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Fiduciary Standards and Best Interests: Should States Take the Lead?

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I. Introduction

The appropriate standard of care for investment professionals in the United States has evolved since the passage of the Securities Exchange Act ("Exchange Act")[1] and the creation of the Securities and Exchange Commission ("SEC") in 1934.[2] The federal government, in an attempt to shield the public from potential conflicts of interest in the investment advisory business, enacted two pieces of legislation in 1940 to take aim at the issue:[3] the Investment Company Act of 1940[4] and the Investment Advisers Act of 1940.[5] Thirty-four years later, as the federal government sought to establish protections for the retirement savings of millions of Americans,[6] the Employee Retirement Income Security Act of 1974 ("ERISA") was passed.[7] Contained within ERISA are provisions that describe what qualifies an individual as a "fiduciary"[8] and the duties, liabilities, and responsibilities that flow from that designation.[9] A

1. Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2018).

2. 15 U.S.C. § 78d (2018); U.S. SEC. AND EXCH. COMM'N, LAWS THAT GOVERN THE SECURITIES INDUSTRY (2013), https://www.sec.gov/answers/about-lawsshtml.html#invadvact1940 [https://perma.cc/T6ZG-6UTP].

3. *See* U.S. SEC. AND EXCH. COMM'N, *supra* note 2 (listing the federal statutes enacted over the last century to regulate and govern the securities industry).

4. Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64 (2018).

5. Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21 (2018).

6. *See* U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS ADMINISTRATION, FACT SHEET: WHAT IS ERISA, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa [https://perma.cc/7JLG-MA42] (describing the goals and importance of the Employee Retirement Income Security Act of 1974).

7. Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001–1461 (2018).

8. *See Fiduciary*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the term to mean "a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires").

9. ERISA § 1002(21)(A) (laying out the events that trigger a fiduciary duty, including the control or management of retirement plan assets, rendering of compensated investment advice, or administration of a plan); § 1104(a)(1) (requiring a fiduciary to act for the sole benefit of the participants and beneficiaries of the retirement plan, to keep expenses reasonable, and to act in a prudent manner by diversifying plan assets and acting in conformity with the plan documents); § 1105(a) (discussing actions that could bring liability on one acting as a fiduciary to a retirement plan); § 1106 (prohibiting certain transactions between the

fiduciary, for the purposes of ERISA, must provide advice for the sole interest of the retirement plan participant.[10]

From the passage of ERISA in 1974 until 2010, very little was done to alter the government's views and interpretations of the proper standards of care that should apply to advisers working with retirees.[11] However, in the wake of the Great Recession, Congress decided that it was time to reexamine the standards of conduct that applied to professionals involved in the financial advisory business.[12] As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[13] Congress mandated that the SEC complete a study that would address concerns over the "obligations of brokers, dealers, and investment advisers," as well as the regulatory environment in the financial advisory industry.[14] Many of the concerns that triggered heightened scrutiny of the industry stemmed the from the events surrounding Bernie Madoff[15] and the failure of the regulatory system in place at the time to protect investors from such predatory schemes.[16] Specifically, the SEC study was to examine "the standards of care for brokers, dealers, investment advisers . . . and persons associated with investment advisers for providing personalized investment advice about securities to retail customers that should be addressed by rule or statute."[17] The study recommended that the SEC promulgate a uniform

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retirement plan itself, the fiduciary to the plan, and the beneficiary or beneficiaries of the plan).

10. JOHN TOPOLESKI & GARY SHORTER, CONG. RESEARCH SERV., R44207, DEPARTMENT OF LABOR'S 2015 PROPOSED FIDUCIARY RULE: BACKGROUND AND ISSUES 4 (2016).

11. *See generally* Dawn Reiss, *ERISA: Why the Fiduciary Rule Is Not a New Idea*, U.S. NEWS & WORLD REP. (Oct. 11, 2017, 11:28 AM), https://money.usnews.com/investing/investing-101/articles/2017-10-11/erisa-why-the-fiduciary-rule-is-not-a-new-idea [https://perma.cc/XV2R-PUR4] (discussing how the views of the public and the federal government regarding the protection of retirement plans have evolved since the passage of ERISA).

12. *See* BAIRD WEBEL, CONG. RESEARCH SERV., R41350, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: BACKGROUND AND SUMMARY 22 (2017) (detailing how Congress came to decide that it needed to scrutinize the regulatory framework for investor protection).

13. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010).

14. Dodd-Frank § 913(b), 124 Stat. at 1824.

15. *See* Amir Efrati, Tom Lauricella, & Dionne Searcey, *Top Broker Accused of $50 Billion Fraud*, WALL ST. J. (Dec. 12, 2008, 11:59 PM), https://www.wsj.com/articles/SB122903010173099377 [https://perma.cc/HR4Q-YWX5] (describing the allegations surrounding Madoff and his securities firm).

16. WEBEL, *supra* note 12, at 22.

17. Dodd-Frank § 913(b)(2), 124 Stat. at 1824.

fiduciary standard that would be applicable to both investment advisers and to broker-dealers.[18] The SEC has never acted on this specific recommendation.[19]

Questions over the scope and reach of the fiduciary standard led the Department of Labor ("DOL") in 2010 to propose a rule that took aim at conflicts of interest for financial advisers providing guidance to investors on retirement accounts.[20] However, due to push back from the financial industry, the proposed reform of the fiduciary interpretation was delayed until 2015, at which time the DOL proposed a revised version of the rule.[21] The final DOL "fiduciary rule,"[22] issued in April 2016, was a culmination of years of political and policy debate over who should be subject to a fiduciary standard and how the standard would be applied moving forward.[23]

With the election of Donald Trump in 2016, the fate of the fiduciary rule was thrown into question, as speculation mounted that the incoming Trump Administration would seek to either delay or completely repeal the fiduciary rule.[24] That speculation was confirmed in February

18. U.S. SEC. & EXCH. COMM'N, STUDY ON INVESTMENT ADVISORS AND BROKER-DEALERS 101 (2011).

19. WEBEL, *supra* note 12, at 22.

20. *See* Stephen Miller, *DOL Issues New Proposed Rule on Investment Advice*, SHRM (Feb. 26, 2010), https://www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/AdviceRuleRedux.aspx [https://perma.cc/3TJR-9PTN] (describing the 2010 rollout of the Obama Administration's proposed changes to the standards governing retirement plan advisers).

21. *See* Janet L. Luxton & Gene Paranczak, *Regulatory Brief: The Final DOL Fiduciary Rule: What It Means to Plan Sponsors*, VANGUARD (Aug. 2016), https://institutional.vanguard.com/iam/pdf/FIDRULPA.pdf?cbdForceDomain=false [https://perma.cc/3D2Z-3GP5] (analyzing the newly released fiduciary rule).

22. Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946, 20946 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550).

23. *See* Ian Salisbury, *A Huge Change Is About to Hit Wall Street*, MONEY (Apr. 6, 2016), http://money.com/money/4281293/fiduciary-rule-standard-retirement/ [https://perma.cc/H2ZR-C2DF] (looking at the path to the fiduciary rule and some of the early reactions from Wall Street and consumers).

24. *See* Anthony Scaramucci, *Your 401(k) Doesn't Need a Federal Babysitter*, WALL ST. J. (Nov. 1, 2016, 7:17 PM), https://www.wsj.com/articles/your-401-k-doesnt-need-a-federal-babysitter-1478042244 [https://perma.cc/NR4L-KWXN] (discussing Scaramucci's criticisms of the fiduciary rule); Sarah N. Lynch, *Retirement Plan Offered by Trump Pick Puzder Sheds Light on Labor Rule*, REUTERS (Dec. 9, 2016, 2:51 PM), https://www.reuters.com/article/us-usa-trump-fiduciary/retirement-plan-offered-by-trump-pick-puzder-sheds-light-on-labor-rule-idUSKBN13Y2GS [https://perma.cc/ND7U-T5RP] (speculating on prospective Secretary of Labor Andy Puzder's views of the fiduciary rule).

2017 when President Trump issued an executive order[25] instructing the DOL to review the fiduciary rule and perform an updated economic and legal analysis of its impact.[26] The Trump Administration followed the executive order by repeatedly delaying the implementation of the fiduciary rule[27] until March 2018, when the United States Court of Appeals for the Fifth Circuit vacated the fiduciary rule in its entirety.[28] The DOL, then headed by a Trump appointee, declined to defend the fiduciary rule further and appeal the Fifth Circuit's ruling to the United States Supreme Court.[29] Consequently, the ultimate fate of the Obama-era fiduciary rule seemed to be sealed.[30]

The demise of the fiduciary rule triggered a series of new governmental actions across numerous agencies at both the state and federal levels.[31] Most significantly, the SEC issued a new package of investor protection regulations, which effectively equated to a revision of the federal fiduciary rule.[32] Several states also proposed or implemented new rules governing the standards which investment professionals must adhere in their business with clients.[33] This new combination of competing regulations, in addition to the lingering confusion from the

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25. Memorandum on the Fiduciary Duty Rule, 2017 DAILY COMP. PRES. DOC. 95 (Feb. 3, 2017), *reprinted in* 82 Fed. Reg. 9675, 9675–76 (Feb. 7, 2017).

