



DAILY REPORT FOR EXECUTIVES



REPORT

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Securities

Brokers Can Take Practical Steps For Any Fiduciary Regime Change, Lawyer Says

Although it is not yet clear whether the Securities and Exchange Commission will move forward under the financial reform act to impose a fiduciary duty on broker-dealers, there are practical steps brokerage firms can take to prepare for a possible new regime, an attorney said Oct. 21.

Among other actions, firms should review potential and actual conflicts of interest, and review their disclosures for current conflicts, said Clifford Kirsch, Sutherland Asbill & Brennan LLP, New York. In addition, firms should review their outside business activities, disciplinary histories, compensation practices, supervision processes, compliance oversight, and training.

Further, firms should start creating documentation with respect to investment advice about securities to show that representatives and financial advisers are acting in the best interests of retail customers, Kirsch said. The attorney spoke on a panel in Washington organized by the American Law Institute-American Bar Association.

Reform Act. Currently, brokers are regulated by the SEC, state regulators, and the Financial Industry Regulatory Authority under standards of commercial conduct known broadly as the “suitability standard.” Investment advisers, meanwhile, are subject to a fiduciary standard.

Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the SEC to study the existing standards of care for brokers and advisers, and to identify regulatory gaps and deficiencies. The SEC is required to report its findings to Congress within six months of the act’s enactment. Based on the study, the SEC may promulgate rules to require that brokers’ standard of care be the same as that for advisers under the 1940 Investment Advisers Act.

Although the Advisers Act does not explicitly provide for a fiduciary standard of care, the U.S. Supreme Court held in the 1963 case of *SEC v. Capital Gains Research Bureau Inc.* (375 U.S. 180) that the common law fiduciary duty arises under the Advisers Act.

Shortly after enactment of Dodd-Frank, the SEC issued a release seeking public comments on the study. The SEC received over 3,000 comments during the comment period, which ended Aug. 30 (168 DER EE-19, 9/1/10).

Kirsch added that there is not much firms can do until the SEC issues the results of its study, and decides whether or when to embark on rulemaking. However, he and other panelists agreed that the signs point to the SEC moving ahead on a harmonized regime.

“There is no requirement for the SEC to do this but all indications are that they are going forward,” said Bruce Maisel, vice president and managing counsel at Minneapolis-based Thrivent Financial. Maisel said he participated recently in a meeting with the SEC’s Investment Adviser/Broker-Dealer study group.

Rulemaking Boundaries. Maisel said the “good news” is that Dodd-Frank lays out many of the “boundaries” of the rulemaking. For example, the requirements apply only to “personalized advice and recommendations” to retail customers. Maisel said that “personalized” advice arguably would not apply to unsolicited advice where the needs and objectives of customers are not known, such as advice given at seminars and through marketing materials. He added that the SEC can go beyond retail customers in its rulemaking but said he would be “very surprised” if it did.

In addition, concessions “hard fought” by industry groups made it into the final reform legislation, Maisel continued. For example, the receipt of compensation based on commissions in and of itself is not a violation, he noted. In addition, Dodd-Frank provides that the fiduciary duty is not ongoing and that brokers no longer act under the duty after a particular transaction. “The duty is transactional,” he said.

Looking ahead, Maisel said that there probably will be an increased emphasis on contractual agreements to allow brokers and customers to delineate their relationships. He also said that there are good investor protections and infrastructure under the current regulatory regime for brokers that he hopes will not be lost going forward.

David Bellaire, general counsel for Financial Services Institute Inc. in Atlanta, said he has met with four of the

five SEC commissioners on the issue of a harmonized regime. There is a “varying level of focus” by the commissioners on a standardized fiduciary duty, given the various other matters before them, but “they are all very concerned” about the issue, Bellaire said. “They also recognize the need” to move very carefully, he said.

BY YIN WILCZEK