Broker-Dealer Liability: Are the Rules Pertaining to Providing Investment Advice to Retail Customers About to Change?

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Introduction

In the securities industry, broker-dealers[1] play an important and vital role. If the current broker-dealer regulatory environment is not daunting enough already, it is about to get more complicated and costly, from a revenue and liability perspective. The Department of Labor (DOL) appears poised to adopt a rule early next year holding broker-dealers to a fiduciary standard of care when providing investment advice in connection with Employee Retirement Income Security Act (ERISA) plans, and significantly more important from an industry revenue perspective, IRAs.[2] Presently, broker-dealers are not generally considered fiduciaries when they provide investment advice and related services, other than when they have investment discretion over client accounts.[3] Although the courts' characterization of the broker-dealer duty when providing investment advice is hardly uniform,[4] it is often analyzed in terms of whether the recommendation was suitable, which is narrower and less strict than the best interest standard applying to fiduciaries, such as ERISA plan administrators and investment advisors. Thus, all things being equal, if the DOL's rule is enacted, aggrieved investors will have an easier time suing broker-dealers, and the DOL will have enforcement and oversight powers relative to the industry, which it did not previously possess.

In addition to increased liability related costs, there is considerable angst in the industry over whether broker-dealers and their firms will be able to continue many of their current third-party compensation arrangements – e.g., commissions, 12b-1 fees and revenue fees – despite the rule's so-called "best interest contract exemption" (Best Interest Exemption or Exemption) for prohibited transactions. This could have significant financial consequences for many participants in the brokerage industry, especially wealth management companies and insurance companies selling annuity products generating high commissions. Morning-star estimates that by 2020 IRAs alone will likely exceed $10 trillion in assets.[5] Accordingly, many brokerage firms also can expect substantial compliance and monitoring related costs to ensure compliance with the rule, especially the Exemption.

It is likely this new rule will result in significant costs for the brokerage industry, in terms of increased liability and administrative and lost revenues for wealth managers and insurance companies.

The Securities and Exchange Commission (SEC), responsible for regulating broker-dealers, is actively studying whether broker-dealers providing investment advice to retail investors should be subject to a fiduciary standard across all investment platforms.[6] Presently, the SEC appears to be relatively far behind the DOL in rulemaking. However, there is a good chance in the near future, the SEC will require broker-dealers to adhere to a fiduciary standard, including mandating broker-dealers disclose conflicts of interest, albeit under a less cumbersome structure than required by the DOL rule.

The Financial Industry National Regulatory Agency (FINRA), the quasi-governmental self-regulatory organization which regulates broker-dealers registered with the SEC under the Securities Exchange Act of 1934, is essentially in a holding pattern in terms of its rules and regulations.[7]

The genesis of the DOL's broker-dealer regulatory reform has been led by President Barack Obama.[8] Proponents of this reform believe the suitability standard prompts broker-dealers to recommend bad investments to their retail cus-tomers.[9] In other words, current broker-dealer compensation models, not requiring disclosure of conflicts of interest, incentivize broker-dealers to place their interests ahead of their customers' interests.[10] According to President Obama's administration, IRA holders lose an aggregate $17 billion annually resulting from this conflicted investment advice.[11] The DOL estimates the proposed rule will save retirees between $88 billion and $100 billion over 20 years.[12] The impetus for this reform is reflective of a worldwide movement to protect retail investors[13] in response to the Great Recession of 2008 and its fallout.

Based on the foregoing, it is not surprising the brokerage industry, and the lawyers who service it, are keenly interested in the DOL rule and related activity. The dilemma they face is what to do about the changing landscape given the uncertainty of the requirements. It is not the purpose of this article to debate the merits of the DOL rule or the direction in which the SEC may be headed. Despite the regulatory uncertainty, it is reasonable to assume broker-dealers will soon be subject to a stricter standard of care at the federal level, at least relative to ERISA plan participants and IRA owners. Accordingly, it appears the DOL rule will have important liability and significant cost and revenue implications for the brokerage industry. Therefore, the purpose of this article is to discuss the *highlights* of the DOL rule and related devel-opments.[14] Although the DOL rule probably will not be enacted and effective until at least a year, and its exact parameters are somewhat uncertain, prudent broker-dealers and their legal counsel would be wise to start planning for the change now.

