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Simply the Best (Interest) — SEC Proposes New Broker-Dealer Standard and Additional Related Guidance

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Spurred on at least in part by the Department of Labor's efforts that led to the now-defunct amended fiduciary rule (DOL Rule), the Securities and Exchange Commission has proceeded to move forward in crafting a series of proposals focused on the ''best interest'' of certain customers of brokers and advisers who turn to these securities professionals' recommendations or investment advice as well as the provision of basic information to retail clients and customers of advisers and broker-dealers about the nature of the services provided thereby. These proposals (SEC Proposals) were ultimately released for comment on April 18, 2018.

A prior Bloomberg Tax article[1] chronicled and discussed the demise of the DOL Rule under the Employee Retirement Income Security Act of 1974 at the hands of the U.S. Court of Appeals for the Fifth Circuit.[2]

BACKGROUND

The SEC Proposals are generally intended to improve the retail investor experience and to provide greater clarity regarding such investors' relationships with broker-dealers and investment advisers. The proposed rules and interpretations seek, in the SEC's view, to: (1) create a principles-based standard of conduct for broker-dealers providing recommendations to retail customers and require broker-dealers to act in the best interest of these customers; (2) ''clarify and reaffirm'' investment advisers' fiduciary obligations to their clients under the Investment Advisers Act of 1940 (Advisers Act); and (3) create additional disclosure obligations for broker-dealers and investment advisers that are intended to help retail investors better understand the scope and material facts surrounding their relationships with investment professionals. The SEC also requested comment on the advisability of implementing certain additional compliance obligations for investment advisers, some of which would be similar to requirements that currently apply to broker-dealers, as well as labeling requirements to address what the SEC describes as investor confusion about the capacity in which their financial professionals are acting.

PROPOSED REGULATION BEST INTEREST

Proposed Regulation Best Interest, which would be codified as Rule 15l-1 under the Securities Exchange Act of 1934 (Exchange Act), would build upon certain existing obligations of broker-dealers, and would incorporate some concepts from the now-defunct DOL Rule, to create an express standard of conduct requiring a broker-dealer ''to act in the best interest of the retail customer at the time the recommendation is

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[1] Andrew L. Oringer, *The Once and Former Amended Fiduciary Rule — Finally (Almost?) Dead Yet*, 46 Comp. Plan. J. 99 (June 1, 2018); *see also* Oringer, *The amazing vanishing DOL fiduciary rule?*, Crain's InvestmentNews (Nov. 21, 2016); Oringer and Zuber, *Done, Done, On To The Next One*, Law360 (June 15, 2018).

[2] *Chamber of Commerce v. DOL*, 885 F.3d 360 (5th Cir. 2018).

ISSN 0747-8607

made without placing the financial or other interest of the broker, dealer, or a natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.''[3] A broker-dealer would meet this standard of conduct by fulfilling its ''Care Obligation,'' ''Disclosure Obligation,'' and ''Conflict of Interest Obligations.'' The SEC's stated purpose is the importance of ''clear, understandable and consistent standards'' for recommendations regarding securities transactions or investment strategies involving securities by broker-dealers that are more closely aligned with the standards for other advice relationships. Rather than adopt a uniform standard of conduct for broker-dealers and investment advisers, the SEC has published for comment Proposed Regulation Best Interest, which the SEC views as ''tailored to the unique structure and characteristics of the broker-dealer relationship with retail customers and existing regulatory obligations (applicable to broker-dealers), while taking into consideration and drawing on (to the extent appropriate) the principles of the obligations that apply to investment advice in other contexts.''[4]

Broker-dealers are currently subject to a duty of fair dealing, which includes suitability obligations, under the federal securities laws and the rules of the Financial Industry Regulatory Authority, Inc. (FINRA). Under FINRA Rule 2111, a broker-dealer and its associated persons are required to 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 [firm] or associated person to ascertain the customer's Investment Profile.''[5] Additionally, FINRA Rule 2111 sets forth a broker-dealer's three main suitability obligations: (1) reasonable basis (also known as ''general suitability''); (2) customer-specific; and (3) quantitative suitability. However, the FINRA suitability obligations do not explicitly require that a broker-dealer's recommendation be in the best interest of its customer.[6] Furthermore, the customer-specific suitability obligation does not apply to customers, including natural persons, who have at least $50 million in total assets.[7]

In proposing a best interest obligation for broker-dealers, the SEC stated that Proposed Regulation Best Interest ''would address certain conflicted recommendations and set a clear minimum standard for broker-dealer conduct'' to enhance protections afforded to retail investors while ''generally preserving (to the extent possible) the range of choice and access — both in terms of services and products — that is available to brokerage customers today.''[8] Proposed Regulation Best Interest is the culmination of a number of regulatory initiatives over the past several years that have sought to evaluate and address the standards of conduct applicable to investment advice provided by broker-dealers and investments advisers, including a 2011 study mandated by §913 (the ''Section 913 Study'') of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[9] In the Section 913 Study, the SEC staff recommended that the SEC engage in rulemaking to adopt and implement a uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to retail customers. While ''[m]ost commenters on the Section 913 Study expressed support for a uniform fiduciary standard of conduct requiring firms to 'act in the best interest' of the investor,'' the SEC noted that there was no consensus on the parameters of such a standard.[10] Subsequently, in November 2013, the SEC's Investment Advisory Committee recommended, among other matters, that the SEC adopt a uniform fiduciary standard for broker-dealers and investment advisers.[11]

Application of Regulation Best Interest

Generally, Proposed Regulation Best Interest would apply to all securities recommendations made by broker-dealers, or their associated persons, to retail customers, at or before the time of the recommendation with no ongoing obligation for the broker-dealer

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[3] *Regulation Best Interest*, SEC Release No. 34-83062 (Apr. 18, 2018) (the ''Regulation Best Interest Proposing Release'').

[4] *Id.*

[5] A customer's Investment Profile would generally include the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, and risk tolerance.

[6] As noted by the SEC in the Regulation Best Interest Proposing Release, ''FINRA and a number of cases have interpreted FINRA's suitability rule as requiring a broker-dealer to make recommendations that are 'consistent with his customers' best interests'' or are not ''clearly contrary to the best interest of the customer[.]'' In this regard, *see, e.g.,* FINRA Regulatory Notice 12-25, Additional Guidance on FINRA's New Suitability Rule (May 2012).

[7] FINRA Rule 2111.

[8] Regulation Best Interest Proposing Release.

[9] *Staff of the U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011).

[10] Regulation Best Interest Proposing Release.

[11] *See* Recommendation of the Investor Advisory Committee, Broker-Dealer Fiduciary Duty (Nov. 2013).

ISSN 0747-8607

unless agreed to by contract.[12] Specifically, subject to express exclusions for certain activities, Proposed Regulation Best Interest would require a ''broker, dealer, or a natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer . . . [to] act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.''[13] Proposed Regulation Best Interest would deem this obligation to be satisfied if specified obligations relating to disclosure, care and conflicts of interest, described below, are fulfilled.

Definitions

The SEC proposes to define ''retail customer'' broadly to include any ''person, or the legal representative of such person, who . . . receives a recommendation [regarding] a securities transaction or investment strategy involving securities from a [broker-dealer or its covered associated persons], and uses the recommendation primarily for personal, family, or household purposes.''[14] Notably, while the retail customer definition excludes recommendations related to business or commercial purposes, it does not contain any exclusions based on a customer's net worth, investment experience, or sophistication. Furthermore, Regulation Best Interest would not define the term ''recommendation'' as a general matter, as the SEC noted that this term ''is not susceptible to a bright line definition.''[15] Rather, the SEC stated that a recommendation should continue to be interpreted in accordance with existing regulatory provisions and guidance, including the Exchange Act and FINRA rules.[16]

The Three Elements of the Best Interest Obligation

As noted above, a broker-dealer would discharge its duty to its retail customer under Proposed Regulation Best Interest if it complies with three obligations:

- the Disclosure Obligation;
- the Care Obligation; and
- the Conflicts of Interest Obligations.

