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IN THIS ISSUE

Investment Advisors Beware: Understanding the Potential Burdens of a Uniform Fiduciary Standard of Care and Rule “Harmonization”

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I. Executive Summary

The SEC has issued a “request for data” concerning a potential uniform fiduciary standard of care for broker-dealers and investment advisors. The SEC data request explains the possible parameters of this uniform standard of care. Many of the SEC’s assumptions, both about possible “harmonization” of broker-dealer and investment advisor rules, and about how to document compliance with a fiduciary duty of care, could impose substantial new duties on investment advisors. The SEC’s assumptions would impose many current broker-dealer rules on investment advisors, and could require advisors of all sizes to develop written supervisory and compliance processes similar to those of Wall Street wirehouses.

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On March 1, 2013, the SEC released a request for data and other information concerning a possible uniform fiduciary standard of care which would apply to both investment advisors and broker-dealers.[1] The implications of such a uniform standard of care for broker-dealers are widely understood: instead of being required to follow a “suitability” standard when making recommendations to clients, broker-dealers would be held to a “fiduciary” standard. But are there any potential implications of a uniform standard for investment advisors? Would a uniform standard change how investment advisors conduct their day-to-day operations? The answer to both questions is yes – and this article will examine some of those potential implications.

II. Background

The issue of whether broker-dealers and investment advisors should be held to the same standard of care when dealing with retail investors has been debated for years. In January 2008, a RAND Institute study commissioned by the SEC found that most investors did not understand the differences between broker-dealers and investment advisors, and believed both should be subject to the same standards when delivering advice to retail clients.[2] The issue was hotly debated as part of the Dodd-Frank Act to reform the financial services industry. Ultimately, Congress compromised: in Section 913 of the Dodd-Frank Act, Congress gave the SEC the authority to adopt a uniform fiduciary standard of care for both industries, but it did not require the SEC to adopt such a standard. Congress also required the SEC to conduct a study of the issue before it proposed any rules.

The SEC staff completed its Section 913 study in January 2011, and that study recommended that the SEC both adopt a uniform fiduciary standard, and harmonize many of the rules governing broker-dealers and investment advisors.[3] However, two of the SEC's five commissioners dissented from the issuance of the report; they argued that the SEC staff did not have enough cost-benefit data to justify making these recommendations.[4] In the meantime, the SEC has lost several court decisions in which the court found that the SEC's cost-benefit analysis of its proposed rules was inadequate.[5] Although former SEC Chairman Mary Schapiro had stated that a uniform fiduciary standard of care was one of her highest priorities, because the SEC had so little data to support such a proposal, she left office without being able to move forward on the uniform fiduciary standard.

In March 2013, the SEC issued its request for data relevant to the uniform fiduciary standard of care issue. The SEC made it clear that it has not decided whether to move forward with a new rule in this area. Nor has the SEC made any final decisions about the exact parameters of what such a uniform fiduciary standard rule would contain. However, to allow the securities industry and investors to provide meaningful comments and data, the SEC made a series of assumptions about what a possible uniform fiduciary standard would provide. The SEC also provided a list of areas in which the rules governing broker-dealers and investment advisors could be harmonized. Those areas, and their potential implications for investment advisors, are the subject of this article.

III. Rules, Rules and More Rules

Historically, investment advisors have been subject to "principles-based" regulation: a small number of broad, general principles, such as a fiduciary duty to act in the client's best interests. Today there are just under 40 SEC rules governing investment advisors, and before the Dodd-Frank Act, that number was closer to 30. By contrast, broker-dealers are subject to a very "rules-based" scheme of regulation, with scores of SEC rules and hundreds of FINRA rules. One of the factors that led to the SEC issuing its data request was that broker-dealers repeatedly asked for more information about exactly what rules would apply under a fiduciary standard. The SEC's data request suggests that there could be a substantial number of such rules – and that many of those rules could apply to investment advisors as well as broker-dealers.

Applying additional rules to investment advisors is likely to increase the expense and burden of an investment advisor's compliance program. Typically regulators expect a written supervisory procedure for each rule to which a regulated firm is subject, and then written evidence that the firm actually has carried out that procedure. As a result, a more "rules-based" compliance regime may be substantially more time-consuming and expensive to carry out than a "principles-based" approach, even if there is little additional investor-protection benefit.