26. *Id.*

27. Jim Pavia, *Trump Delays Controversial Fiduciary Rule for Advisors*, CNBC (Feb. 3, 2017, 1:37 PM), https://www.cnbc.com/2017/02/03/trump-delays-controversial-fiduciary-rule-for-advisors.html [https://perma.cc/6JXP-8LUT]; Lisa Beilfuss, *Labor Department Seeks 18-Month Delay in Fiduciary Rule*, WALL ST. J. (Aug. 9, 2017, 5:23 PM), https://www.wsj.com/articles/labor-department-seeks-18-month-delay-in-fiduciary-rule-1502305970 [https://perma.cc/T2LW-939B].

28. U.S. Chamber of Commerce v. U.S. Dep't of Labor, 885 F.3d 360, 388 (5th Cir. 2018).

29. Tara Siegel Bernard, *Obama-Era Investor Protection Rule is Dead*, N.Y. TIMES, June 22, 2018, at B3 ("The department did not try to defend the rule after the appeals court's initial decision, experts said, and it let a deadline pass to petition the Supreme Court to hear the case.").

30. *See id*. (discussing the demise of the fiduciary rule in the federal courts).

31. *See* Sarah O'Brien, *SEC's New Investor Protection Rule Won't End the Fiduciary Debate*, CNBC (July 30, 2019, 8:15 AM), https://www.cnbc.com/2019/07/30/sec-new-investor-protection-rule-wont-end-the-fiduciary-debate.html [https://perma.cc/J4LZ-3Z97] ("The multi-tentacled tug-of-war [over investor protection laws] is likely to persist.").

32. Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318, 33318 (July 12, 2019) (to be codified at 17 C.F.R. pt. 240).

33. John Manganaro, *State-Based Fiduciary Regulations Take Shape in 2019*, PLANADVISER (Jan. 24, 2019), https://www.planadviser.com/exclusives/state-based-fiduciary-regulations-take-shape-2019/ [https://perma.cc/NPE4-9SQG].

fiduciary rule's brief existence, has produced a significant amount of uncertainty in the investment advice industry.[34]

This Note proceeds in six parts. Part II delves into the portion of ERISA that deals directly with the fiduciary standard and how it originally applied to financial advisers.[35] Part III reviews the Obama Administration's fiduciary rule, its rationale, and the reaction to the rule from industry and consumer advocates.[36] Part IV analyzes the new SEC rules package, the early reaction to it, and its potential fate as a result of pending litigation.[37] Part V examines the patchwork of state regulations that have arisen in the past few years.[38] Part VI concludes by recommending that the federal government rethink its level of involvement in the regulation of the financial advisory industry.[39]

II. THE ORIGINAL FIDUCIARY STANDARD SET FORTH IN ERISA

When the Obama Administration announced in 2015 that it intended to promulgate a new investor protection rule, the Administration singled out ERISA and its outdated provisions,[40] pointing to the seismic transformation that had taken place in America's retirement system since the law's passage in 1974.[41] Under ERISA, a person is deemed to be a fiduciary regarding a retirement plan if he or she maintains any direct control over the management, disposition, or administration of the plan's assets or "renders investment advice for a fee or other compensation"[42] regarding the plan and its assets.[43] The DOL responded to the passage of ERISA by implementing a five-part test to determine whether or not a

34. John Manganaro, *Fog Still Hangs Over Defunct DOL Fiduciary Rule's Influence*, PLANADVISER (June 25, 2019), https://www.planadviser.com/fog-still-hangs-defunct-dol-fiduciary-rules-influence/ [https://perma.cc/4R93-QVSD].

35. *See infra* Part II.

36. *See infra* Part III.

37. *See infra* Part IV.

38. *See infra* Part V.

39. *See infra* Part VI.

40. *See* Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(21)(A) (2018) (setting forth ERISA's criteria to qualify as a fiduciary).

41. Press Release, The White House, Fact Sheet: Middle Class Economics: Strengthening Retirement Security by Cracking Down on Backdoor Payments and Hidden Fees (Feb. 23, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/02/23/fact-sheet-middle-class-economics-strengthening-retirement-security-crac [https://perma.cc/4A6Q-5KDE].

42. ERISA § 1002(21)(A).

43. *Id*.

person had, in fact, provided "investment advice" for the purposes of triggering the fiduciary standard of care.[44]

First, a person must have provided advice or recommendations regarding securities or other appreciable property.[45] Second, that person must have provided the necessary type of advice on a "*regular basis*."[46] Third, the advice must have been rendered in accord with an understanding between the fiduciary and the person seeking advice.[47] Fourth, the advice provided must have served as the "*primary basis for investment decisions*" regarding the plan assets.[48] Finally, the advice must have been individualized for the participant in the plan.[49] The last four prongs of the test confused financial professionals and investors alike for decades.[50] The second and fourth prongs were the two components that were the most heavily targeted by the fiduciary rule.[51]

At the time of ERISA's passage, the dominant retirement savings vehicle in the United States was the defined benefit pension plan.[52] In these types of retirement plans, the employer sponsors the plan, bears the risk of the plan's investment returns, and promises the participants in the plan either a fixed dollar amount per pay period or an amount to be determined through a plan formula.[53] Over time, however, the retirement market experienced a vast swing to defined contribution plans,[54] in which

44. Susan P. Serota & Kathleen D. Bardunias, *Take Two: DOL Reproposes Changes to Definition of Fiduciary for ERISA Plans and IRAs,* PILLSBURY WINTHROP SHAW PITTMAN (May 8, 2015), https://www.pillsburylaw.com/images/content/6/5/v2/65729/AdvisoryMay2015ECBTakeTwoDOLReproposesChangestoDefinitionofFiduc.pdf [https://perma.cc/AQK8-EEDG].

45. Definition of "Fiduciary," 29 C.F.R. § 2510.3-21(j)(1)(i)(A) (West 2017).

46. 29 C.F.R. § 2510.3-21(j)(1)(i)(B)(2) (emphasis added).

47. *Id.*

48. *Id.* (emphasis added).

49. *Id.*

50. *See generally* David C. Kaleda, *Department of Labor's Proposal to Define "Investment Advice,"* THE INV. LAW., Oct. 2015, at 1 (examining the sections of ERISA which the fiduciary ruled aimed to change).

51. *See* Serota & Bardunias, *supra* note 44 (discussing the changes to the "regular basis" and "primary basis for investment decisions" prongs).

52. *See* Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(35)(B) (2018) (defining defined benefit plans "as a pension plan other than an individual account plan and . . . [one that] shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan").

53. U.S. DEP'T OF LABOR, TYPES OF RETIREMENT PLANS, https://www.dol.gov/general/topic/retirement/typesofplans [https://perma.cc/7578-SAGB].

54. *See* ERISA § 1002(34) (defining defined contribution plans as "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses,

the employee bears the investment risk of the plan's assets and will ultimately have at his or her disposal only the assets in his or her particular account in the plan, not a promised amount from the employer.[55] In 2012, it was estimated that nearly 70% of private-sector retirees held their assets in these defined contribution plans, up from 26% in 1975.[56] It was this shift in retirement savings vehicles, in addition to the explosion of growth in the number of retirees using the Individual Retirement Account ("IRA")[57] that formed the basis for the Obama Administration's efforts to alter the investment advisory regulatory landscape.[58]

III. THE FIDUCIARY RULE

On February 23, 2015, President Obama delivered a speech to the AARP[59] in which he expressed his desire for the DOL to change federal regulations to require financial advisers to place the needs of their clients before the advisers' own financial interests.[60] Obama pointed to the need to take aim at incentives provided to financial advisers by their employers, such as backdoor payments and hidden fees.[61] On the same day, the Council of Economic Advisers released an economic analysis

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and any forfeitures of accounts of other participants which may be allocated to such participant's account").

55. U.S. DEP'T OF LABOR, *supra* note 53.

56. TOPOLESKI & SHORTER, *supra* note 10, at 12.

57. Internal Revenue Code, 26 U.S.C. § 408(a) (2018) ("[T]he term 'individual retirement account' means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries . . . .").

58. *See* TOPOLESKI & SHORTER, *supra* note 10, at 12 (pointing to the $17 billion lost by IRA investors per year due to conflicted investment advice and lack of regulatory safeguards).

59. The AARP, formally known as the American Association of Retired Persons, is an interest group whose stated mission "is to empower people to choose how they live as they age." *About AARP*, AARP, https://www.aarp.org/about-aarp/ [https://perma.cc/2YBV-CZGT] (last visited Jan. 6, 2020).

60. Press Release, The White House, Remarks by the President at the AARP (Feb. 23, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/02/23/remarks-president-aarp [https://perma.cc/J7HK-36XJ] ("If you are working hard, if you're putting away money, if you're sacrificing that new car or that vacation so that you can build a nest egg for later, you should have the peace of mind of knowing that the advice you're getting for investing those dollars is sound, that your investments are protected, that you're not being taken advantage of . . . There are a lot of very fine financial advisors out there, but there are also financial advisors who receive backdoor payments or hidden fees for steering people into bad retirement investments that have high fees and low returns. So what happens is these payments, these inducements incentivize the broker to make recommendations that generate the best returns for them, but not necessarily the best returns for you.").

61. *Id.*

titled "The Effects of Conflicted Investment Advice on Retirement Savings," supplying data in support of the Obama Administration's push to rewrite the rules governing financial advice.[62] The study's key findings were that, due to conflicted advice, retirees experienced roughly a 1% reduction in investment returns and added costs of $17 billion.[63] The report focused in particular on the IRA market and the lower regulatory standard for investment professionals when providing advice on how to execute IRA rollovers.[64] An IRA rollover is the process by which an investor moves his or her retirement account from either an employer-sponsored retirement plan or an existing IRA into a new IRA.[65] Because the IRA rollover is a one-time financial transaction, the advice rendered regarding the rollover did not meet the "regular basis" prong of the 1975 regulations.[66] By extension, this meant that financial advisers who provided guidance on IRA rollovers were not subject to a fiduciary standard of care.[67]

In response to the request from President Obama, on April 6, 2016, then-Secretary of Labor Tom Perez announced the completion of the fiduciary rule.[68] Two days later, the final rule was published in the Federal Register.[69] The remainder of this Part examines the main

62. COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, THE EFFECTS OF CONFLICTED INVESTMENT ADVICE ON RETIREMENT SAVINGS (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf [https://perma.cc/ZJM9-KA2X] [hereinafter CEA REPORT].

63. *Id.* at 2.

64. *Id.* at 3 ("The average IRA rollover for individuals 55 to 64 in 2012 was more than $100,000; losing 12 percent from conflicted advice has the same effect on feasible future withdrawals as if $12,000 was lost in the transfer.").

65. Julia Kagan, *IRA Rollover*, INVESTOPEDIA, https://www.investopedia.com/terms/i/ira-rollover.asp [https://perma.cc/97XE-LNE2] (last updated Apr. 29, 2019).

66. Brad Campbell & Joshua Waldbeser, *Old Standard, New Day: The Death of the Fiduciary Rule Doesn't Mean That Broker-Dealers Won't Be Fiduciaries*, DRINKER BIDDLE & REATH (May 22, 2018), http://www.brokerdealerlawblog.com/2018/old-standard-new-day-the-death-of-the-fiduciary-rule-doesnt-mean-that-broker-dealers-wont-be-fiduciaries/ [https://perma.cc/45A2-Y2TV].

67. *Id*.

68. *See* Melanie Waddell, *Perez: Final DOL Fiduciary Rule Includes Big Changes to Deadlines, BICE*, THINKADVISER (Apr. 6, 2016, 2:10 AM), https://www.thinkadvisor.com/2016/04/06/perez-final-dol-fiduciary-rule-includes-big-change/ [https://perma.cc/T448-LWRS] (detailing the final fiduciary rule's provisions and scheduled implementation date).

69. Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946, 20946 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550).

changes that were to be made to existing federal law under the fiduciary rule.

A. Replacement of the "Five-Part Test" to Qualify as a Fiduciary

Instead of laying out required actions that must be taken for an adviser to trigger the fiduciary standard of care, the fiduciary rule set forth a list of investment-related actions which, if committed in exchange for a fee or commission, would qualify as "investment advice" and subject the adviser to the fiduciary standard.[70] With a few exclusions,[71] any recommendation regarding the acquisition, holding of, or disposal of investment property or securities and how investment property or securities should be rolled over, transferred, or taken out of an employer-sponsored retirement plan or an existing IRA would constitute investment advice.[72] In addition, any recommendations regarding the actual investment strategy, asset allocation, portfolio makeup, or selection of type of investment account, along with how an existing IRA should be managed for planning purposes, would be considered investment advice.[73]

The fiduciary rule also required that the person providing the advice have either (a) represented himself as a fiduciary under the ERISA or the Internal Revenue Code, (b) provided the advice in accord with an oral or written agreement or an understanding that the advice was provided to help the individual needs of the plan participant, or (c) directed tailored advice to a participant in relation to assets contained within a retirement plan or IRA.[74]

B. Exceptions to Actions That Would Ordinarily Trigger Fiduciary

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70. *See* TOPOLESKI & SHORTER, *supra* note 10, at 8–9 (2016) (providing a list of activities that would and would not trigger the fiduciary standard of care).

71. *See* Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. at 20972 (listing exclusions such as assistance provided by platform providers such as assistants to fiduciaries; general communications between advisers or their companies and clients, such as newsletters or television programs; and most forms of investment education provided to clients).

72. *See* Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. at 20948 (listing forms of advice that qualify as investment advice for purposes of the fiduciary rule).

73. *Id.*

74. *Id.*

Status

If an investment adviser had any communication with a person the fiduciary rule deemed to be a "counterparty,"[75] then the adviser was permitted to proceed under the reasonable belief that these types of sophisticated financial professionals would be able to make the investment decisions discussed on their own.[76] Another exemption to fiduciary status occurred when an adviser provided advice regarding swaps and derivative dealings, in accordance with certain procedures.[77] Finally, the fiduciary rule exempted employees of retirement plan sponsors or their affiliates who offered advice to fiduciary advisers or plan participants from qualifying as fiduciaries themselves, provided they did not receive any additional compensation for their advice.[78]

C. *The Best Interest Contract Exemption*

The component of the fiduciary rule that generated considerable debate among academics[79] and heightened scrutiny from the financial industry as a whole was the "best interest contract prohibited transaction exemption" ("BIC Exemption").[80] The BIC Exemption allowed financial advisers to make recommendations that could potentially violate a fiduciary standard *if* specific regulatory requirements were met.[81] This exemption was included to provide broker-dealers a way forward in the

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75. *See id.* (providing that the list of carved out counterparties included "broker-dealers, registered investment advisers, banks, insurance companies . . . or plan fiduciaries who have at least $50 million under management").

76. *See id.* ("At the same time, however, as the Department acknowledged in the proposal, the broad test could sweep in some relationships that are not appropriately regarded as fiduciary in nature . . . .").

77. *See id.* at 20985 (listing the requirements to avoid being deemed a fiduciary in a swap transaction to include the person not be acting as the adviser to the subject plan, there must be an "independent plan fiduciary" representing the plan, etc.).

78. *See id.* at 20986 (defining the scope of the employee/affiliate exception).

79. *See generally* Quinn Curtis, *The Fiduciary Rule Controversy and the Future of Investment Advice* (Univ. of Va. Sch. of Law, Law & Econ. Research Paper Series 2018-04, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3121708 [https://perma.cc/2QTP-M3GE] (arguing that the BIC Exemption is flawed in its design).

80. *See* Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. at 20946–47 (introducing the BIC Exemption).

81. *See id.* at 20991 ("[The BIC Exemption] require[s], among other things, that investment advice fiduciaries adhere to certain Impartial Conduct Standards, which are fundamental obligations of fair dealing and fiduciary conduct, and include obligations to act in the customer's best interest, avoid misleading statements, and receive no more than reasonable compensation.").

changing regulatory environment.[82] Because broker-dealers, unlike investment advisers,[83] conduct business on a transaction-by-transaction basis, they had previously not fallen under the 1975 regulations that imposed a fiduciary duty on the financial professionals who did satisfy the five-prong test.[84]

The BIC Exemption required that financial institutions "acknowledge fiduciary status for itself and its Advisers."[85] The BIC Exemption imposed upon institutions several additional requirements when dealing with retirees: (1) prudent advice in the best interest of the retiree; (2) charging reasonable compensation; (3) a promise to avoid making misleading statements concerning the investments; (4) the implementation of policies to discourage violations of the required standards of conduct; (5) the avoidance of improper incentives for financial representatives; and (6) the fair disclosure of all relevant information surrounding advice.[86] The acknowledgment of the requirements must be in writing prior to any advice or recommendations being made.[87] Crucially, the BIC Exemption provided a private remedy for IRA investors,[88] which created a legal right of action against financial

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82. *See* Press Release, Nat'l Ass'n of Ins. and Fin. Advisors ("NAIFA"), The Best Interest Contract Exemption (June 2015), https://www.naifa.org/NAIFA/media/GovRel/issuefed/The-Best-Interest-Contract-Exemption.pdf [https://perma.cc/CR8R-WDTS] ("The BIC exemption, while intended as a way to allow continuation of the broker-dealer/registered representative model for providing investment advice . . . ."); Ryan Fuhrmann, *Suitability vs. Fiduciary Standards: What's the Difference?*, INVESTOPEDIA, https://www.investopedia.com/articles/professionaleducation/11/suitability-fiduciary-standards.asp [https://perma.cc/RAQ6-Z4YN] (last updated Sept. 9, 2019) (describing how the suitability standard, the prior standard to which broker-dealers were held differs from the newly imposed fiduciary standard).

83. *See* Pete Woodring, *Know the Difference Between a Broker and a Registered Investment Adviser*, KIPLINGER (Sept. 22, 2015), https://www.kiplinger.com/article/investing/T023-C032-S014-the-difference-between-a-broker-and-an-adviser.html [https://perma.cc/K934-4PSN] (discussing how investment advisers such as Registered Investment Advisers (RIAs) generally offer a broader array of services to consumers, such as investment, insurance, education, and retirement planning and are usually compensated in the form of a fee based on the amount of assets under his or her management).