The Disclosure Obligation is intended to help better inform retail customers of certain key aspects of the broker-dealer/customer relationship by requiring written disclosure to the retail customer of ''material facts relating to the scope and terms of the relationship . . . and all material conflicts of interest associated with the recommendation'' at or prior to the time the broker-dealer or its associated persons make a recommendation to a retail customer. According to the SEC, the Disclosure Obligation would build on, and complement, the information contained in proposed Form CRS (discussed below), by requiring broker-dealers to provide more comprehensive information relevant to a particular recommendation to retail customers. The Disclosure Obligation would also require that a broker-dealer, prior to or at the time of such recommendation, disclose all material conflicts of interest associated with the recommendation, including any financial incentives. Other than the general requirement that a broker-dealer would have to disclose material conflicts prior to, or at the time of, the recommendation, the SEC views Proposed Regulation Best Interest as providing flexibility for a broker-dealer to determine the most appropriate way to sat-

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[12] The best interest obligation would apply to ''natural persons who are associated persons of a broker-dealer,'' but would not include associated persons whose functions are solely clerical or ministerial. This limited scope of covered associated persons therefore would address concerns that the prescriptive obligations under Proposed Regulation Best Interest could extend to parent companies or affiliates of a broker-dealer. Regulation Best Interest Proposing Release.

[13] Regulation Best Interest Proposing Release.

[14] *Id.*

[15] *Id.*

[16] According to current FINRA guidance, the facts and circumstances of a particular communication drive whether a broker-dealer has made a recommendation to a customer; these facts and circumstances include the communication's content, context, and manner of presentation, as well as the extent to which a communication about a security or a strategy involving securities is tailored to a specific customer or group of customers. *See* FINRA Regulatory Notice 11-02 (Jan. 2011). In other words, the question is whether a communication is a ''call to action'' or an instruction to refrain from taking action. *See* NASD Notice to Members 01-23 (Apr. 2001). A ''recommendation'' would not include any communication that provides general investor education (such as discussions of asset allocation strategies) or limited investment analysis tools (such as retirement savings calculators). The SEC also stated that it would reconsider the scope of the brokers' exclusion from the definition of ''investment adviser'' under the Advisers Act in connection with the provision of investment advice that is ''solely incidental'' to the broker-dealer's business, as this exclusion applies to discretionary authority of broker-dealers over client accounts. (Section 202(a)(11)(C) of the Advisers Act excludes from the definition of investment adviser ''any broker or dealer whose performance of such services [(like rendering advice)] is **solely incidental** to the conduct of his business as a broker dealer and who receives no **special compensation** therefor.'' (emphasis added))

ISSN 0747-8607

isfy the Disclosure Obligation based on the broker-dealer's business practices.[17]

The Care Obligation would require broker-dealers to exercise reasonable diligence, care, skill, and prudence when making recommendations to a retail customer. The SEC stated that the Care Obligation is intended to incorporate and enhance existing suitability requirements applicable to broker-dealers under the federal securities laws. To satisfy the Care Obligation, a broker-dealer must have a reasonable basis to believe that the recommendation (1) could be in the best interest of ''at least some retail customers,'' (2) is in the best interest of the specific customer to whom the broker-dealer is making the recommendation, and (3) is not excessive if made as part of a series of recommendations, ''even if [the particular recommendation is] in the retail customer's best interest when viewed in isolation.''

The Care Obligation, which largely tracks and builds on broker-dealers' existing suitability obligations under FINRA Rule 2111, would require a broker-dealer to consider ''reasonable alternatives, if any, offered by the broker-dealer in determining whether it has a reasonable basis for making the recommendation,'' without requiring the broker-dealer to consider all possible securities or investment alternatives to recommend the single ''best'' option.[18] Certain elements of the Care Obligation echo the language of ERISA's general prudence and other fiduciary rules, which are commonly viewed as resulting in a focus on a prudent process, rather than mandating a retrospective review of the substantive decisions that are made. There is a potentially relevant difference between ERISA and the securities laws, however, in that ERISA tends to operate inflexibly in an aspirationally unconflicted world of prudence and prohibited transactions, while the securities laws operate in a world oriented toward disclosure, policies and procedures, and mitigation.

The Conflict of Interest Obligations would require broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to: (1) identify and disclose or eliminate, all material conflicts of interest that are associated with recommendations; and (2) identify, and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with such recommendations.[19] The SEC stated that the Conflict of Interest Obligations are not intended to preclude specific activities or services, but rather to eliminate certain incentives that could motivate a broker-dealer to make certain recommendations that might not be in the customer's best interest. The Conflict of Interest Obligations would provide that merely disclosing a conflict would not always be sufficient.