Background

It is useful to briefly summarize the difference between the standard of care for investment advisors[15] and broker-dealers because this distinction lies at the center of the regulatory debate. Investment advisors, which are regulated at the federal level under the Investment Advisors Act of 1940 (Act), are generally subject to the best interest of the client standard of care which is the highest form of duty.[16] This federal standard is uniformly adopted by federal and state courts for investment advisors.[17] This standard holds investment advisors to a duty of care and duty of loyalty and employs a prudent person standard.[18] The duty of loyalty, at the heart of the reform movement, requires investment advisors to put their clients' interests ahead of their own. This includes the obligation to disclose all conflicts of interest. The duty of care encompasses such matters as aligning the customer's investment and financial needs with investment recommendations, as well as overall account management. Thus, recommending a high risk investment that does not comport with the customer's investment objections, most likely would be a breach of the duty of care. The fiduciary standard under ERISA essentially reflects the common law understanding of the term.[19]

Broker-dealers generally are subject to the lesser suitability standard when providing investment advice to retail investors, absent exigent circumstances such as the customer placing special trust in the broker-dealer which is acknowledged or the customer providing the broker-dealer with discretionary account responsibility.[20] Importantly, unlike fiduciaries, broker-dealers, under the suitability standard of care, are not obligated to disclose any third-party payment arrangements as part of the overall investment advice.[21] High commissions or failure to disclose conflicts may be a basis for liability under the suitability standard, de - pending on the facts and circumstances, but neither is necessarily dispositive. Generally speaking, absent exigent circum - stances, aggrieved retail investors need to prove gross negligence or fraud on the part of their brokers to recover losses.

FINRA has institutionalized the suitability standard as part of its disciplinary and arbitration procedures. This is important because a majority of individual broker-dealer disputes that are adjudicated result in FINRA arbitration.[22] FINRA Rule 2111 requires that broker-dealers have a

reasonable basis to believe the recommended investment advice is suitable for the client.[23] Rule 2090 requires that the broker-dealers know their clients.[24] Taken together, these two rules provide an analytical framework similar to the fiduciary standard under ERISA, with one major exception: conflict disclosures are not mandated.[25]

Meanwhile, the SEC appears to adhere to a reasonableness standard falling somewhere between suitability and the best interest standard.[26] In the years subsequent to the passage of the Act, the broker-dealer profession has greatly expanded its investment advice beyond the mere incidental advice and now includes full service investment advice, including, in many cases, retirement and even financial planning advice. In effect, broker-dealers often look and act like investment advisors, which is precisely what the proponents of the DOL's reform object to. No corresponding changes have been made to the federal regulatory regime to accommodate this development, which has not gone unnoticed by the SEC.[27] In short, the reformers seek to close this gap.

DOL Proposed Rule – Establishing a Fiduciary Standard of Care

The DOL proposed rule consists of three amendments to the Code of Federal Regulations (CFR).[28] For simplicity's sake, we will address them as one rule. The first part of the rule takes a functional approach to determining when a person is providing investment advice.[29] The rule begins by asking whether a person is recommending investment advice for a fee or other compensation, directly or indirectly, basically addressing fee arrangements of any type.[30] The rule identifies four categories of activity constituting investment advice.[31] Providing advice concerning a customer's sale, purchase or holding of an investment vehicle fits under the definition, as well as providing advice relative to ERISA distributions or rollovers.[32] Customer directed trading transactions are not considered investment advice under the rule.[33]

The definition of recommendation is more problematic. According to the DOL, it is an objective inquiry into whether a communication, based on its content, con - text and presentation, would *reasonably be viewed as a suggestion* that the advice recipient engage in or refrain from taking a particular course of action.[34] Obviously, this is an incredibly broad definition, the contours of which remain to be worked out subsequent to adoption of the final rule, unless the DOL tightens the definition before the final rule adoption.