84. *See* Campbell & Waldbeser, *supra* note 66 (describing the shifting regulatory environment for broker-dealers under the fiduciary rule).

85. Best Interest Contract Exemption, 81 Fed. Reg. 21002, 21003 (Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2550).

86. *Id*. at 21007.

87. *Id.* at 21003.

88. *Id.* at 21008; *see* Joshua Waldbeser & Jamie Helman, *The DOL's Best Interest Contract Requirement: Effect on Litigation Against Broker-Dealers*, DRINKER BIDDLE & REATH (Oct. 28, 2017), http://www.brokerdealerlawblog.com/2017/dols-best-interest-

advisers and institutions in the event that the BIC Exemption was allegedly violated.[89]

D. Reactions to the Fiduciary Rule

There was a wide disparity in the reaction to the proposed and final fiduciary rules, both on Capitol Hill and between pro-consumer[90] and pro-business groups.[91] Senator and 2020 presidential candidate Elizabeth Warren, one of the fiercest proponents of the fiduciary rule, pointed to what she perceived as the main source of conflicted advice being given to investors by financial advisers: kickbacks, prizes, bonuses, and other awards offered by financial services companies that would be triggered by the advisers' meeting such things as sales quotas and benchmarks.[92] Warren asserted that the fiduciary rule would force the financial industry to stop these practices and to stop hiding these potential rewards for advisers deep in the pages of product prospectuses.[93] She believed that, without government intervention, the industry would not

contract-requirement-effect-litigation-broker-dealers/ [https://perma.cc/J9T8-J6R5] (describing how ERISA-covered plans did not require anything like the BIC Exemption because there are already legal remedies for breach of fiduciary duties in those plans).

89. Waldbeser & Helman, *supra* note 88.

90. *See* Darla Mercado, *How the New 'Fiduciary' Rule Will Actually Affect You*, CNBC (Oct. 13, 2016, 10:33 AM), https://www.cnbc.com/2016/10/13/how-the-new-fiduciary-rule-will-actually-affect-you.html [https://perma.cc/4RGC-BRLS] ("'The Department of Labor has done what the Securities and Exchange Commission is unable to do: create an enforceable best interest standard and rein in conflicts that aren't in the best interest of the investor,' said Barbara Roper, director of investor protection at the Washington, D.C.-based Consumer Federation of America.").

91. *See* Tim Devaney, *Chamber Waging Lobbying Battle Over Investment Rule*, THE HILL (Mar. 7, 2016, 3:24 PM) https://thehill.com/regulation/labor/272079-chamber-waging-lobbying-battle-over-investment-rule [https://perma.cc/ZFS4-BMHA] (looking at the concerted effort led by the U.S. Chamber of Commerce to fight back against what it perceived as negative effects of the fiduciary rule).

92. OFFICE OF SENATOR ELIZABETH WARREN, VILLAS, CASTLES, AND VACATIONS: AMERICANS' NEW PROTECTIONS FROM FINANCIAL ADVISER KICKBACKS, HIGH FEES, & COMMISSIONS ARE AT RISK 4 (2017 ed.), https://www.warren.senate.gov/files/documents/2017-2-3_Warren_DOL_Rule_Report.pdf [https://perma.cc/G4RA-UZ29] ("The Conflict of Interest Rule put in place by DOL will put a stop to these harmful kickbacks. The new rule prohibits financial firms from compensating their advisers in ways that encourage and reward them for making recommendations that are not in their clients' best interest.").

93. *Id.*

end these practices on its own.[94] Many of her fellow Democratic politicians shared her favorable views of the fiduciary rule.[95]

On the other hand, Republicans held much more skeptical views of the fiduciary rule.[96] Then-Chairman of the Senate Finance Committee, Orrin Hatch, echoed his Republican colleagues in voicing concern that the fiduciary rule would force financial advisers into an environment with higher compliance costs and reduce the number of choices in advisers and investment products that would be available to everyday investors.[97] These assertions were mirrored by financial advisers who, under the new regulations, were placed at a greater risk of class-action litigation.[98] Advisers were also concerned that, with the forced move away from commission-style payments, which the Obama Administration viewed as generating conflicts of interest,[99] small investors would be effectively forced out of the market for financial advice because a fee on an account with a small investable balance would not be worth an adviser's time and energy.[100]

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94. *Id.*

95. Bobby Scott, Maxine Waters, & Elijah Cummings, *Time to Curb High Fees on Retirement Accounts*, CNBC (Apr. 14, 2016, 10:45 AM), https://www.cnbc.com/2016/04/14/time-to-curb-high-fees-on-retirement-accounts-commentary.html [https://perma.cc/CYR6-A6VT] (discussing commentary by Bobby Scott, Maxine Waters, and Elijah Cummings, members of the U.S. House of Representatives and the top Democrats on the committees on Education and the Workforce, Financial Services, and Oversight and Government Reform, respectively).

96. Representative Phil Roe (R-TN), the Chairman of the House Subcommittee on Health, Employment, Labor, and Pensions stated the following: "[The] new regulatory scheme will hinder access to retirement advice for low- and middle-income families and make it harder for small businesses to help their employees plan for retirement . . . ." Melanie Waddell, *GOP Fights to Block DOL Fiduciary Rule*, THINKADVISOR (Apr. 19, 2016, 9:21 AM), https://www.thinkadvisor.com/2016/04/19/gop-fights-to-block-dol-fiduciary-rule/?t=riasrefchannel-more-news [https://perma.cc/D2AF-QDMT]. Representative Ann Wagner (R-MO) stated the following: "[The new rule] hurts those it claims to protect: low- and middle-income families who are looking for sound investment advice in the midst of a savings crisis. The unquestionably flawed rule raises costs, limits choices and restricts access to investments for hardworking Americans." *Id.*

97. Press Release, Office of Senator Orrin Hatch, Hatch Statement of DOL Fiduciary Rule (Apr. 6, 2016), https://www.finance.senate.gov/chairmans-news/hatch-statement-on-dol-fiduciary-rule [https://perma.cc/45J9-PCWZ].

98. *See* Liz Skinner, *The DOL Fiduciary Rule Will Forever Change Financial Advice, and the Industry Has to Adapt*, INVESTMENTNEWS (June 9, 2016, 11:34 AM), https://www.investmentnews.com/article/20160509/FEATURE/160509939 [https://perma.cc/874B-E7D9] (describing the potential litigation facing advisers under the fiduciary rule).

99. CEA REPORT, *supra* note 62, at 2.

100. Brad Allen, *Advisers Do the Math on Fiduciary Rule Compliance*, STARTRIBUNE (Apr. 29, 2017, 2:00 PM), http://www.startribune.com/advisers-do-the-math-on-fiduciary-rule-compliance/420548943/ [https://perma.cc/X4JD-SRT3] ("[M]oving away from

In June 2016, a collection of financial industry advocacy groups, spearheaded by the United States Chamber of Commerce, sued[101] the DOL.[102] The groups cited many of the same reasons as the Republicans on Capitol Hill, pointing to what they perceived to be the fiduciary rule's whittling away of the investment selections that would be available for financial advisers to offer their clients and what would effectively be a cloud of potential legal liability hanging over all future interactions between advisers and clients.[103]

This litigation culminated in the Fifth Circuit's decision to vacate the entire fiduciary rule in March 2018.[104] First, the court held that the fiduciary rule conflicted with federal law, that the DOL misinterpreted "investment advice fiduciary" to be ambiguous,[105] and that this interpretation of fiduciary would disrupt the uniform application of the word "fiduciary" through the ERISA law.[106] Second, the court held that the policy argument for the need to modernize ERISA for the better protection of today's retirement investors was one that should be addressed by Congress, not the executive branch.[107] Finally, the court held that the fiduciary rule did not satisfy the requirements set forth by the *Chevron*[108] doctrine.[109] Specifically, the court held that the fiduciary rule violated step two of the doctrine, which requires courts to determine "whether [or not] Congress intended to delegate interpretive authority over a question to the agency asserting deference" regarding an ambiguous portion(s) of a statute.[110] In pointing to the many

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commissions would leave smaller investors without access to financial advice, since a percentage fee on a small account would not justify an adviser's time.").

101. Chamber of Commerce of the United States of America v. Hugler, 231 F. Supp. 3d 152 (N.D. Tex. 2017).

102. Monica C. Meinert, *Industry Groups Sue DOL over Fiduciary Rule*, ABA BANKING J. (June 2, 2016), https://bankingjournal.aba.com/2016/06/industry-groups-sue-dol-over-fiduciary-rule/ [https://perma.cc/B3KR-7PJE].

103. *See id.* (laying out the concerns of the financial industry and how the potential liability could restrict interactions with consumers).

