, Inc., No. 06-10677, 2006 WL 2077588, at *4–5 (E.D. Mich. July 24, 2006).

platforms provides a strong shield from litigation and liability,[159] this does not inherently mean that those costs would increase under a unified fiduciary standard. In fact, despite the judicial trend of expanding fiduciary obligations to Brokers, the percentage of new federal case filings arising from the retail trade sector has stayed roughly constant since 2010.[160] This is strong evidence that, even if a unified fiduciary duty were extended to online platforms, there would be no significant increase in instances of new litigation. Hence, a unified fiduciary standard should not increase costs to either financial advisers or investors as a result of rising litigation.

Despite reasonable criticisms of a unified fiduciary standard, this standard still possesses the greatest potential for effective and efficient reform in retail trading. Specifically, FARA represents a balanced approach to industry reform that would benefit investors by virtue of reduced consumer confusion and potential for investor harm while maintaining investor choice and market efficiency with minimal impact on costs. Although passing any legislation is no sure thing, retail trading reform is needed and has been necessary for years.[161] In light of the foregoing criticisms and benefits of FARA, it would seem natural that some of its key features, such as a uniform fiduciary duty, should be implemented in the coming years; however, given the current political climate focused largely on deregulation, it is unlikely that any of its features will be enacted prior to a change of administration. Therefore, FARA reforms remain a near-future promise to investors.

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[159] *Williams*, 2006 WL 2077588, at *4–5.

[160] Monica Loseman, *2016 Mid-Year Securities Litigation Update*, HARV. L. SCH. F. CORP GOVERNANCE & FIN. REG. (July 30, 2016), https://corpgov.law.harvard.edu/2016/07/30/2016-mid-year-securities-litigation-update/ [perma.cc/5X7R-XPA7].

[161] *See generally* Edwards, *supra* note 2; Laby, *supra* note 9; Varnavides, *supra* note 6; Lazaro, *supra* note 17.

V. CONCLUSION

This Note argues that new legislation is required in order to create a uniform fiduciary standard applicable to Investment Advisers, Brokers, and online platforms. The clear direction of the case law has been to extend fiduciary duties to Brokers who now offer many of the same services and occupy positions of trust that, historically, have been within the realm of Investment Advisers. Online platforms are a form of discount broker and, thus, share many of these same attributes. Yet, three different legal standards currently exist, which have led to widespread consumer confusion regarding what services are provided by, and what legal protections are applicable to, a financial adviser, thus making it difficult for consumers to determine which financial adviser is best-suited for their needs. The fact that the regulation of financial advisers implicates competing concerns that require making tradeoffs does not mean that the law governing financial advisers should remain in its current 1930s and 1940s form. After examining the current system and several proposed solutions, this Note concludes that a unified fiduciary standard across all financial advisers, with varying additional rights depending on the service selected by the investor, provides the optimal balance between protecting consumers—namely, reducing consumer confusion and potential consumer harm—and the concerns of investors to efficiently be able to select their desired form of investment services without increasing costs to either financial Advisers or investors.