The rule then sets out certain actions which would render such a person a fiduciary.[35] The first action is straight - forward: when a person providing investment advice represents or acknowledges that he or she is a fiduciary.[36] For obvious reasons, most broker-dealers tend to shy away from any such representation or acknowledgment. The alternative activity sweeps more broadly. Specifically, an advisor is a fiduciary if he or she:

Renders the advice pursuant to a written or verbal agreement, arrangement or *understanding* that the advice *is individualized to, or that such advice is specifically* directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.[37]

This encompasses most typical broker-dealer customer relationships. Thus, once satisfied, any broker-dealer who provides investment advice to plan participants or IRA owners, among others, is now a fiduciary (Investment Advisor Fiduciary) under ERISA, and the suitability standard is replaced with ERISA's fiduciary standard. More importantly, once the broker-dealer is subject to ERISA and the IRS rules governing IRAs, he or she may not engage in prohibited transactions, e.g. payments which could result in a conflict of interest.[38]

Recognizing the realities of the market place,[39] the DOL has inserted a number of carve outs for transactions that normally are not considered fiduciary investment advice.[40] These carve outs include a Seller carve out which addresses financial sophisticated plan fiduciaries and an Investment Education carve out which runs the gamut of traditional financial planning and analysis and related services provided by broker-dealers.[41] A theme covering most of the carve outs is avoidance of individualized and specialized investment advice.[42] While some of these carve outs are not

controversial, others, such as the Investment Education carve out and § (b)(6)(ii) titled "General financial, investment and retirement information" are highly nuanced and will require close monitoring to ensure compliance.[43]

The rule appears to permit broker-dealers to engage in flat fee arrangements, eliminating most, if not all, conflict of interest concerns without resorting to the Best Interest Exemption. However, this does not relieve the advisor of his or her fiduciary duties.[44] This is important because many commentators who have addressed the rule focus mostly on the problems associated with the Best Interest Exemption because it will have the greatest impact on revenues.[45] The DOL concluded that even absent a conflict of interest arising from a compensation model, broker-dealers providing investment advice to plan participants and IRA holders must still adhere to a heightened standard of care.[46] The heightened standard of care requires broker-dealers to actively monitor customer accounts, increase communications and increase due diligence concerning the customer's financial condition and investment needs. Further, the heightened standard of care requires broker-dealers to be cautious when investing in high-risk investments, such as hedge funds, as fiduciaries must comply with ERISA. Increasingly over the year, class action lawsuits were filed under ERISA against plan administrators for investing client monies in high-risk investments. Presumably, under the rule, broker-dealers would be subject to similar litigation depending on their advice.

In sum, from a liability perspective, broker-dealers and their firms will be judged by a stricter and broader standard once they meet the criteria of an investment advisor, although the exact contours of this standard will be worked out after the rule is adopted. This, in itself, is unsettling from the industry's perspective. In any event, the fiduciary standard will result in some quantum of new direct and indirect costs such as increased monitoring, training and compliance programs, not to mention legal related costs, especially if class action litigation becomes an attractive option.

Best Interest Exemption

As Fiduciary Investment Advisors, for purposes of ERISA plans and IRAs, broker-dealers may not engage in prohibited transactions, which basically entail third-party payment arrangements such as com - missions, Rule 12b-1 fees and the like. Recognizing the realities of the marketplace, the DOL concluded broker-dealers and others should be permitted to pursue more traditional compensation models that are otherwise prohibited transactions under the first half of the new rule.[47]

The Exemption requires, as a condition precedent, that the broker-dealer enter into a written contract with the customer wherein the broker-dealer agrees: 1) to be a fiduciary acting in the client's best interest; 2) to warrant he or she will com - ply with relevant federal and state laws relating to providing investment advice; 3) to disclose all potential conflicts of interest among other information, which must be repeated annually; 4) to receive no more than reasonable compensation for services provided; and 5) to create a webpage with updated compensation information.[48] Additionally, the Exemption requires the broker-dealer or their financial firms to warrant that policies and procedures are designed to mitigate the impact of material conflicts of interest.[49] If this is not confusing enough, the DOL states the provision incorporates the so-called implied conduct standards principle, which, along with some of the other conditions, arguably makes the Exemption virtually illusory.[50] The rule appears to require that the broker-dealer prohibit compensation practices encouraging broker-dealers to make recommendations not in the best interest of their clients.[51] Exactly how broker-dealers are to go about determining when a third-party payment arrangement is not in the best interest of the customer remains a mystery, although, some commentators believe it will largely end third-party payment arrangements for ERISA plans and IRAs.[52] Certainly, FINRA can craft more precise rules to provide guidance for its arbitration and disciplinary proceedings. However, this hardly covers the parties who will seek to use non-compliance with the rule against the industry. Indeed, some of the examples of compensation arrangements which the DOL states could help satisfy the Exemption seems to be removed from certain high commission investments,[53]

although the DOL seems to be satisfied with differential fee arrangements if the advisor can demonstrate that advice on certain products requires greater expertise or time to justify a higher fee.[54] Ironically, the DOL states that the examples in the rule's commentary are only suggestions and gives the advisor or his or her firm the latitude necessary to design its compensation and employment arrangements, provided those arrangements promote, rather than undermine, the best interest and Impartial Conduct Standards.[55]

Notice and Data Collection Requirement

There is one final aspect of the rule which merits attention.[56] The rule requires certain notice and data collection requirements for firms seeking the Exemption, including notifying the DOL of the intention to rely on the Exemption.[57] The rule commentary makes it clear this is designed to help the DOL evaluate the effectiveness of the exemption.[58] The rule does not re - quire prior DOL approval for the Exemption, as the commentary specifically states that "[t]his is a notice provision only and does not require any approval or finding by the [DOL]."[59]

Ramifications of the Rule

The rule appears to create a new breach of contract cause of action for aggrieved parties.[60] Unfortunately, the DOL provides little guidance as to how this will actually work in practice.[61] For example, if one of the conditions of the exemption which does not relate to a breach of the best interest of the customer condition is violated and there is no investment loss, what damages are available to aggrieved investors? This is only one of many questions that presumably will need to be worked out in the courts or some other forum, such as arbitration. The DOL has made it clear that a violation of any of the Impartial Conduct Standards may result in the Exemption being lost.[62] Thus, if broker-dealers get it wrong, they face liability or regulatory enforcement proceedings, including class actions in federal or state courts.[63] Excise taxes under the Internal Revenue Code also loom. Furthermore, the DOL, as well as the Security and Exchange Commission (SEC) depending on the circumstances, may also have the authority to bring an enforcement action for violations.

The rule also provides that there may be no limitation or disclaimer of damages, presumably including punitive damages, allowed in FINRA arbitrations.[64] Nevertheless, there is some good news for the brokerage community because the rule expressly permits mandatory FINRA arbitration proceedings. At least for now, the SEC does not appear inclined to take up Congress' offer in Dodd-Frank to limit or prohibit arbitration of broker-dealer disputes.[65] FINRA would have to modify its current rules and regulations to account for the changes occasioned by the rule, at least for disputes involving ERISA and IRAs. In the past five years, it changed the rules for the selection of arbitration panels to allow customers to select an all public – i.e. non-securities professional – three person panel or a single non-public arbitrator[66] probably in response to criticism of the industry.

The Best Interest Exemption appears intended to drive brokerage firms away from third-party compensation arrangements into flat fee arrangements. The DOL's primary concern is to protect retirees and concluded this is the way to do it, rightly or wrongly. In consideration of the unworkable Best Interest Exemption, Morningstar predicts that the industry winners will include discount brokerage firms who will take advantage of the low balance retirement accounts jettisoned by the larger firms because of cost considerations; although it does acknowledge that wealth management firms may offset, to a certain extent, potential loss revenues through increased resort to flat fee arrangements.[67] Under any circumstance, however, the costs of complying with the rule, as well as increased liability-related costs, will place a heavy burden on the industry. It remains to be seen whether broker-dealers will push everything into flat fee arrangements, assuming the cost model works from a profit perspective, or seek to take advantage of the Best Interest Exemption. It is believed that with increased compliance, monitoring, training and documentation costs, sophisticated brokerage firms will be able to minimize the liability related costs. Whether broker-

dealers will be able to continue current revenue streams from third-party payment arrangements is of much greater concern.