104. Chamber of Commerce of the United States of America v. U.S. Dep't of Labor, 885 F.3d 360, 369 (5th Cir. 2018); Lisa Beilfuss, *Fiduciary Rule Dealt Blow by Circuit Court Ruling*, WALL ST. J. (Mar. 15, 2018, 9:48 PM), https://www.wsj.com/articles/fiduciary-rule-dealt-blow-by-circuit-court-ruling-1521164915?mod=article_inline [https://perma.cc/8F32-P63V].

105. *U.S. Chamber of Commerce*, 885 F.3d at 369.

106. *Id.* at 376–78.

107. *Id.* at 378–79.

108. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (laying out the test that has formed the foundation for the boundaries of administrative deference).

109. *U.S. Chamber of Commerce*, 885 F.3d at 379–80.

110. *Id.* at 387.

administrative flaws it perceived in the fiduciary rule, the court concluded that the fiduciary rule possessed "hallmarks of 'unreasonableness' under *Chevron* Step Two and [constituted] arbitrary and capricious exercises of administrative power."[111]

Crucially for the financial industry, the court took aim at the fiduciary rule's portions that relate to legal liability on the part of advisers and their financial institutions.[112] The court criticized the fiduciary rule for its attempted creation of vehicles for private litigation through the BIC Exemption contracts.[113] The court pointed to the need for Congress to authorize a private right of action, which it did for ERISA-qualified retirement plans through the enactment of ERISA itself but *did not* for plans such as IRAs.[114] The elimination of the fiduciary rule set the stage for the SEC to step in with its own solution to address the issue of conflicted retirement advice.[115]

IV. THE SEC BEST INTEREST PACKAGE

On June 5, 2019, the SEC formally announced that it had voted in favor of a new package ("SEC package") of investor protection regulations.[116]

A. General Overview of SEC Package

The SEC package centers around the difference in regulatory standards between a broker-dealer, governed under the Exchange Act,[117] and an investment adviser, governed under the Investment Advisers Act

111. *Id.* at 388.

112. *See id.* at 384 ("[T]he BICE provisions regarding lawsuits also violate the separation of powers . . . .").

113. *Id.*

114. *Id.*

115. *See* Dave Michaels, *Brokers Will Have to Reveal More to Investors Under Coming SEC Rule*, WALL ST. J. (Mar. 15 2018, 1:05 PM), https://www.wsj.com/articles/brokers-will-have-to-reveal-more-to-investors-under-coming-sec-rule-1521133534?mod=searchresults&page=1&pos=1&mod=article_inline [https://perma.cc/XYY7-4YYU] (speculating on the SEC's plans for a new regulatory framework to replace the fiduciary rule).

116. Press Release, U.S. Sec. and Exch. Comm'n, SEC Adopts Rules and Interpretations to Enhance Protections and Preserve Choice for Retail Investors in Their Relationships with Financial Professionals (June 5, 2019), https://www.sec.gov/news/press-release/2019-89 [https://perma.cc/38VV-P8SR].

117. Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2018).

of 1940.[118] The SEC aims to assure the investor that he or she is receiving information that is in the investor's "best interest," not in the financial interests of the broker, adviser, or financial firm.[119] The SEC package identifies the same problems that the fiduciary rule sought to eliminate: inherent conflicts of interest in the financial advising process emanating from the commission-based compensation structure.[120]

However, in a sharp deviation from the view that the Obama Administration held of the commission-based compensation structure,[121] under the direction of President Trump-appointed Chairman Jay Clayton, the SEC sought a more balanced approach between the concerns of investors and the financial advisory industry.[122] The SEC pointed to the positive impacts that the commission-based compensation structure has had on the industry, such as the typical example of the investor seeking only a one-time investment and holding it for a number of years.[123] That investor benefits from the commission structure because he or she saves money through not having to pay fees on a balance that was not being actively traded or managed.[124] Additionally, for many consumers with small amounts of investable assets, the commission structure provides the only possible access to investment advice because many fee-based

118. Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21 (2018).

119. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318, 33319 (July 12, 2019) (to be codified at 17 C.F.R. pt. 240) (requiring that "broker-dealers . . . [a]ct 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 ahead of the interests of the retail customer . . . .").

120. *Id.*

121. *See* Liz Skinner, *Figuring out Fiduciary: Now Comes the Hard Part*, INVESTMENTNEWS (May 9, 2016), https://www.investmentnews.com/article/20160509/FEATURE/160509939/the-dol-fiduciary-rule-will-forever-change-financial-advice-and-the [https://perma.cc/5NHQ-D6GA] (asserting that the fiduciary rule's BIC Exemption, while not outright banning commissions, would have forced the financial adviser to earn "reasonable" compensation only, in addition to its other disclosure requirements; also that the sale of high-commission annuity products was expected to decrease under the fiduciary rule).

122. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. at 33319 ("[T]he relationship between a broker-dealer and a customer has inherent conflicts of interest, including those resulting from a transaction-based (e.g., commission) compensation structure and other broker-dealer compensation . . . Notwithstanding these inherent conflicts of interest in the broker-dealer-customer relationship, there is broad acknowledgement of the benefits of, and support for, the continuing existence of the broker-dealer business model . . . .").

123. *Id.*

124. *Id.*

advisers[125] require a minimum amount to be invested before entering into a professional advisory relationship.[126]

B. Component of the SEC Package

The SEC package centers on "Regulation Best Interest," which includes the regulation's "General Obligation" for broker-dealers.[127] The General Obligation requires four components: (1) a "Disclosure Obligation," (2) a "Care Obligation," (3) a "Conflict of Interest Obligation," and (4) a "Compliance Obligation."[128] The package also contains "Form CRS,"[129] a new requirement defining relationships with broker-dealers and investment advisers and their clients, along with two new interpretations of the fiduciary duty.[130]

1. Disclosure Obligation

The broker-dealer must disclose: its title as a broker-dealer in dealings with a client, the scope of the broker-dealer's relationship with the client, the material costs and fees that the client will incur, and any possible conflicts of interest that might come between the broker-dealer's acting in the client's best interest.[131]

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125. In other words, the adviser gets paid a percentage of assets under management ("AUM") instead of receiving a commission on the purchase of an investment product. Roger Wohlner, *What You Need to Know About Fee-Only Financial Advisors*, INVESTOPEDIA, https://www.investopedia.com/articles/investing/102014/feeonly-financial-advisers-what-you-need-know.asp [https://perma.cc/X8W7-HV3C] (last updated Oct. 14, 2019).

126. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. at 33319 ("Retail customers with limited investment assets may benefit from broker-dealer recommendations when they do not qualify for advisory accounts because they do not meet the account minimums often imposed by investment advisers.").

127. *Id.* at 33320.

128. *Id.*

129. Form CRS Relationship Summary; Amendment to Form ADV, 84 Fed. Reg. 33492, 33492 (July 12, 2019) (to be codified at 17 C.F.R. pts. 240, 249, 275, and 279).

130. Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33669, 33669 (July 12, 2019) (to be codified at 17 C.F.R. pt. 276).

131. Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. at 33321.

2. Care Obligation

The broker-dealer is required to use "reasonable diligence, care, and skill when making a recommendation to a retail customer."[132] The risk and potential return of the recommended investment products must be considered in light of the client's investment objectives, along with any other reasonable investment alternatives that could fit the client's needs.[133]

3. Conflict of Interest Obligation

The broker-dealer "must establish, maintain, and enforce reasonably designed written policies and procedures addressing conflicts of interest associated with its recommendation to retail customers."[134] This prong of the General Obligation harkens back to some of the chief goals of the DOL fiduciary rule, as it requires disclosure of "sales contests, sales quotas, bonuses, and non-cash compensation"[135] that might sway broker-dealers to place their own financial interests above those of the client seeking advice.[136]

4. Compliance Obligation

The broker-dealer "must also establish, maintain, and enforce written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest as a whole."[137] This component of the SEC package is designed to tie together adequate compliance with all aspects of new rules, not just a selected few.[138]

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132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *See id.* ("[A] broker-dealer's policies and procedures must address not only conflicts of interest but also compliance with its Disclosure and Care Obligations under Regulation Best Interest.").

C. Reaction to the SEC Package

The reaction to the SEC package has been a practical mirror image of the reaction received by the fiduciary rule.[139] As the details of the proposed SEC package became public, Senator Warren criticized the proposal for what she perceived to be its failure to adequately shield consumers from unscrupulous financial advisers.[140] She pointed to the discrepancies between the package and the DOL fiduciary rule, such as the package's failure to definitively place broker-dealers under a fiduciary standard.[141] Instead, the package places broker-dealers under a vaguely defined "best interest standard."[142] She advocated that the SEC outright ban the types of incentives that she asserted were the "source"[143] of conflicted advice, such as competitions fostered by the financial services companies among their broker-dealers.[144] Finally, she took issue with the fact that, under the SEC package, there was no private right of action supplied to investors to sue their broker-dealers.[145] In her view, the legal remedies available to consumers—FINRA arbitration proceedings or independent SEC enforcement—were not sufficient to discourage broker-dealers from pushing the boundaries of appropriate behavior with their investors.[146] These concerns are shared by consumer and investor advocacy groups.[147]

Conversely, several Republican members of Congress expressed to Chairman Clayton their approval of the SEC's collaboration with the financial industry to protect investors from possible conflicts of interest

139. *See* Press Release, Bates Group, SEC Adopts Regulation Best Interest: Early Reaction and Its Impact (June 13, 2019), https://www.batesgroup.com/news/sec-adopts-regulation-best-interest-early-reaction-and-its-impact [https://perma.cc/H5UR-F3W9] (stating the different reactions to the package, both from different advocacy groups and the SEC Commissioners themselves).

