

Sneak peek at new SEC advice standard sparks hope, concern

Investor advocates and industry representatives are both hopeful and concerned after studying overview of proposal slated for release on April 18.



April 12, 2018 [By Mark Schoeff Jr.](#)

The sneak peek the Securities and Exchange Commission has offered of its pending proposal on investment advice standards has sparked both hope and concern among investor advocates and industry representatives.

In a [notice posted](#) on its website Wednesday, the agency indicated it will release a regulation on April 18 consisting of three parts: a disclosure document for registered investment advisers and brokers that summarizes their relationship with investors; a rule that sets a broker advice standard; and an “interpretation” of the standard of conduct for investment advisers.

“The rule appears to have the three main components it needs to be a good rule,” said Barbara Roper, director of investor protection at the Consumer Federation of America. “The \$64,000 question — or the \$17 billion question — is whether the standard of conduct they propose is sufficient to reform harmful broker-dealer business practices.”

The \$17 billion to which Ms. Roper referred is the amount of investor harm caused annually by broker conflicts when working with customers in retirement accounts, according to an Obama administration study.

That report undergirded the Labor Department’s fiduciary rule, which requires brokers to act in the best interests of clients in retirement accounts. The DOL rule was [partially implemented](#) last summer, but was vacated by a recent split decision in the 5th Circuit Court of Appeals. It is uncertain whether the Department of Justice on behalf of the DOL will request a rehearing by the 5th Circuit’s full complement of judges, appeal the decision to the Supreme Court, or stand down.

One investor advocate fears that the SEC rule will not measure up to the DOL regulation, which supporters say mitigates broker conflicts.

“So far, so bad,” Andrew Stoltmann, president of the Public Investors Arbitration Bar Association, said of the outline of the SEC rule. “It looks like it’s going to be a disclosure-based

rule. That's grotesquely bastardized from what the DOL rule is. I'm concerned SIFMA and the securities industry has already infected this process."

The Securities Industry and Financial Markets Association has proposed a [best-interests standard for brokers](#) that revises the current suitability rule, which requires that brokers sell investment products that meet a client's objectives and risk tolerance but allows them to recommend those with high fees.

SIFMA managing director Kevin Carroll said it is impossible to know whether the SEC rule will depend mostly on disclosure, based on the brief description.

"We don't think a best-interest standard would be satisfied by disclosure alone," Mr. Carroll said.

He likes what he sees so far on the SEC proposal.

"It seems fairly consistent with what we were expecting based on conversations [with SEC staff] over a period of months," Mr. Carroll said. "We're cautiously optimistic."

TITLE REFORM

The SEC's brief overview did not mention [title reform](#), or defining who can call themselves "financial advisers." There's a chance that clarification could be part of disclosure or broker-standard provisions.

Brokers "need to be clearly labeled as sales people or regulated as the advisers they claim to be everywhere but in the court room," Ms. Roper said.

The SEC said it would "interpret" the standard of conduct to which registered investment advisers adhere under the 1940 Investment Advisers Act. Advisers must meet a fiduciary duty and act in the best interests of their clients.

The Investment Adviser Association said it is pleased that the SEC is not proposing to change the adviser standard, but is leery about the interpretative guidance.

"The IAA believes that the fiduciary duty under the Investment Advisers Act is well-understood and has served investors, the economy and the capital markets well for more than 75 years," IAA president and chief executive Karen Barr said in a statement.

Ms. Roper hopes that when the SEC revisits the adviser standard, it will emphasize that alerting a client to conflicts doesn't go far enough.

"They need to clarify that the Adviser Act standard is satisfied by acting in the customer's best interests, not just providing disclosures," Ms. Roper said.

SEC TO ECLIPSE DOL?

The SEC will advance its advice proposal just 12 days before the deadline for the DOL to ask for a rehearing of the 5th Circuit's decision. It's not clear whether the DOL will continue to [defend its rule in court](#).

The SEC's timing provides a way for the agency to take the lead on establishing investment advice policy, as opponents of the DOL rule want it to do.

"It allows the DOL to respond to the retirement-specific aspects of the SEC rule, rather than having the SEC try to adjust to a very problematic DOL rule," said Bradford Campbell, partner at Drinker Biddle & Reath and a former DOL assistant secretary in the George W. Bush administration.

The DOL is reviewing its rule under a directive from President Donald J. Trump that could lead to major changes.

"It would not surprise me if there's a DOL rule that dovetails into the SEC rule," said David Levine, principal at Groom Law Group. "I could see this all slowly coming together."

But the SEC rule is just beginning its own journey. After the proposal is released, there likely will be a comment period of a couple months. The agency might modify the regulation and send it out for more comments before releasing a final rule.

"This is a long and involved process," said Peter Chepucavage, an independent regulatory consultant. "I honestly think it's 2020 before it is complete."