Under the Conflict of Interest Obligations, a conflict of interest would be material if ''a reasonable person would expect [that the conflict] might incline a broker-dealer — consciously or unconsciously — to make a recommendation that is not disinterested.'' The SEC indicated that material conflicts of interest arising from financial incentives would include, among others: certain services fees and charges; employee compensation or incentive plans (e.g., quotas, sales contests, or differential or variable compensation); receipt of commissions or sales charges; compensation to encourage the sale of proprietary products; and, compensation that does not result from sales activity, such as compensation for services provided to third parties (e.g., sub-accounting or administrative services provided to a mutual fund). Although the SEC has proposed two categories of conflicts of interest, it is likely that the majority of material conflicts of interest derive from financial incentives. Industry commentary on the SEC Proposal may well focus on such matters as the extent to which material conflicts rise to the level of requiring elimination or mitigation as opposed to disclosure alone, types of products with inherent material conflicts, and the lack of an express definition of ''best interest.''

INTERPRETIVE GUIDANCE REGARDING STANDARD OF CONDUCT FOR INVESTMENT ADVISERS

The SEC Proposals also include a proposed interpretation of the standard of conduct for investment advisers (the ''Proposed IA Interpretation'') under the Advisers Act.[20] The SEC indicated that the Proposed IA Interpretation is intended to ''reaffirm'' and

[17] The Proposal provides examples of flexible approaches in certain limited circumstances, such as recommendations made by telephone, but the SEC did not address a number of practical situations that can arise, particularly in the context of new customers, and did not specify the form or manner of disclosure, beyond indicating that all disclosure should be concise, clear and understandable.

[18] The SEC did, however, clarify in the Regulation Best Interest Proposing Release that ''[o]ne key difference between the Care Obligation imposed by Proposed Regulation Best Interest and the suitability obligation derived from the antifraud provisions of the federal securities laws is that the antifraud provisions require an element of fraud or deceit'' whereas scienter would not be required to establish a violation of Proposed Regulation Best Interest. Thus, compliance would essentially be measured against a negligence standard and not a strict-liability standard.

[19] This additional requirement to mitigate or eliminate conflicts of interest represents a departure from what has previously been required of broker-dealers under the federal securities laws.

[20] *Proposed Commission Interpretation Regarding Standard of*

ISSN 0747-8607

''clarify'' certain aspects of the fiduciary duty that the SEC believes apply to investment advisers (whether or not SEC-registered). In the SEC's view, the Advisers Act imposes a fiduciary duty on investment advisers, although such duty is not explicitly defined in that statute. Instead, the SEC notes that this duty is based on equitable common law principles. The Proposed IA Interpretation indicates that the fiduciary duty is enforceable through the anti-fraud provisions of the Advisers Act, and consists of a duty of care and a duty of loyalty.[21] The Proposed IA Interpretation describes what the SEC believes are certain elements of each of these duties.

Under the Proposed IA Interpretation, the duty of care requires an investment adviser to (1) provide advice that is in the client's best interest, (2) seek best execution for client securities transactions when the adviser has the responsibility to select broker-dealers, and (3) act and provide advice and ongoing monitoring over the course of the relationship. The Proposed IA Interpretation departs in several ways from commonly accepted interpretations of the Advisers Act. For example, the Proposed IA Interpretation suggests that, in certain circumstances, advisers may need to eliminate and mitigate conflicts (as opposed to disclosing them fully and fairly to clients) — a departure from the prior understanding of the investment management bar and industry as to how advisers comply with the Advisers Act's anti-fraud provisions. Another potentially novel assertion in the Proposed IA Interpretation is the view that the Act ''**establishes a federal fiduciary standard**'' and '' impose[s]'' these fiduciary duties, while at the same time admitting that ''[t]he fiduciary duty to which advisers are subject is not specifically defined in the Advisers Act'' (emphasis added). To support the assertion that the Advisers Act establishes and imposes a federal fiduciary duty, the Proposed IA Interpretation relies on references in the Supreme Court's opinion in *SEC v. Capital Gains Research Bureau, Inc.* to Congress's recognition that advisers are fiduciaries, as well as in dicta in other Supreme Court opinions.[22] However, to the extent that the Court refers to fiduciary duties under the Advisers Act, the holding in *Capital Gains* relates solely to full and fair disclosure in accordance with Section 206.[23]