140. Elizabeth A. Warren, *Worried About Wall Street Conflicts? The SEC Isn't*, BLOOMBERG: OPINION (Aug. 3, 2018), https://www.bloomberg.com/opinion/articles/2018-08-03/worried-about-wall-street-conflicts-the-sec-isn-t [https://perma.cc/JVA2-U9G8].

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* Sarah O'Brien, *SEC Adopts Rule to Protect Ordinary Investors, but Critics Say It's Too Lax*, CNBC (June 5, 2019, 12:20 PM), https://www.cnbc.com/2019/06/05/sec-adopts-rule-to-protect-ordinary-investors-critics-say-its-too-lax.html [https://perma.cc/Q2LU-WTKR] ("The obligation to act in the best interests of the customer in the regulation simply codifies the obligation to make recommendations that are 'consistent with the investor's best interests.'").

while simultaneously maximizing the menu of investment options advisers can offer.[148] Industry advocates such as the United States Chamber of Commerce[149]—the same group who headed the effort to invalidate the fiduciary rule—also applauded the SEC package for its balancing efforts.[150]

There are efforts currently underway in Congress to block the SEC from enforcing the new package of rules.[151] The House of Representatives, acting on an amendment sponsored by Maxine Waters, the Chairwoman of the House Financial Services Committee, voted to prohibit the SEC from using congressionally appropriated funds to enforce the new package.[152] While not expected to be signed into law by the Trump Administration, the amendment signals the hostility to the SEC package held by congressional Democrats and a view that might be held by a future Democratic president with the ability to appoint his or her desired commissioners to the SEC.[153] The amendment, in addition to being opposed by all House Republicans—and even a few Democrats[154]—is criticized by the Securities Industry and Financial Markets Association ("SIFMA")[155] as an unjustified attempt to halt the

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148. *See* Members of Congress, Comment Letter on SEC's Proposed Regulation Best Interest (Aug. 8, 2018), https://www.sec.gov/comments/s7-07-18/s70718-4201409-172824.pdf [https://perma.cc/9RQL-3LM4] ("[W]e believe it is critical to maintain multiple business models based on the needs and preferences of an investor over their lifetime.").

149. *See* Chamber of Commerce of the United States of America, Comment Letter on SEC's Proposed Regulation Best Interest (May 16, 2019), https://www.sec.gov/comments/s7-07-18/s70718-5528937-185232.pdf [https://perma.cc/W7GN-NQM3] (pointing to the SEC package's preservation of "the transaction-based payment models for financial services that better serve the needs of the consumers, especially those with small account balances" as a positive aspect of the SEC package).

150. *See* O'Brien, *supra* note 147 ("Supporters of the rule say it will be an improvement over current standards for brokers, which only require them to make sure an investment is 'suitable' for a client.").

151. Sarah O'Brien, *House Passes Bill That Would Block Enforcement of SEC Investor Protection Rule*, CNBC (June 26, 2019 3:59 PM), https://www.cnbc.com/2019/06/26/house-passes-bill-blocking-enforcement-of-sec-investor-protection-rule.html [https://perma.cc/UYA3-GANV].

152. Brian Croce, *House Passes Amendment to Block Reg BI, but Senate Not Likely to Follow*, PENSIONS & INVESTMENTS (June 26, 2019, 3:53 PM), https://www.pionline.com/legislation/house-passes-amendment-block-reg-bi-senate-not-likely-follow [https://perma.cc/2A3B-E9E4].

153. *See id.* ("[T]he amendment will not be signed into law and mainly serves as a messaging piece.").

154. H.R. 3351, 116th Cong. (1st Sess. 2019).

155. SIFMA is described as "the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets." *About SIFMA*, SIFMA, https://www.sifma.org/about/ [https://perma.cc/6GGA-N2ZT] (last visited Feb. 7, 2020).

implementation and enforcement of the SEC package.[156] SIFMA praised the new package as "the most comprehensive enhancement of standard of conduct rules governing broker-dealers since the enactment of the Securities and Exchange Act of 1934."[157]

Also, in September 2019, several states[158] and the District of Columbia challenged[159] the SEC package as a violation of federal law[160] and, as a result "arbitrary, capricious, [and] an abuse of discretion . . . ."[161] Specifically, the lawsuit alleges that the SEC violated its directions in the Dodd-Frank Act where it was instructed to do the following:

> harmonize the standards that apply to broker-dealers and investment advisers . . . and [to provide] that 'the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers . . . shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.[162]

This litigation provides another example—just as the lawsuit[163] that challenged and eventually defeated the fiduciary rule—of the degree to which the fight over how to address the issue of conflicted financial advice has become so politicized and divisive.[164] The lawsuit, should it

156. Press Release, Sec. Indus. & Fin. Mkts. Ass'n., Waters Amendment to Defund Reg BI Would Undermine Inv'r Prot. (June 25, 2019), https://www.sifma.org/resources/news/waters-amendment-to-defund-reg-bi-would-undermine-investor-protection/ [https://perma.cc/Z9MB-9LD8].

157. *Id.*

158. New York, California, Connecticut, Delaware, Maine, New Mexico, and Oregon. Dave Michaels, *Seven States Sue SEC on Concern Broker Rule Is Weak*, WALL ST. J. (Sept. 9, 2019, 11:31 PM), https://www.wsj.com/articles/seven-states-sue-sec-on-concern-broker-rule-is-weak-11568085859 [https://perma.cc/UVM5-WAK9].

159. State v. U.S. Sec. & Exch. Comm'n, No. cv-08365-VM (S.D.N.Y. Sept. 9, 2019).

160. *See* Dodd-Frank §§ 913 (g)(1)–(2), 124 Stat. 1828-29 (2010) (detailing the provisions granting the SEC the authority to create matching standards of conduct for broker-dealers and investment advisers).

161. Complaint for Declaratory and Injunctive Relief at 3–4, *U.S. Sec. & Exch. Comm'n*, No. cv-08365-VM.

162. *Id.* at 2–3.

163. U.S. Chamber of Commerce v. U.S. Dep't of Labor, 885 F.3d 360 (5th Cir. 2018).

164. *See* Michaels, *supra* note 158 (looking at the current lawsuit against the SEC package and the history of litigation surrounding investment advice).

succeed in its mission to void the SEC package, would have the effect of returning the regulatory landscape in the financial advice industry to its pre-fiduciary rule status after ten years of fighting in Washington, D.C.[165] Therefore, even if the SEC package has set the proper standards of care for broker-dealers and investment advisers, the politicization of this issue makes it unlikely that the SEC package will withstand the test of time.[166]

V. STATE INVESTOR PROTECTION LAWS

In light of the uncertainty and legal limbo generated by the fiduciary rule and SEC package, multiple states have taken it upon themselves to enact legislation or regulations to address the issue of conflicting retirement advice.[167] Each state that elects to implement its own investor protection laws and regulations must ensure that the policies are not preempted by federal legislation, either expressly or implicitly.[168] Legal challenges could arise to state investor protection laws on the grounds that the National Securities Market Improvement Act ("NSMIA")[169] expressly preempts these types of state policies.[170] The SEC package could also be construed to implicitly preempt any new state policies that aim to achieve the same goals that the SEC package was meant to tackle.[171]

Four states in particular have advanced, in varying stages, legislation or regulation to attempt to fill the void left by the vacation of the DOL fiduciary rule: New Jersey, Massachusetts, Nevada, and New

165. *See generally* Makini Brice, *Seven U.S. States, District of Columbia Sue to Block SEC Rule Change*, REUTERS (Sept. 9, 2019, 10:16 PM), https://www.reuters.com/article/us-usa-sec-bestinterest/seven-u-s-states-district-of-columbia-sue-to-block-sec-rule-change-idUSKCN1VV04T [https://perma.cc/XR6T-JYUW] (describing the lawsuit challenging the SEC package).

166. *See* Croce, *supra* note 152 (foreshadowing a potential attempt to alter the SEC package should the presidency return to Democratic control).

167. *See The Pros and Cons of State Fiduciary Rules*, INVESTMENTNEWS (June 22, 2019, 6:00 AM), https://www.investmentnews.com/article/20190622/FREE/190629990/the-pros-and-cons-of-state-fiduciary-rules [https://perma.cc/6CML-QJQF] (discussing the potential coexistence of federal and state investor protection rules).

168. DAVID C. BOCH & JASON S. PINNEY, MORGAN LEWIS, SIFMA REGULATION BEST INTEREST SEMINAR 6–9, (July 10, 2019), https://www.morganlewis.com/-/media/files/publication/presentation/seminar/2019/outline-for-panel-discussion-on-whats-next-state-fiduciary-rules-and-preemption.ashx [https://perma.cc/27EL-7BRL].