Securities and Exchange Commission

Because the SEC is relatively early in its rule making process, it is impossible to predict where it will come out in this process or when. Section 913(g) of the Dodd-Frank Act of 2010[68] mandated that the SEC study the effectiveness of existing standards of care for brokers and others. If the SEC concludes the current suitability standard is not sufficient to protect investors from inaccurate or biased advice, it is free to adopt a new standard by adopting its own rule. In January 2011, the SEC staff issued a brief report recommending that broker-dealers working with retail investors be subject to a uniform standard of care no less stringent than the standard for investment advisors.[69] The SEC's recommendation appears con fined to investment advice similar to that provided by investment advisors, as opposed to traditional broker-dealer services.[70] The disclosure-based approach was rejected. However, the report is preliminary, as it does not adequately address the problems new regulation would cause for the industry, nor does it consider whether its recommendation could adversely impact investors.[71] Interestingly, the SEC seems wary of schemes that would materially impact traditional industry compensation models, from which it can reasonably be inferred the SEC would not adopt a mechanism similar to the DOL's Best Interest Exemption.[72] This is understandable because the SEC has to operate under the federal securities laws, and one of its mandates is to promote capital formation and economic growth.[73] A serious disruption of traditional broker-dealer compensation models could run counter to this mandate. The DOL has no such restrictions. Nevertheless, recently, SEC Commissioner Mary Jo White endorsed a fiduciary liability standard for broker-dealers, stating that "the SEC should act under 913 of Dodd-Frank to implement a uniform fiduciary duty for broker-dealers and investment advisors' where the standard is to act in the best interest of clients when giving advice to retail investors."[74]

Conclusion

This article has only scratched the surface of the DOL proposed rule which, despite its relative brevity, is complex and ambiguous in several places. First, at least with respect to providing investment advice to ERISA plan participants and IRA owners, broker-dealers will be treated as fiduciaries, even if they engage in flat fee compensation arrangements only. Given the SEC's current direction, absent some unforeseen major development, it is highly likely that broker-dealers sooner than later will be subject to a fiduciary standard, including conflict disclosure obligations for any investment advice provided to retail investors. However, it is highly doubtful that the SEC would go as far as the DOL has gone with the Best Interest Exemption.

Second, as confounding as the Best Interest Exemption may be, there is no indication the DOL intends to change its core structure. The chances the SEC will pre-empt the DOL rule with its own or that Congress will successfully block the rule appear unlikely at this time.

It is likely this new rule will result in significant costs for the brokerage industry, in terms of increased liability and administrative and lost revenues for wealth managers and insurance companies. In fact, the rule may re-shape whole sectors of the industry.

While some commentators are pessimistic concerning its application, the DOL has made it clear broker-dealers and their firms should be permitted to pursue traditional compensation arrangements, which is a good starting point.[75] Assuming rigorous protocols, documentation and other devices are established to prevent, or at least significantly reduce, the risk of noncompliance, liability related costs would be manageable. Compliance with the rule will not be easy and failure to comply can result in penalties, injunctive relief, or both, at the regulatory level. Moreover, it is hard to imagine that under any circumstance some revenues from third-party payment plans will not be lost.

Ultimately, sophisticated brokerage firms will find a way to successfully navigate the rule, although it will come at increased costs and some loss of revenue for many. Put more simply, the days of

easy money derived from providing investment advice to retail investors are probably over for wealth management firms. Many sophisticated brokerage firms have been preparing themselves for the challenges presented by the rule and eventual adoption of a rule by the SEC. FINRA seems to have been moving in this direction as well, albeit at a slow pace. Those who have done little or nothing in the hopes this is all going to go away are making a high risk bet and likely to get caught short when the dust settles. In sum, despite several uncertainties surrounding the rule and potential SEC action, prudent brokerage firms, especially wealth management companies and their legal counsel should consider planning for the inevitable now.

ENDNOTES

1 *The word "broker" is defined as "any person engaged in the business of effecting transactions in securities for the account of others." Securities Exchange Act of 1934 § 3(a) (4), 15 U.S.C. § 78c (1). The word "dealer" is defined as "any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such per-son's own account through a broker or otherwise. Id. at § 3(a) (5), 15 U.S.C. § 78c (4).*

2 *Proposed Conflict of Interest Rule—Retirement Investment Advice, 29 Fed. Reg. 80, Parts 2509, 2510 & 2550 (April 20, 2015).*

3 *Arthur B. Laby,* Fiduciary Obligations of Broker-Dealers and Investment Advisors, *55 VILL. L. REV. 701, 704 (2010) [hereinafter Fiduciary Obligations of Broker-Dealers].*

4 *Id. at 705.*

5 *Morningstar,* The U.S. Department of Labor's Fiduciary Rule for Advisors Could Reshape the Financial Sector, *FINANCIAL SERVICES OBSERVER, 2 (Oct. 30, 2015) (hereinafter Morningstar).*

6 SEC Chief White Backs Fiduciary Rule for Brokers, *THINK ADVISOR (Mar. 17, 2015), http://www.thinkadvisor.com/2015/03/17/sec-chief-white-backs-fiduciary-rule-for-brokers.*

7 *States also have certain regulatory authority over the broker-dealer community, which are beyond the scope of this article.*

8 *Fact Sheet, Department of Labor Proposes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle-Class Families Billions of Dollars Every Year, DEPT. OF LABOR, 1 available at http://www.dol.gov/ebsa/newsroom/ fsconflictsofinterest.html.*

9 *Id. See also Andrew H. Friedman,* Department of Labor Fiduciary Proposal Threatens IRA Advice Status Quo, *TIMELY THINKING, EATON VANCE ON WASHINGTON, 2 (Nov. 2015).*

10 *Andrew H. Friedman,* Department of Labor Fiduciary Proposal Threatens IRA Advice Status *are even more restrictive than the DOL rule. Id. at 9-19.*

11 *Id.*

12 *Gains to Investors and Compliance—Commen - tary, 29 Fed. Reg. 80, 21930 (April 20, 2015).*

13 *Morningstar, supra note 5, at 9. The entire financial world has witnessed the adoption of measures similar to the DOL rule and some measures are even more restrictive than the DOL rule. Id. at 9-19.*

14 *We pause to stress that this article covers only the high points regarding these proposed amendments.*

15 *An investment advisor is someone that provides a wide range of investment advice, but does not execute trades. Advisors "must adhere to a strict fiduciary standard including a duty of utmost good faith, full and fair disclosure of all material facts, and an obligation to use reasonable care to avoid misleading clients." Fiduciary Obligations of Broker-Dealers, supra note 3, at 716-17. "Under DOL's proposed definition, an individual receiving compensation for providing advice that is individualized or specifically directed to a particular plan sponsor..., plan participant, or IRA owner for consideration in making a retirement investment decision is a fiduciary." See Fact Sheet, Department of Labor Proposes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle-Class Families Billions of Dollars Every Year, DEPT. OF LABOR, 1 available at http://www.dol.gov/ebsa/ newsroom/fsconflictsofinterest.html.*

16 *Fiduciary Obligations of Broker-Dealers, supra note 3, at 718. See, e.g., SEC v. Tambone, 5550 F.3d 106, 146 (1st. Cir. 2008) ("Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund and its investors.").*