The burden on and costs to advisors of the potential new rules summarized below would be cumulative, and likely would require redesigning existing compliance programs and adding to compliance staff or responsibilities.

IV. Harmonization

The SEC's data request lists a series of areas in which broker-dealer and investment advisor rules could be harmonized. In almost all of those areas, the result of harmonized rules may be additional obligations or limits on investment advisors.

However, the SEC makes it clear that it has not yet decided whether harmonization would be beneficial, or that it should proceed on the same timeline as adoption of the uniform fiduciary standard of care.

A. Advertising and Communications with the Public

Communications with the public (such as newsletters and marketing brochures) are a good example of the contrast between broker-dealer and investment advisor regulation. Investment advisors generally are subject to a general requirement that their communications be accurate and not misleading, supplemented by certain prohibitions and requirements, including a ban on testimonials in advertising. Broker-dealers have much more prescriptive rules: certain communications must be pre-reviewed and approved by a principal of the business; other communications may be reviewed by a principal, but on an after-the-fact basis. Some communications must be pre-filed with FINRA, others must be filed with FINRA within ten days of first use.[6] With proper disclosure, and in the proper context, investment advisors may make investment projections and use back-tested performance; broker-dealers are subject to general bans on both of these types of communications (although broker-dealers may use some testimonial advertising). In short, if "harmonization" means adopting the broker-dealer standard, as the SEC staff suggests is likely, the result would be significant limits and new burdens on investment advisors compared to current practice.

Current Requirement

Today, communications from RIA firms must be accurate and not misleading with specific requirements for specific communications such as those relating to performance, recommendations, and fees. Additionally, there is a ban on testimonial advertising.

Potential New Requirements Under Harmonization

Borrowing from FINRA rules, new regulations could require: (1) prior registered principal approval of certain retail client communications which go to more than 25 clients or prospects, such as newsletters, emails, advertising and sales materials; (2) written procedures for the preparation, review, and documentation of client correspondence (to 25 or fewer clients or prospects), and other communications, and (3) pre-and post-regulatory filing requirements for certain types of retail communications. Expanded requirements may include:

- Qualification and registration of a principal to review and approve retail client communications (see possible new licensing requirements below).
- Establish and document a system to facilitate and document principal review and approval of retail client communications.
- Educate and train firm personnel on client correspondence consistent with the firm's procedures governing correspondence, with documentation and surveillance of correspondence.
- File with a named regulator (either pre- or post-use) marketing materials that mention mutual funds, ETFs, UITs, variable insurance products, closed-end funds, options, CMOs, or derivatives.
- Prohibitions against performance projections, or hypothetical or back-tested performance results.

B. Finders and Solicitors

Under current law, an SEC-registered investment advisor may pay an unregistered solicitor to help obtain new clients so long as the solicitor and the advisor comply with the disclosure requirements in the cash solicitation rule, SEC Rule 206(4)-3.[7] By contrast, for a broker-dealer to pay someone for referring a client, generally that person must be licensed and registered with FINRA. Once again, "harmonization" may mean that some business practices currently common for investment advisors will be restricted.

Current Requirement

Today, RIA firms may pay unregistered solicitors for referring potential client accounts, subject to disclosure requirements.

Potential New Requirements Under Harmonization

Harmonization may mean that investment advisors:

- Could not use "solicitors" to seek new business without those solicitors being registered with and supervised by the advisor firm.
- Would have to discontinue unregistered solicitor arrangements.

C. Supervision

Supervision is another good contrast between the regulation of broker-dealers and investment advisors. Investment advisors are required to have a Code of Ethics and compliance program, which may be tailored to their business.[8] Broker-dealers have much more specific, prescriptive supervisory rules. Each broker-dealer employee must have an assigned supervisor, and that supervisor (or the supervisor's delegate) must document their review of the employee's client trades and new accounts, personal trades, private securities transactions, outside business activities, correspondence and emails. Broker-dealers must have annual compliance exams of branch locations, an annual independent anti-money-laundering review, and must perform annual compliance tests of a variety of specific functions within the business.[9] Those tests lead up to an annual CCO compliance report and an annual CEO compliance certification.[10] Again, there is little evidence to suggest that the broker-dealer supervisory structure has been more effective than that for investment advisors. However, applying the more prescriptive broker-dealer supervision requirements to investment advisors would require a great deal more time, resources and paperwork for investment advisors.