The SEC's proposed interpretation thus may not be universally recognized as grounded in the Advisers Act or *Capital Gains* and its progeny. This is not merely an academic point: by reaching beyond disclosure obligations, the Proposed IA Interpretation may represent a significant change in the application of the Advisers Act to an adviser's relationships with its clients, including institutional clients.[24] Further, the Proposed IA interpretation is unclear as to the extent to which an adviser's fiduciary duty can be circumscribed by the agreement between the adviser and the client, as well as the sophistication of the client.[25]

COMPARISON OF THE PROPOSED IA INTERPRETATION AND PROPOSED REGULATION BEST INTEREST

Each of the elements of the SEC's proposed rulemaking and interpretations is aimed primarily at the same goal — protecting retail investors. Nonetheless, while Proposed Regulation Best Interest would apply only to broker-dealers when making recommendations to retail customers, including legal representatives of retail customers, the Proposed IA Interpretation would apply to all investment advisory clients, whether retail or institutional, and would apply throughout the duration of, and cover all aspects of, the advisory relationship (with insufficient clarity as to the extent to which the agreed nature of the relationship impacts the nature of the duties owed). In the case of Proposed Regulation Best Interest, the SEC recognized the transactional nature of the broker/customer relationship and stated that the obligation applies at or before a recommendation is made and that there is no ongoing obligation unless contractually agreed to by a broker-dealer and its retail customer. Through Proposed Regulation Best Interest and the Proposed IA Interpretation, the SEC stated its view that in a number of cases disclosure alone is insufficient to address material conflicts of interest and that the SEC's expectation is that the firm will need to mitigate or eliminate material conflicts of interest,

Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, 83 Fed. Reg. 21,203 (May 9, 2018).

[21] Advisers Act §206; *see also* Proposed IA Interpretation.

[22] *Capital Gains*, 375 U.S. 180, 194 (1963). Notably, the release also cites to a variety of SEC releases, including the proposing release for the abandoned ''suitability rule,'' as well as to secondary sources like treatises.

[23] The Proposed IA Interpretation reaches beyond the Section 913 Study, since the former discusses the possible need to eliminate (rather than disclose) certain conflicts. Proposed IA Interpretation, 83 Fed. Reg. 21209 (''[i]n all of these cases where full and fair disclosure and informed consent is insufficient, we expect an adviser to eliminate the conflict or adequately mitigate the conflict so that it can be more readily disclosed'').

[24] In this regard, while the Proposed IA Interpretation speaks in the lingo of services to retail clients, the release itself makes clear that the SEC's views are intended to apply also to institutional relationships.

[25] The SEC has also requested comments as to, among other things, whether investment advisers should be subject to investor protection requirements that are comparable to those applicable to broker-dealers, with respect to (1) licensing and continuing education requirements for personnel, (2) account-statement delivery requirements for advisory accounts, and (3) financial responsibility requirements, including net capital and fidelity bond requirements.

ISSN 0747-8607

where they cannot be adequately addressed through disclosure alone.

While the Proposals outline different standards for broker-dealers and investment advisers (and confirm that such standards are intended to be different), recent statements by Division of Investment Management Director Dalia Blass, Division of Trading and Markets Director Brett Redfearn, and Chairman Jay Clayton suggest that the obligations would be similar for broker-dealers and investment advisers.[26] These statements indicate that, while the term ''fiduciary duty'' is not explicitly used in Proposed Regulation Best Interest, the broker-dealer's obligations would be based on fiduciary principles. Director Redfearn indicated that the principal distinction between the standards of conduct for a broker-dealer and an investment adviser is that the broker-dealer's best interest obligation would apply only at the time a recommendation is provided, while an investment adviser's fiduciary duty is generally ongoing over the course of its relationship with its client. It should be noted that the SEC acknowledged in the case of the Proposed IA Interpretation that the scope and duration of an adviser's fiduciary duty can be determined by contract, although the SEC did not clarify the conditions that it believes must be satisfied to do so.

FORM CRS RELATIONSHIP SUMMARY

The SEC Proposals also include proposed new disclosure requirements for registered broker-dealers, investment advisers, and dual registrants (collectively, firms),[27] under the Advisers Act and the Exchange Act (the ''Proposed Disclosure Rules'').[28] The Proposed Disclosure Rules would: (1) require firms to provide retail investors with a relationship summary on Form CRS covering certain topics; (2) restrict the use of the terms ''adviser'' and ''advisor'' by broker-dealers and their associated financial professionals in certain circumstances; and (3) require broker-dealers and investment advisers to disclose in retail investor communications the firm's registration status and require that any associated financial professionals disclose their association with the firm. The Proposed Disclosure Rules do not address situations when a financial professional is ''dual-hatted'' with a broker-dealer and an investment adviser that are separate firms.