17 *Fiduciary Obligations of Broker-Dealers, supra note 3, at 718.*
18 *Id. at 716-17.*
19 *See Marcia S. Wagner, Esq., Basics of* ERISA, *THE WAGNER LAW GROUP, 1 & 3-5 (Oct. 17, 2011).*
20 *Fiduciary Obligations of Broker-Dealers, supra note 3, at 719.*
21 *Id. at 730.*
22 *See FINRA Rule 2111 FAQ (Suitability), available at https://www.finra.org/industry/faq-finra-rule-2111-suitability-faq; Fiduciary Obligations of Broker-Dealers, supra note 3, at 706. Further, the DOL mentioned in its commentary to the rule changes that it "expects that most individual arbitration claims under this exemption will be subject to FINRA's arbitration procedures and consumer protections." Proposed Conflict of Interest Rule, Retirement Investment Advice—Commentary, 29 Fed. Reg. 80 at 21973 (April 20, 2015).*
23 *FINRA Rule 2111 FAQ (Suitability), available at https://www.finra.org/industry/faq-finra-rule-2111-suitability-faq.*
24 *FINRA RULE 2090 (Know Your Customer).*
25 *See FINRA RULE 2090 (Know Your Customer); FINRA Rule 2111 (Suitability).*
26 *Fiduciary Obligations of Broker-Dealers, supra note 3, at 721-22.*
27 *Press Release, U.S. Securities and Exchange Commission, SEC Releases Staff Study Recommending a Uniform Fiduciary Standard of Conduct for Broker-Dealers and Investment Advisors (Jan. 22, 2011) available at https://www. sec.gov/news/press/2011/2011-20.htm.*
28 *Proposed Conflict of Interest Rule—Retirement Investment Advice, 29 Fed. Reg. 80, Parts 2509, 2510 & 2550 (April 20, 2015).*
29 *Puneet Arora & Lynn Cook,* DOL Issues Re-Proposed Conflict-of-Interest Rule for Investment Advice, *TOWERS WATSON, 2 (Aug. 24, 2015), https://www.towerswatson.com/en-US/Insights/Newsletters/Americas/insider/2015/08/dol-issues-re-proposed-conflict-of-interest-rule-for-investment-advice [hereinafter Towers].*
30 *Proposed Conflict of Interest Rule—Retirement Investment Advice, 29 Fed. Reg. 80, § 2510.3-21(a) (1) (April 20, 2015).*
31 *Id.*
32 *Proposed Conflict of Interest Rule—Commentary, 29 Fed. Reg. 80 at 21936 (April 20, 2015).*
33 *Id. at 21938.*
34 *Id. (emphasis added).*
35 *Proposed Conflict of Interest Rule—Retirement Investment Advice, 29 Fed. Reg. 80, § 2510.3-21(a) (2) (April 20, 2015).*
36 *Id. at § 2510.3-21(a) (2) (i).*
37 *Id. at § 2510.3-21(a) (2) (ii) (emphasis added).*
38 *Marcia S. Wagner, Esq., Basics* of ERISA, *THE WAGNER LAW GROUP, 5 (Oct. 17, 2011).*
39 *Proposed Conflict of Interest Rule—Commen - tary, 29 Fed. Reg. 80 at 21941 (April 20, 2015).*
40 *See Proposed Conflict of Interest Rule— Retirement Investment Advice, 29 Fed. Reg. 80, § 2510.3-21(b) (April 20, 2015); Proposed Conflict of Interest Rule—Commentary, 29 Fed. Reg. 80 at 21941 (April 20, 2015).*
41 *See Proposed Conflict of Interest Rule— Retirement Investment Advice, 29 Fed. Reg. 80, § 2510.3-21(b) (1) (April 20, 2015); Proposed Conflict of Interest Rule—Commentary, 29 Fed. Reg. 80 at 21941 (April 20, 2015).*
42 *See Proposed Conflict of Interest Rule— Retirement Investment Advice, 29 Fed. Reg. 80, § 2510.3-21(b) (1) (April 20, 2015); Proposed Conflict of Interest Rule—Commentary, 29 Fed. Reg. 80 at 21941-42 (April 20, 2015).*
43 *See Proposed Conflict of Interest Rule— Commentary, 29 Fed. Reg. 80 at 21944-45 (April 20, 2015).*
44 *See Best Interest Contract Exemption— Commentary, 29 Fed. Reg. 80 at 21962 (April 20, 2015).*
45 *Morningstar, supra note 5 at 20-32.*
46 *See Proposed Conflict of Interest Rule— Commentary, 29 Fed. Reg. 80 at 21945 (April 20, 2015).*
47 *See Best Interest Contract Exemption— Commentary, 29 Fed. Reg. 80 at 21964-65 (April 20, 2015).*
48 *Id. at 21961.*