Current Requirement

Advisors need a general system of supervision for compliance with the Investment Advisers Act (and similar state laws), including a Code of Ethics and a compliance program tailored to the RIA's business.

Potential New Requirements Under Harmonization

Supervision requirements could be expanded such that a firm supervisory compliance program might include:

- Perform (by principal) and document periodic reviews of all staff activities.
- Conduct documented testing of procedures and controls.
- Conduct documented supervision of outside business activities of personnel (for example, insurance sales or participation on any boards).
- Establish a supervisory hierarchy with assignment of direct supervision of each registered person, and document any delegations of supervisory authority.
- Conduct registered principal review and endorsement of all trades.
- Documented new product review and approval process prior investing clients in the product.

D. Licensing, Registration and Continuing Education

Other areas of possible "harmonization" are licensing, registration and continuing education. Today, a new investment advisor can register with the SEC or a state securities commission and begin business in a matter of days. By contrast, a new broker-dealer registering with FINRA must go through an initial qualification process involving a substantive review of written supervisory procedures, business plans, ownership, financing sources, financial projections and capital needs, as well as interviews with key firm personnel.[11] That FINRA new member process typically takes six months or more to complete. A similar, time-consuming process occurs whenever a broker-dealer applies to FINRA to enter a new line of business.

Once again, if this type of "harmonization" is applied to investment advisors, the result could be substantial new burdens for investment advisors.

Similarly, the registration process for individuals at investment advisors is relatively straight-forward. An "investment adviser representative" who deals with retail clients must pass the Series 65 (or 66) examination. There is no similar requirement for investment advisor personnel who serve institutional clients. Broker-dealers have a much more elaborate set of requirements. Typical broker-dealer registered representatives must pass the Series 7 and the Series 63 examinations. Broker-dealer supervisors must pass, for example, the Series 24; every firm must have operations professionals who pass the Series 99 and a Financial Operations supervisor who passes the Series 27. And there are a variety of specialty registrations: an investment banker must pass the Series 79; a municipal securities principal must pass the Series 53. Other registrations are necessary for equities trading, options, private placements, research analysts and so on.[12] In addition to passing the required licensing examination, individuals must register with FINRA by filing a form with specific background information which must be kept current. In sum, moving to the more specific, broker-dealer style of registration and licensing could impose substantial new complexity, delay and expense on the operations of investment advisors.

The SEC also identified continuing education as an area where "harmonization" may be desirable. Currently, all broker-dealer registered personnel must complete annual "regulatory element" and "firm element" continuing education modules.[13] The registrations of these personnel (and thus the ability to do business) are suspended if they do not complete the required continuing education in a timely manner. The firm is required to prepare a "firm element" of continuing education tailored to its business, and must track the continuing education status of all of its registered employees. "Harmonization" could result in these additional and ongoing training and education requirements for investment advisors.

Current Requirement

Today, a new investment advisor is required to register with the SEC or a state securities commission. Employees who provide advice (Investment Adviser Representatives) generally must register with the state in which they reside or do business after completing the Uniform Investment Adviser Law Examination known as the Series 65 (or 66) Exam, or as an alternative in some states, meet the exam waiver requirement by holding one or more of the following pre-qualifying designations: CFP, ChFC, PFS, CFA, or CIC. There is no specific continuing education or training requirement by regulation, although some qualifying designations include such obligations.

Potential New Requirements Under Harmonization

Under new regulations, licensing requirements for advisory personnel could be patterned after broker-dealers. Today for broker-dealers, in addition to qualifying examinations and licenses for personnel who work with clients and recommend and sell securities (such as the Series 7), there are also licensing and exam requirements for supervisors and principals (for example the Series 24) and for operations personnel (the Series 99), with continuing education requirements for all employees. Individuals at advisory firms could be required to register with a regulator by filing and keeping current a detailed form that is available to the public which includes employment history, terminations, customer complaints, and certain lawsuits.[14]

New obligations for advisors could include:

- Required coursework for principals and back-office personnel (in addition to existing requirements for portfolio managers), and sufficient preparation prior to taking federal licensing exams.
- Mandatory continuing education on industry regulations initially and every 3 years (the "Regulatory Element").
- Firm's own continuing education for its employees (sometimes outsourced) tailored to its own business and based on an annual needs assessment (the "Firm Element").

- Maintenance of books and records tracking the continuing education status of all of licensed employees.
- Registration of each non-clerical employee with a regulator by filing employment and disciplinary history, and maintaining and updating that information including when an employee leaves or joins a firm.

E. Books and Records

Another set of issues identified by the SEC staff involves books and records requirements. Currently, investment advisors must keep books and records for five years, while broker-dealers must keep most records only for three years (although certain categories must be kept for six years or more).[15] However, broker-dealers must keep all books and records that relate to their "business as such," while investment advisors are only required to keep certain specified types of records.[16] Moreover, broker-dealers are required to keep electronic records in a specific storage format (write-once, read-many, or "WORM" format), a very expensive storage format not commonly used outside the securities industry.[17] Once again, if the SEC harmonizes toward the current broker-dealer standard (as the January 2011 staff report suggested), the result would be increased costs for investment advisors.

Current Requirement

Today, an investment advisor must keep specified books and records for five years.

Potential New Requirements Under Harmonization

Under new regulations, advisors may be required to make and keep additional books and records. Today, broker-dealers have to create and maintain many more books and records than investment advisors. Expanded books and records requirements could include:

- Retain all documents and communications that relate to advisors "business as such," not just enumerated records. Broker-dealers, for example, retain almost everything including all internal memoranda (meeting notes, emails, typed memos).
- Create and retain questionnaires and applications for employment at the firm, last 10 years employment history for each employee, and a summary of each employee's compensation arrangement.[18]
- Create and retain a record for each new customer account with 9 items of personal information including investment objectives, signed by the advisor personnel assigned to the account, and approved by a principal of the firm, and provide a copy of the record to the client at least once every three years.[19]
- Store electronic records kept in a specific format that does not apply to advisors today, known as "write-once, read-many", or "WORM" format (not commonly used outside the brokerage industry). This includes communications through employee mobile devices such as text messages and emails. Also, enter into a contract with a third-party that gives that party access to and the ability to download the firm's electronic records (provides assurance if firm personnel are unwilling or unable to do so for a regulator).[20]

F. The Duty of Loyalty and the Duty of Care

The SEC's data request explains the two affirmative elements of which it believes a uniform fiduciary duty must consist. The two elements are a duty of loyalty, and a duty of care, and these duties already should be familiar to all investment advisors. However, the SEC's explanation even of these elements may be somewhat surprising to investment advisors. The SEC does not express the duty of loyalty as a duty always requiring a broker-dealer to act in the best interests of clients.[21] Rather, the SEC expresses the duty of loyalty primarily as a duty to disclose conflicts of interests and obtain the client's consent to those conflicts of interest. The SEC does not assert that there is any duty to minimize or eliminate those conflicts of interest. The SEC's view appears to be that a document like a Form ADV Part 2A would satisfy this disclosure duty. As discussed above, a broker-dealer could continue to conduct principal trades with clients so long as it disclosed that practice in its disclosure brochure. The SEC does indicate that it might ban sales contests as part of a broker-dealer fiduciary duty.

The SEC data request also discusses the elements of a duty of care. Interestingly, the SEC does not express this duty in the terms most often used for investment advisors: the "prudent investor rule" as codified in most states in the Uniform Prudent Investor Act. Rather, the SEC expresses the duty of care in terms that are familiar to broker-dealers, as a combination of:

1. a product-specific and customer-specific suitability requirements;[22]
2. heightened suitability and disclosure requirements for "higher risk" products such as penny stocks, options, hedge funds and structured products;[23]
3. a duty of best execution;[24] and
4. a duty to charge only fair and reasonable compensation.[25]

For each of these portions of the duty of care, the SEC then references its 2011 study, which in turn discusses harmonizing these elements with the existing broker-dealer regulatory scheme.