Proposed Form CRS

Chief among the Proposed Disclosure Rules is proposed Form CRS (Customer or Client Relationship Summary) — a standardized four-page disclosure document that is designed to highlight eight categories of information that the SEC believes retail investors should consider before establishing a relationship with a financial professional that generally must be provided at the commencement of, or substantial change in, the relationship.[29] Under the Proposed Disclosure Rules, firms would be permitted to deliver a relationship summary on Form CRS via electronic or paper delivery. If a firm utilizes electronic delivery, such delivery would be required to comply with the SEC's existing guidance on electronic delivery and the Form CRS Proposing Release specifically addresses potential operational challenges (including those associated with client global consent to electronic delivery) posed for robo-advisers and online broker-dealers by the new requirements. If a firm utilizes paper delivery, a relationship summary should be the first document delivered if multiple documents are distributed to a retail investor in a single mailing. Further, if a firm does not maintain a website on which to post a Form CRS, the firm would be required to provide a toll-free number where retail investors could request a copy.

Form CRS, which is intended to supplement rather than supersede existing disclosure requirements, is principally intended to help retail investors distinguish between the services, fees, and obligations of broker-dealers and investment advisers. Unlike exist-

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[26] In recent speeches, Chairman Clayton and Director Redfearn remarked that both broker-dealer and investment advisory relationships involve a fiduciary principle, with each relationship creating a duty for the investment professional to act in the best interest of the client. Director Redfearn further stated that the ''Best Interest'' standard under Proposed Regulation Best Interest ''is similar to 'best interest' approaches under other advice standards, including the fiduciary standard applicable to investment advisers.'' Clayton, SEC Chairman, Fireside Chat: A Conversation with SEC Chairman Jay Clayton (May 22, 2018); Redfearn, SEC Director, Division of Trading and Markets, Remarks at the FINRA Annual Conference (May 22, 2018), Remarks at the PLI Investment Management Institute 2018 (Apr. 30, 2018).

[27] ''Dual registrant'' would be defined as ''a firm that is dually registered as a broker-dealer and an investment adviser and offers services to retail investors as both a broker-dealer and investment adviser.'' Form CRS Proposing Release.

[28] *Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles*, SEC Release Nos. 34-83063, IA-4888 (Apr. 18, 2018) (the ''Form CRS Proposing Release'').

[29] ''Retail investor'' would be defined as ''a prospective or existing client or customer who is a natural person (an individual).'' Form CRS Proposing Release. All natural persons, irrespective of net worth or investment experience, would also be considered retail investors, as would trusts or other similar entities that ''represent natural persons, even if another person is a trustee or managing agent of the trust.'' Broker-dealers and/or investment advisers would not be required to provide Form CRS to legal representatives of retail investors, unlike Proposed Regulation Best Interest, which would require broker-dealers to provide certain disclosures to legal representatives.

ISSN 0747-8607

ing forms, Form CRS would prescribe specific required disclosures within each of the categories of information, unless they were inaccurate as applied to the firm. Because the relationship summary is designed to supplement, rather than replace, current disclosure obligations of broker-dealers and investment advisers, delivery of a relationship summary would not necessarily relieve a firm of other disclosure obligations to current or prospective retail investors under federal or state law.[30] The SEC also proposed recordkeeping requirements that potentially represent a significant increase in applicable recordkeeping obligations, as firms would be required to track and retain records of the dates of communications with each existing and prospective retail client.

