

The Goldman Charges and the Fiduciary Standard  
April 21, 2010 Conference Call Discussion  
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Today, we are just five days since the SEC's charges have been brought. We only have, on the record, the SEC complaint, Goldman's initial public response, Goldman's prior testimony regarding its business practices, and news reports of pieces Goldman's September written responses to the SEC's notice. Still some observations can be made.

**Goldman is clear: no fiduciary duty.** Goldman's position on these charges is consistent with Goldman CEO, Lloyd Blankfein's, testimony in January before the Financial Crisis Inquiry Commission when he explained its firm's role as a market maker. Here he said, clearly, "We are not a fiduciary." And then stressed Goldman must "fully disclose what an instrument is and be honest in our dealings, but we are not managing somebody else's money."

**Retail vs Institutional clients.** While Goldman did not deal with retail clients in this transaction, the principles – caveat emptor versus fiduciary advisor – and practices – full and effective disclosures versus non disclosure – apply similarly for either retail or institutional clients.

**What is the suitability or fair dealing standard?** At the heart of this case is the question, "what is permitted conduct under the suitability standard or fair dealing standard?" The SEC, in its complaint, expresses one view, that Goldman's conduct is not permitted; Goldman, in its replies thus far, expresses another view, its conduct, based on the facts, is fully and completely within the boundaries permitted in law.

Here we have a part of a picture of what Goldman explicitly believes is the suitability standard. And this raises the question as to what it may mean when it says, as it does often, "Our clients interests always come first."

The punditry, the collected wisdom of experts who have opined on the matter, while expressing divergent views as to relevance and merits of the case, seem to agree on one important point. It is that a clear SEC win will be very difficult, that more likely we will see a draw, or a Goldman win. If this analysis proves correct, and the SEC does not win a clear victory, we will then have, in this scenario, an unvarnished picture of some of the principles and practices that would appear to be affirmed as meeting the requirements of the suitability standard.

**The Fiduciary Distinction.** This case draws attention to what "suitability" actually means, at the very least, in the view of Goldman. In so doing, the distinctions between the two standards are at center stage. The wide gap and opposing roles of a broker who is generally permitted in law to further his own and his firm's interests at the expense of customers, versus a fiduciary who is required in law to put his client's best interests first, are clear. This fiduciary distinction is at its core, why the fiduciary standard is important and why Members of the Senate should take note.