In each of these areas, most large broker-dealers have developed written supervisory procedures they use to document their compliance with the relevant broker-dealer regulatory requirements. For example, most large broker-dealers have a formal, carefully documented new product approval process in which they document their consideration of a product, conclude that it is suitable for some firm clients, and establish suitability requirements for the clients to whom the product may be offered.[26] Then the broker-dealer can establish exception reports to monitor the sale of that product to any investor outside the initial set of suitability criteria, and document the reasons for approval of any such sales. Similar large broker-dealer processes review and document exceptions in trade execution quality and potential excessive compensation. Supervisors review the relevant exception reports, and then compliance officers confirm that the supervisors have done their reviews and follow up on potential problems.

Many investment advisors have a more informal process for reviewing new products and determining which products are appropriate for which clients – and this process may not result in any formal, contemporaneous documentation. The question is whether the SEC, in evaluating an investment advisor's compliance with its duty of care, will expect the same level of documentation as it is accustomed to see from broker-dealers. Similarly, while virtually all investment advisors monitor execution quality and the reasonableness of compensation, they often do so with less documentation, and less in the way of formal exception reports, than is typical for large broker-dealers. Broker-dealer regulators are known to take the position that "if you didn't document it, then you didn't do it." It appears that as part of the fiduciary duty of care, the SEC may be expecting a level of new product due diligence, ongoing suitability, best execution and reasonable compensation documentation similar to that produced by major broker-dealer wirehouses. If that is the case, the ironic result may be that it will be relatively easy for large broker-dealers to satisfy this duty – but many smaller investment advisors currently would not meet the standard. Meeting this standard could require many investment advisors to spend substantial additional amounts of time and resources to document processes that they currently perform, but in a somewhat informal manner.

The current large broker-dealer approach to the issues of new product approval, suitability, best execution and compensation has not always been effective at preventing product-related regulatory issues. By contrast, the fact that many smaller investment advisors have a more informal, less-documented approach has not led to significant numbers of product-related problems being reported at those firms. In short, if the SEC is viewing the duty of care as another opportunity to harmonize broker-dealer and investment advisor regulation, the result may be an increase in costs and burdens for investment advisors, not broker-dealers. And it is far from clear that there would be a significant investor protection benefit as a result.

Potential New Requirements Under Harmonization

The duty of care, as explained by the SEC staff,[27] may cause investment advisors to establish and document:

- Product-specific and customer-specific suitability requirements, including an obligation to collect and update detailed information on clients' financial situation (approximately 10 mandated data elements) and to investigate, obtain, and retain adequate information about the securities recommended.
- Heightened suitability and disclosure requirements for "higher risk" products (as set forth in a dozen or more broker-dealer rules or FINRA notices) such as hedge funds (alternative investments), structured products, certain debt securities, municipal securities, direct participation programs, variable insurance products, penny stocks, options, any other "complex" products, and for assuring clients are put in appropriate mutual fund share classes.
- Best execution of trades, not simply relying on the executing broker's process, but also analyzing factors such as size of orders, where the orders execute, and the costs of access to various markets.
- Charging fair and reasonable compensation, substantiated by research and documentation, not unfairly discriminating among clients in terms of pricing, and strict limitations on receiving cash or non-cash compensation from third parties.

In short, rule harmonization of the duty of care could require advisors of all sizes to have to develop written supervisory and compliance processes similar to those of Wall Street wirehouses.[28]

V. Possible Additional Requirements

Beyond the areas identified in the SEC's March 2013 data request, there are other possible requirements currently imposed on broker-dealers that could be imposed on investment advisors as part of "harmonization". For example, broker-dealers are required to keep minimum levels of net capital, and to submit periodic financial reports to FINRA and the SEC.[29] The SEC does not impose similar requirements on investment advisors, although some states do have minimum net capital and financial reporting requirements for state-registered investment advisors. Broker-dealers have argued that investment advisors should be subject to these requirements as well, on the theory that poorly capitalized advisors, or advisors with a deteriorating financial position, pose a greater risk to clients.