Proposed Labeling Rule and Registration Status Disclosures

If adopted, the proposed ''Labeling Rule'' would prohibit any broker or dealer (or any natural person who is an associated person of such broker or dealer) from using the words ''adviser'' or ''advisor'' as part of its name or title when communicating with a retail investor, unless (1) the broker or dealer is registered as an investment adviser under the Advisers Act or with a state; or (2) any natural person who is an associated person of a dually-registered firm using such title is a supervised person of an investment adviser registered under §203 of the Advisers Act or with a state and provides investment advice on behalf of such investment adviser. This restriction would not apply to dually-registered firms, nor would the restriction apply to dually-hatted professionals of a dually-registered firm that provides investment advice to retail investors on behalf of the investment adviser, except that financial professionals of a dually-registered firm who provide only brokerage services would be restricted from using the title ''adviser'' or ''advisor.''[31] The ''Labeling Rule'' reflects the SEC's policy determination to recognize the different business, compensation, and client-service models of broker-dealers and investment advisers (while imposing similar best interest obligations on each) and fostering public education about the differences.

The Proposed Disclosure Rules would also require (1) SEC-registered broker-dealers and investment advisers to prominently disclose such registered status in print or electronic retail investor communications; (2) associated persons of a broker or dealer who are natural persons, to prominently disclose that status in print or electronic retail investor communications; and (3) supervised persons of a registered investment adviser to prominently disclose that status in print or electronic retail investor communications. The SEC indicated that the foregoing disclosures are intended to assist retail investors in determining the type of firm that is most appropriate for the investor's specific investment needs.

WHERE DO WE GO FROM HERE?

While the SEC Proposals might not be adopted in their current form, the SEC has already signaled that retail investors will be the focus of its regulatory and enforcement agenda.[32] Many commenters have believed that the SEC is better situated than the DOL to balance competing constituencies and interests in this area given its broad investor-protection mandate (which extends beyond the retirement arena) and related market-wide expertise. However, while Chairman Clayton, in particular, has clearly signaled that he wants the SEC to adopt standard of conduct obligations for broker-dealers and investment advisers, there are unique dynamics at work that raise questions as to whether the SEC will adopt final rules and, if so, the extent to which the final rules will diverge from the proposals.

First, the SEC currently consists of only four commissioners, and two of these, Commissioners Stein and Jackson, have signaled that they would not vote to approve the SEC Proposals in their current form — although likely for substantially different reasons.

Second, if no new commissioners are appointed by the end of the year, when Commissioner Stein's extended term will expire, there will only be three Commissioners; any one of whom can effectively veto the approval of the Proposals simply by not appearing for a vote.

Third, the demise of the DOL Rule may effectively lessen the industry's desire for the SEC to take action (i.e., because it is no longer the case that a failure of the SEC to act increases the likelihood that the now-defunct DOL rule will survive) — although at the same time the appetite of consumer-protection groups for SEC action may potentially be heightened. In addition, there are multiple legislative initiatives pending at the state level that would impose stricter stan-

[30] Specifically, the SEC indicated that the relationship summary ''would not necessarily satisfy the disclosure requirements under the proposed Regulation Best Interest.'' Form CRS Proposing Release.

[31] Such a financial professional would be required to be both ''a supervised person of an investment adviser and an associated person of a broker-dealer.'' Form CRS Proposing Release.

[32] For example, SEC Commissioner Robert J. Jackson Jr. has specifically stated that he would not approve the SEC Proposal, unless there were to be substantial changes to the proposed rules and interpretations. *See generally* Jackson, Statement at SEC Open Meeting (Apr. 18, 2018).

ISSN 0747-8607

dards of conduct on investment advice and recommendations, and the desire to avoid the burdens of a multitude of potentially competing and inconsistent state standards could provide an incentive for market participants to engage with the SEC.

If the SEC does not act, is there the possibility that the DOL will act once again? Maybe, particularly in another administration if the political winds someday blow in another direction. Even in that case, however, the fact that the Fifth Circuit (as opposed to the Trump administration) sealed the fate of the DOL Rule could make any future proposals — at least on anywhere near the scale of the DOL Rule — more difficult to implement without congressional action.

CONCLUSION

Recent efforts to issue fiduciary-type standards for financial institutions have gone down a long and winding road, going all the way back to: the SEC's first consideration of fiduciary-type regulation; the DOL's initial proposal (approximately eight years ago, in a markedly different environment); the later withdrawal, reproposal, and finalization of the DOL Rule; the effectiveness and ultimate applicability of the DOL Rule; the Fifth Circuit's decision vacating the DOL Rule and the absence of an appeal of that decision by the Trump administration. Now we have the SEC Proposals, taking us down a different branch in the path, and it remains to be seen what happens next. The safest expectation is that there will be more bends in the road.

ISSN 0747-8607