169. National Securities Market Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C. (2006)).

170. BOCH & PINNEY, *supra* note 168, at 6–7.

171. *Id.*

York.[172] The inception of these state laws and regulations that strongly mirror the federal fiduciary rule has introduced several issues which the financial advisory industry will have to address, besides the unanswered question of possible preemption.[173] The following subsections detail these individual efforts by states to strengthen investor protections, along with the early reactions to these regulatory efforts.

A. New Jersey

In April 2019, the state announced the implementation of a "fiduciary duty"[174] that would apply to broker-dealers, investment advisers, and investment adviser representatives.[175] The proposed regulation, promulgated in response to the 2018 elimination of the DOL fiduciary rule, requires an adviser acting as a fiduciary to not "subordinate clients' interests to its own," to act with "loyalty and care," and to "fully disclose to its clients all material facts relating to the conflict [of interest, if any]."[176]

Industry advocates lobbied for the state regulations to be suspended until the results of the new SEC rule are able to be quantified and analyzed.[177] The industry advocates first assert that competing state and federal regulations will only add to the confusion of both investors and financial professionals.[178] They also raise the issue of investors'

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172. *See* Ian Wenik, *The States Setting up Their Own Fiduciary Rules*, CITYWIRE (Mar. 13, 2019), https://citywireusa.com/registered-investment-advisor/news/the-states-setting-up-their-own-fiduciary-rules/a1209414?i=8 [https://perma.cc/D9M5-SSWD] (listing the states that have thus far implemented or announced laws and rules that pertain to investor protection and the fiduciary status of financial advisers).

173. *See* James F. Jorden, *INSIGHT: SEC 'Best Interest' Rule and Proposed State Fiduciary Rules–Common Law and Preemption Tests*, BLOOMBERG (June 28, 2019, 4:00 AM), https://news.bloomberglaw.com/securities-law/insight-sec-best-interest-rule-and-proposed-state-fiduciary-rules-common-law-and-preemption-tests [https://perma.cc/3GGL-3HTC] ("Efforts by state regulators to adopt a sales conduct model based on the 'fiduciary' standards in the DOL's rule would result in a patchwork of different standards (and different, uncharted boundaries for conduct) that run afield of traditional common law definitions.").

174. Fiduciary Duty of Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives, 51 N.J.R. 493(a) (proposed Apr. 15, 2019).

175. *Id.*

176. *Id.*

177. Mark Schoeff Jr., *New Jersey Fiduciary Rule: Pressure Leads to Public Hearing, Comment Deadline Extension*, INVESTMENTNEWS (July 17, 2019, 2:22 PM) [hereinafter Schoeff Jr., *New Jersey Fiduciary Rule*], https://www.investmentnews.com/article/20190617/FREE/190619935/new-jersey-fiduciary-rule-pressure-leads-to-public-hearing-comment [https://perma.cc/C2GU-ZFCR].

178. *Id.*

moving from state to state as possibly providing yet another obstacle to investors' having a clear idea on the standard of care that is required of the financial advisor they have chosen.[179] On the other hand, proponents of the state rule point to the alleged failure of the SEC package to adequately shield investors from conflicting investment advice and that the state regulation will impose upon financial professionals the necessary fiduciary standard.[180] The state argues that the SEC package is not on par with regulations that impose a fiduciary duty and that the new state rule can coexist with the SEC package.[181]

B. Massachusetts

In June 2019, the state proposed a "fiduciary conduct standard" for all broker-dealers, agents, investment advisers, and investment adviser representatives in their interactions with customers and clients.[182] The Massachusetts Secretary of State designed the standard so that the state's financial advisers would be required to act in "the best interest of customers and clients, without regard to the interests of the broker-dealer, advisory firm and its personnel."[183] The Secretary based the new standard on the "common law fiduciary duties of care and loyalty."[184] The proposed regulation would apply to recommendations, advice, and the selection of account types.[185]

179. Bernice Napach, *Brokerage Industry Blasts NJ Fiduciary Rule at Hearing*, THINKADVISOR (July 18, 2019, 3:49 PM), https://www.thinkadvisor.com/2019/07/18/brokerage-industry-blasts-nj-fiduciary-rule-at-hearing/ [https://perma.cc/DY88-JXN6] (describing some of the complaints of the financial services industry over the proposed New Jersey rule, including one wealth advisor who said, "If our advice and our services have to vary from state to state, it will be very confusing to our clients and will require very substantial increased costs that they should not have to bear" in protest of the propposal).

180. Schoeff Jr., *New Jersey Fiduciary Rule*, *supra* note 177.

181. *Id.*

182. Press Release, Sec'y of the Commonwealth of Mass., Preliminary Solicitation of Public Comments: Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives (June 14, 2019), https://www.sec.state.ma.us/sct/sctfiduciaryconductstandard/fiduciaryconductstandardidx.htm [https://perma.cc/K4ED-2QLF].

183. Melanie Waddell, *Galvin Proposes Fiduciary Rule in Massachusetts*, THINKADVISOR (June 14, 2019, 4:06 PM), https://www.thinkadvisor.com/2019/06/14/galvin-proposes-fiduciary-rule-in-massachusetts/ [https://perma.cc/AH3V-HEYY].

184. *Id.*; *see Fiduciary*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the term to mean a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires).

185. Press Release, Sec'y of the Commonwealth of Mass., *supra* note 182.

The state asserted that the SEC package has failed to properly define the term "best interest" and thus left investors exposed to the potential pitfalls of conflicted investment advice.[186] Like the New Jersey proposal, industry advocates such as SIFMA worry this proposal will generate confusion both among investors over the standard of care to which their adviser is held and among advisers over how to comply with competing federal and state regulatory frameworks.[187] These concerns, in addition to the added compliance cost, are the industry's reasons for requesting that the state hold off on implementing its own fiduciary rule until the SEC package can be allowed to take effect.[188]

C. Nevada

In June 2017, then-Governor of Nevada Brian Sandoval signed a mandate[189] that imposed on all Nevada financial planners a "duty of a fiduciary toward a client."[190] The law requires planners to disclose "any gain the financial planner may receive, such as profit or commission, if [the planner's] advice is followed."[191] Crucially, the law also grants clients a right to sue financial planners who do any of the following: "(a) violate[s] any element of his or her fiduciary duty; (b) was grossly negligent in selecting the course of action advised, in light of all the client's circumstances known to the financial planner; or (c) violated any law of [Nevada] in recommending the investment or service."[192]

In January 2019, the Nevada Secretary of State announced proposed regulations to implement the 2017 law.[193] The proposed regulations impose a fiduciary duty on all broker-dealers or sales

186. *Id.*

187. *See* Press Release, SIFMA, Comments on Massachusetts Fiduciary Rule Proposal (July 26, 2019), https://www.sifma.org/resources/news/sifma-comments-on-massachusetts-fiduciary-rule-proposal/ [https://perma.cc/JD76-57G3] ("We believe that once Reg BI is fully operational and the SEC, FINRA and state regulators begin examining for compliance, the Division will find that Massachusetts investors are receiving substantial additional protections while continuing to have access to the numerous choices and opportunities they have today.").

188. *Id.*

189. Andrew Hartnett, *Nevada Imposes Statutory Fiduciary Duty on Broker Dealers*, GREENSFELDER, HEMKER & GALE, P.C. (June 2017), https://www.greensfelder.com/newsroom-publications-Nevada-imposes-statutory-fiduciary-duty-on-broker-dealers.html [https://perma.cc/EFJ4-S7X5].

190. Nev. Rev. Stat. § 628A.020 (2018).

191. *Id.*

192. § 628A.030.

193. Press Release, Sec'y of State of the State of Nev., Notice of Draft Regulations and Request for Comment (Jan. 18, 2019), [https://perma.cc/2L3X-EZ6A].

representatives who: "(a) provide investment advice; (b) perform discretionary trading; (c) maintain assets under management; (d) act in a fiduciary capacity towards the client; (e) disclose fees or gains; (f) through the completion of any contract; and (g) through the term of engagement of services."[194] Broker-dealers and sales representatives who engage in the following activities are exempted from an ongoing fiduciary duty; rather, they owe the customer a fiduciary only relating to the specific transaction at hand:

1. The broker-dealer does not manage client's assets;
2. The broker-dealer does not create periodic financial plans for the client, provide ongoing investment advice or enter into a contract to provide investment advice;
3. The broker-dealer does not perform discretionary trading for the client; and
4. The broker-dealer has not otherwise developed a fiduciary duty with the client. [195]

Multiple financial services firms oppose the proposed regulations, saying that they will either be forced to stop offering retail brokerage in the state or that investment options will be strictly limited.[196] The North American Securities Administrator Association ("NASAA"),[197] an advocate for state securities regulators, has come out on the other side of those financial services firms and groups like SIFMA.[198] NASAA argues that the securities industry is able to handle these complex changes in the regulatory environment and that state regulation can coexist with the SEC package.[199] There is early evidence that demonstrates the effectiveness that this type of proper, tailored

194. *Id.*

195. *Id.*

196. Ian Wenik, *Morgan Stanley Says It Could Leave Nevada over Fiduciary Law*, CITYWIRE (Mar. 14, 2019), https://citywireusa.com/registered-investment-advisor/news/morgan-stanley-says-it-could-leave-nevada-over-fiduciary-law/a1210356 [https://perma.cc/LHA9-AYU7].