Broker-dealers are required to have elaborate anti-money-laundering (AML) programs.[30] These programs require broker-dealers to screen new client accounts, scrutinize wire transfers and other movements of client funds, conduct annual independent AML reviews, and affirmatively report suspicious activities to the government. Investment advisors have not been subject to these AML requirements. Once again, "harmonization" in these areas could result in new and potentially expensive compliance and reporting obligations for investment advisors.

VI. What Is Not Included YET – an SRO for Investment Advisors

An issue that has been debated along with the uniform fiduciary standard of care is the issue of whether investment advisors should be required to join a self-regulatory organization ("SRO") in the same way that broker-dealers are required to join FINRA. The Dodd-Frank Act also required the SEC to study this issue, although (unlike the uniform standard of care) it did not give the SEC authority to issue rules to address any problems it found. The SEC staff issued its report on this issue in January 2011.[31] The SEC staff conceded that it had been able to examine less than 10% of the SEC-registered investment advisors per year, and forecast that this percentage would likely decrease. This contrasts with broker-dealers, all of whom are examined at least every four years by FINRA; the large broker-dealers that hold the vast majority of US customer assets are examined every year.

The SEC staff report laid out three possible alternatives for investment advisor examinations: (1) imposing "user fees" on investment advisors to fund additional SEC examinations; (2) mandating that investment advisors join an industry-funded SRO similar to FINRA; or (3) authorizing FINRA to examine the investment advisory operations of "dual registrant" firms that are already registered as broker-dealers with FINRA. The SEC staff did not choose a preferred recommendation among these alternatives. SEC Commissioner Elisse Walter issued a separate statement dissenting from the report, and argued that in her view the SRO alternative was clearly preferable.[32] However, the primary trade associations for investment advisors and many consumer groups have argued that an SRO is the wrong model for the investment advisor industry, and in particular that FINRA is ill-suited to become that SRO.

In 2012, members of Congress introduced competing bills, one to provide for an investment advisor SRO, and another for SEC user fees for investment advisors. Neither bill advanced out of committee.

The SEC's March 2013 data request does not address the investment advisor examination issue at all – it does not make any assumptions about how investment advisors would be examined or overseen. However, both FINRA and many broker-dealers argue that it is misleading to speak of a "uniform fiduciary standard of care" for investment advisors and broker-dealers, if most broker-dealers are examined against that standard of care every year or two, but most investment advisors are only examined every ten years or less. If it is anything like FINRA, an investment advisor SRO would be expensive and burdensome for investment advisors: a Boston Consulting Group study estimated such an SRO would cost the industry twice as much as expanding the SEC's existing investment advisor examination program.[33] The creation of an investment advisor SRO remains a possibility, especially if the SEC adopts new investment advisor rules in the name of harmonization. The adoption of a unified fiduciary standard of care likely would provide additional ammunition for the broker-dealer industry to continue to advocate that FINRA become that SRO.

VII. Conclusion

Many investment advisors have viewed a uniform fiduciary standard of care as imposing a new and higher set of responsibilities for broker-dealers. But most investment advisors have assumed that because they were already subject to a fiduciary standard of care, this initiative would not impose new requirements on investment advisors themselves. In fact, the "harmonization" portion of the SEC's uniform fiduciary standard of care could impose substantial new burdens on investment advisors, because the SEC appears to be "harmonizing" toward existing broker-dealer rules that do not currently apply to investment advisors. Even more surprisingly, the SEC appears to be treating the "duty of care" portion of fiduciary duty as an amalgam of existing regulatory requirements that apply to broker-dealers. Because many smaller investment advisors do not document their compliance with these requirements in the same way that large broker-dealers do, the ironic result may be that investment advisors find it more difficult to demonstrate their compliance with these requirements than do those large broker-dealers.

Many investment advisor firms have been founded by professionals who were dissatisfied with the large broker-dealer wirehouse experience. Those professionals often felt that at the wirehouses, they were required to process large amounts of supervisory paperwork that had little to do with promoting better investment outcomes for clients. However, there is a reason the wirehouses created that paperwork – to demonstrate compliance with the "rules-based" system of broker-dealer compliance. Historically, investment advisor compliance has been more "principles-based" and less driven by a need for constant reporting and documentation. The SEC's data request suggests that it may impose the requirements that created the current broker-dealer supervisory paperwork system on the investment advisor profession.

