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Fate of the Fiduciary Rule: Appellate Courts Have Spoken, but What Comes Next?

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A flurry of activity surrounding the Department of Labor's (DOL's) new fiduciary definition and final conflict of interest regulation (the Fiduciary Rule) has thrown the Fiduciary Rule into a state of flux. A pair of decisions from the US Courts of Appeals, one from the Fifth Circuit and another from the Tenth, recently arrived within days of each other and have so far generated more questions than answers. On March 15, 2018, the Fifth Circuit censured DOL and vacated the Fiduciary Rule "*in toto*."[1] The 2-1 split decision ignored the Tenth Circuit's decision filed just two days earlier, which upheld a portion of the same rule pertaining to fixed indexed annuities (FIAs).[2]

After a quick review of the portions of the Fiduciary Rule relevant to the Fifth and Tenth Circuit litigation, we explain what the two recent opinions did, and did not, say. We conclude with our thoughts on the possible impact of these opinions and whether the Fiduciary Rule will proceed through the court system, be re-worked by DOL, face a re-write from the Securities and Exchange Commission (SEC) or Congress, or be left to the states to resuscitate.

Fiduciary Rule: A Brief Overview

Before delving into the opinions, there are a few basic facts to remember about the Fiduciary Rule. The Fiduciary Rule broadened DOL's longstanding definition of an ERISA "investment advice fiduciary"[3] that had been in place since 1975. It makes a person such a fiduciary if the person provides investment recommendations for a fee or other compensation to an ERISA plan, its participants or beneficiaries, or an individual retirement account (IRA).[4] Accepting a fee for such a recommendation would then be a prohibited transaction, absent an applicable exemption. Enter the now-infamous Best Interest Contract (BIC) Exemption. DOL included two new administrative class exemptions when it issued the Fiduciary Rule, the most notable of which is Prohibited Transaction Exemption (PTE) 2016-01, or the BIC Exemption, and amended several other exemptions.[5] The BIC Exemption generally applies to financial institutions and advisers and would require them to enter into "best interest contracts" with retirement investors, the terms of which required them to abide by "Impartial Conduct Standards."[6] The Fiduciary Rule also amended certain other exemptions, most notably by removing fixed indexed annuities (FIAs) from PTE 84-24, which concerns transactions involving insurance and annuity contracts, and instead requiring FIA sellers to comply with the more onerous BIC Exemption.[7]

The Fifth Circuit Strikes Down the Rule

In *Chamber of Commerce v. U.S. Department of Labor*, