Letter to the Editor, *Financial Planning*

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Ann Marsh's June 12 article *SEC 'guts' RIA industry with a footnote, degrading fiduciary duty* reflects a misunderstanding about recent SEC rulemaking and regrettably may exacerbate investors' confusion about where to go and whom to trust for advice. The article states that "[p]reviously, advisors [sic] had to seek to avoid conflicts of interest *and* make a full disclosure of all material conflicts of interest. The SEC changed the 'and' to an 'or'" and, because of this, the article suggests, "RIAs are not fiduciaries anymore." We strongly disagree.

Investment advisers are fiduciaries by virtue of their special relationship of trust and confidence with their clients. That has not been – and cannot be – altered. The SEC's interpretation reaffirms that, as fiduciaries, investment advisers continue to have an affirmative duty of care, loyalty, and the utmost good faith to act in the best interests of their clients at all times.

The SEC language in question states that an adviser "must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested." It also states, however: "We believe that while full and fair disclosure of all material facts relating to the advisory relationship or of conflicts of interest and a client's informed consent prevent the presence of those material facts or conflicts themselves from violating the adviser's fiduciary duty, *such disclosure and consent do not themselves satisfy the adviser's duty to act in the client's best interest*." (emphasis added)

Full and fair disclosure of conflicts – and indeed *all* material facts relating to the advisory relationship – is a necessary condition for satisfying the fiduciary duty, but it is not now, nor has it ever been, a sufficient one. Advisers still have an overarching duty to act in their clients' best interest. To do so, they must mitigate or manage their conflicts so those conflicts do not compromise their advice.

Notably, the interpretation does not withdraw the instruction to an adviser's Form ADV disclosure document, which states that, "[a]s a fiduciary, you also must seek to avoid conflicts of interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship." Indeed, the interpretation reads this instruction as consistent with its statement that advisers "must

eliminate or at least expose" conflicts, noting that the leading cases emphasize that "the adviser, as a fiduciary, should seek to avoid conflicts, but at a minimum must make full and fair disclosure of the conflict."

The SEC's interpretation reaffirms that an adviser "must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client." Investment advisers will continue to conduct themselves consistent with the fiduciary values and principles they adhere to today. And they will continue to put their clients' interests first.

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