49 *Proposed Best Interest Contract Exemption, 29 Fed. Reg. 80, § 2550, II (d) (April 20, 2015). See also Friedman, supra note 9, at 2.*
50 *Friedman, supra note 9, at 2.*
51 *Id.*
52 *Morningstar, supra note 5, at 9.*
53 *Best Interest Contract Exemption—Commen - tary, 29 Fed. Reg. 80 at 21971 (April 20, 2015).*
54 *Id.*
55 *Id.*
56 *The proposed rule also calls for further comments on the appropriateness of certain "lowest fee" investment products, provides for the sale of debt securities from broker-dealers' firms, and other exemptions all of which are beyond the scope of this article. However, it is important to note that the DOL is seeking further comment on the proposed eight month transition period for the Best Interest Exemption and other provisions once the rule is published in the Federal Register. Thus, a revised effective date for certain important provisions could significantly extend the transition period for compliance.*
57 *Proposed Best Interest Contract Exemption, 29 Fed. Reg. 80, § 2550, V (April 20, 2015).*
58 *Best Interest Contract Exemption—Commen - tary, 29 Fed. Reg. 80 at 21976 (April 20, 2015).*
59 *Id.*
60 *Id. at 21969.*
61 *Id.*
62 *Id.*
63 *Fact Sheet, Department of Labor Proposes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle-Class Families Billions of Dollars Every Year, DEPT. OF LABOR, 4 available at http://www.dol.gov/ebsa/newsroom/ fsconflictsofinterest.html.*
64 *Class actions are not permitted under FINRA. Daniel Herbsi,* The Death of Class Actions? A FINRA Panel Ruling Could Signal the End of Class Claims Against Brokers, *REED SMITH (Feb. 28, 2013), available at http://www. globalregulatoryenforcementlawblog.com/2013/02/ articles/securities-litigation/the-death-of-class-actions-a-finra-panel-ruling-could-signal-the-end-of-class-claims-against-brokers/.*
65 *Dodd-Frank Wall Street Reform and Consumer Protection Act, Publ. L. No. 111-203, § 913 (2010); see also* Fiduciary Obligations of Broker-Dealers, *supra note 3, at 703; Polina Demina,* Broker-Dealers and Investment Advisors: A Behavioral Economics Analysis of Competing Suggestions for Reform, *113 MICH. L. REV. 429, 437(2014).*
66 *John F. Fullerton, III & Aime Dempsey, How* to Choose a FINRA Arbitration Panel, *U.S. ARBITRATION J., 36 (Oct./Nov. 2015).*
67 Morningstar, supra note 5, at 71.
68 Dodd-Frank Wall Street Reform and Consumer Protection Act, IX § 913 (2010).
69 Draft – Recommendation of the Investor as Purchase Subcommittee Broker-Dealer Fiduciary Duty, available at http://www.sec.gov/spotlight/ investor-advisory-committee-2012/fiduciary-duty-recommendation.pdf.
70 *Id.*
71 *Id.*
72 *See id.; Daniel M. Gallagher, SEC Commissioner, Remarks at the SEC Speaks in 2015 (Feb. 20, 2015) (transcript available at http://www.sec.gov/ news/speech/022015-spchcdmg.html).*
73 *See Daniel M. Gallagher, SEC Commissioner, Remarks at Heritage Foundation (Sept. 17, 2014) (transcript available at http://www.sec.gov/News/ Speech/Detail/Speech/1370542976550); Securities Act 3(b).*
74 SEC Chief White Backs Fiduciary Rule for Brokers, *THINK ADVISOR (Mar. 17, 2015), http:// www.thinkadvisor.com/2015/03/17/sec-chief-white-backs-fiduciary-rule-for-brokers.*
75 *See Proposed Conflict of Interest Rule, Retire - ment Investment Advice—Commentary, 29 Fed. Reg. 80 at 21971 (April 20, 2015).* ❖