In short, the SEC's data request concerning the uniform fiduciary standard of care has substantial implications for investment advisors. Investment advisors should review the data request carefully and consider whether to provide comments to the SEC on these issues.

[1] Duties of Brokers, Dealers and Investment Advisers (Request for Data and Other Information) (March 2013) (available at http://www.sec.gov/rules/other/2013/34-69013.pdf).

[2] Investor and Industry Perspectives on Investment Advisers and Broker-Dealers (January 2008) (available at http://www.rand.org/pubs/technical_reports/TR556.html).

[3] Study on Investment Advisers and Broker-Dealers (January 2011) ("2011 SEC Study") (available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf).

[4] See Statement of Commissioners Kathleen L. Casey and Troy A. Parades (January 21, 2011) (available at http://www.sec.gov/news/speech/2011/spch012211klctap.htm).

[5] See, e.g., *Business Roundtable v. SEC,* 647 F.3d 1144 (D.C. Cir. 2011) (striking down proxy ballot access rule).

[6] See FINRA Rule 2210.

[7] Some states take the position that an investment advisor solicitor is required to register as an "investment adviser representative" under state law, although it is difficult for states to enforce this position with respect to SEC-registered investment advisors.

[8] SEC Investment Advisers Act Rule 206(4)-7.

[9] NASD Rule 3010.

[10] FINRA Rule 3130.

[11] See NASD Rules 1011- 1017.

[12] FINRA Rule 1230.

[13] FINRA Rule 1250.

[14] See 2011 SEC Study at 138.

[15] SEC Investment Advisers Act Rule 204-2.

[16] SEC Exchange Act Rules 17a-3, 17a-4.

[17] SEC Exchange Act Rule 17a-4(f).

[18] SEC Exchange Act Rule 17a-3(a)(12) and (19).

[19] SEC Exchange Act Rule 17a-3(a)(17).

[20] SEC Exchange Act Rule 17a-4(f).

[21] The SEC data request does state that the duty of loyalty is "designed to promote advice that is in the best interest of a retail customer". However, this formulation is different from saying that a broker-dealer or investment advisor actually must act in the best interests of customers.

[22] See 2011 SEC Study at 61-64; FINRA Rule 2111.

[23] See 2011 SEC Study at 65-66. The SEC also references special disclosure and suitability requirements for debt securities, bond funds and municipal securities, which is somewhat surprising because most of these investments are not viewed as particularly high risk. Last, the SEC mentions mutual fund share classes – its concern here seems not to be risk so much as the suitability of particular share classes for different investors.

[24] See 2011 SEC Study at 69-70.

[25] See 2011 SEC Study at 66-69.

[26] See FINRA Regulatory Notice 12-03, NASD Notice 05-26.

[27] See Request for Data and Other Information at 34-36 (citing extensively to broker-dealer requirements summarized in the 2011 SEC Study).

[28] Although harmonization would borrow extensively from broker-dealer regulations, many checks on an investment advisor's fiduciary obligation are out of scope for broker-dealers because of the way Dodd-Frank Section 913 was written. Broker-dealers would be able to continue to engage in principal trading, offer affiliated products and a limited product set, and would not be subject to an ongoing fiduciary duty (only at the time when giving personalized investment advice to a retail client).

[29] SEC Exchange Act Rule 15c3-1.

[30] SEC Exchange Act Rule 17a-8 (incorporating bank agency anti-money laundering rules in 31 C.F.R. Chapter X).

[31] Study on Enhancing Investment Adviser Examinations (January 2011) (available at http://www.sec.gov/news/studies/2011/914studyfinal.pdf).

[32] Statement of Commissioner Elisse B. Walter (January 2011) (available at http://www.sec.gov/news/speech/2011/spch011911ebw.pdf).

[33] SRO for Investment Advisers Would Likely Cost at Least Twice as Much as an Adequately Funded SEC; Investment Advisers Express Strong Opposition to SRO (Dec. 15, 2011) (available at http://www.cfp.net/news-events/news-release-archive/article/2011/12/15/sro-for-investment-advisors-would-likely-cost-at-least-twice-as-much-as-an-adequately-funded-sec-investment-advisors-express-strong-oppostition-to-sro).

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