197. NASAA describes itself as "the voice of state securities agencies responsible for efficient capital formation and grass-roots investor protection." *About Us*, NASAA, https://www.nasaa.org/about-us/ [https://perma.cc/K57P-29VA] (last visited Feb. 7, 2020).

198. Mark Schoeff Jr., *State Securities Regulators Back Nevada's Fiduciary Rule Proposal*, INVESTMENTNEWS (Mar. 7, 2019, 2:14 PM), https://www.investmentnews.com/article/20190307/FREE/190309942/state-securities-regulators-back-nevadas-fiduciary-rule-proposal [https://perma.cc/HYB4-M2TA].

199. *Id.*

regulation can have on accomplishing the goal that federal and state regulators have been aiming for: the protection of investors from unethical and improper actions by investment advisers.[200]

D. New York

There are currently efforts underway in the New York legislature to impose a fiduciary standard on all financial advisers operating within the state's borders.[201] The rationale behind the idea is similar to that of New Jersey's proposed investor protection laws: the SEC package does not go far enough to shield investors from potential predatory practices.[202] This follows the successful implementation of a state regulation that required financial services professionals who advise on insurance and annuity products act in the consumer's best interests and not allow external incentives to cloud their advice.[203]

VI. CONCLUSION

One of the criticisms of Dodd-Frank was that it was far too broad and that it instituted cumbersome restrictions on financial institutions that were not equipped to deal with such regulation.[204] The main objection was that the financial world is not a monolith in which all financial institutions are created equal.[205] The same principle can be applied to the

200. *See* Lisa Beilfuss, *When New Investor-Protection Rules Come Up Short, States Step In*, WALL ST. J. (Sept. 6, 2019, 10:09 AM), https://www.wsj.com/articles/when-new-investor-protection-rules-come-up-short-states-step-in-11567778985 [https://perma.cc/F8R4-MGSQ] (describing how a Nevada investor requested her life savings be managed conservatively, the broker-dealer's choosing to place the money in a risky investment to generate higher returns, and the investor's use of the state's fiduciary rule to take the broker and his firm to court).

201. *See* Mark Schoeff Jr., *New York Lawmaker Works on Bill to Establish Fiduciary Duty for Advisers in State*, INVESTMENTNEWS (July 3, 2019, 1:05 PM), https://www.investmentnews.com/article/20190703/FREE/190709974/new-york-lawmaker-works-on-bill-to-establish-fiduciary-duty-for [https://perma.cc/8TVF-NNPZ] ("[The Assemblyman] is now crafting a bill that would impose a fiduciary standard on all advisers in New York.").

202. *Id.*

203. Mark Schoeff Jr., *New York Issues Final Best-Interest Regulation for Annuity, Life Insurance Sales*, INVESTMENTNEWS (July 18, 2018), https://www.investmentnews.com/article/20180718/free/180719913/new-york-issues-final-best-interest-regulation-for-annuity-life [https://perma.cc/22HE-AVWQ].

204. *See* Diego Zuluaga, *Dodd-Frank Is in Trouble – and for Good Reason*, CATO INST. (Mar. 26, 2018), https://www.cato.org/publications/commentary/dodd-frank-trouble-good-reason [https://perma.cc/CAH4-5XA8] (criticizing the expansive reach of Dodd-Frank).

205. *Id.*

financial advice industry, where there is a wide disparity in the amount of advice consumers require, the types of financial advisers available, and the methods in which advisers are compensated.[206] A tailored approach to this problem of balancing the interests of investors and advisers alike is the only way to ensure stability and fairness in the field.[207]

A feasible approach is to dial back federal involvement in the investment advice industry and allow states to experiment with different levels of regulation to achieve the proper balance between investor protection and giving financial advisers flexibility to serve their clients' best interest.[208] As Justice Louis Brandeis famously wrote: "[A] state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[209] Senator Richard Shelby pointed to the success of state regulators in a 2004 hearing on the topic of conflicts of interest in the mutual funds industry:

> Much of the Committee's attention has been focused on . . . the revelations of wrongdoing in the mutual fund industry. These scandals had much in common: They both involved egregious conflicts of interest, widespread misconduct, and inadequate disclosure to investors. There was another common theme underlying these scandals: State securities regulators initiated both investigations. Although the SEC is the primary securities market regulator, time and again we have seen the need for vigorous State regulators to pursue investigations and enforcement actions . . . State regulators are the local cops on the beat, and their proximity to investors enables them to serve as an early detection system for growing frauds and scams . . . Many states have proactively

206. *See* Dock David Treece, *Fiduciary Financial Advisor: What It Is, Duties & Obligations*, FITSMALLBUSINESS.COM (Oct. 18, 2018), https://fitsmallbusiness.com/fiduciary-financial-advisor/ [https://perma.cc/6S7K-S2VG] (providing information on the wide array of choices available in the financial advisory industry and how to decide which one(s) to use).

207. *See Oxford Economics: DOL Fiduciary Rule Price Tag $3.9 Billion for Independent Financial Services Firms*, FIN. SERVS. INST. (Aug. 18, 2015), https://financialservices.org/contentid5867/ [https://perma.cc/55J9-FY29] (describing the burdens of compliance with the fiduciary rule on independent financial services firms).

208. *See The Role of State Securities Regulators in Protecting Investors: Hearing Before the Subcomm. on Banking, Hous., & Urban Affairs*, 108th Cong. (2004) [hereinafter *Hearing*] (analyzing the importance and success of state securities regulators in pursuing investigations and enforcement actions).

209. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

> launched initiatives designed to preempt future frauds by educating investors as to how they can protect their assets and to identify signs of wrongdoing . . . .[210]

The debate over investor protection, should it keep festering in Washington D.C., could make it highly politicized like immigration[211] and health care law.[212] Evidence of a partisan divide over how to properly regulate financial advisers has become apparent over the past decade, from the successful lawsuit[213] against the fiduciary rule, championed by pro-business groups, to the current litigation[214] challenging the SEC package, spearheaded by eight Democratic Attorneys General.[215]

In addition to the SEC package, state laws and regulations, and current litigation, there is also the possibility that the DOL will come out with new regulations that deal with the standards of conduct that relate to retirement accounts.[216] The financial advisory industry has undergone a period of massive change along with rest of the financial and banking systems since Dodd-Frank was enacted in 2010.[217] Allowing states like Nevada[218] to implement their own investor protection laws could lead to one state's striking the right balance between the interest of the financial industry and investors, at which point the federal government could attempt to model its own relevant regulations after those states that have

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210. *Hearing, supra* note 208 (opening statement of Sen. Richard C. Shelby, Then-Chairman, S. Comm. On Banking, Hous., and Urban Affairs).

211. *See* Zachary B. Wolf, *CNN's Poll Shows Why Immigration Is Impossible to Solve*, CNN (July 3, 2019, 12:35 PM), https://www.cnn.com/2019/07/03/politics/immigration-poll/index.html [https://perma.cc/94QV-UA29] (detailing polling data showing a vast ideological split among Americans regarding immigration policy).

212. *See* John Gramlich, *Views of Health Care Law Break Sharply Along Partisan Lines*, PEW RESEARCH CTR. (Oct. 27, 2016), https://www.pewresearch.org/fact-tank/2016/10/27/health-care-law-partisan-divide/ [https://perma.cc/CP3P-SLZH] (detailing differences between Democrats and Republicans over the state of the U.S. health care system).

213. U.S. Chamber of Commerce v. U.S. Dep't of Labor, 885 F.3d 360 (5th Cir. 2018).

214. State v. U.S. Sec. & Exch. Comm'n, No. cv-08365-VM (S.D.N.Y. Sept. 9, 2019).

215. Brian Anderson, *Reg BI Lawsuit: 8 Attorneys General Sue SEC*, 401K SPECIALIST (Sept. 10, 2019), https://401kspecialistmag.com/reg-bi-lawsuit-8-ags-sue-sec/ [https://perma.cc/MW46-5GJU].

216. Lori Konish, *This Was Supposed to Be the Decade of Tougher Consumer Protections. That Didn't Happen*, CNBC (Dec. 25 2019, 8:01 AM), https://www.cnbc.com/2019/12/24/why-consumer-protections-didnt-improve-as-expected-in-the-2010s.html [https://perma.cc/V23X-WU5M].

217. Zuluaga, *supra* note 204.

218. *See* Beilfuss, *supra* note 200 (describing a Nevada investor's successful use of the state's fiduciary rule after an adviser's refusal to follow the investment request of the client).

yielded positive reactions from industry and investor advocates.[219]

CHASE PONDER*

219. *See* Paul L. Posner, *State Laboratories and National Policy Reforms*, GOVERNING (Jan. 20, 2010, 3:00 AM), https://www.governing.com/columns/mgmt-insights/State-Laboratories-and-National.html [https://perma.cc/N7TF-L4RY] (pointing to the important role that state governments play in our system of policy making and how the balance between them and the federal government is of utmost importance).

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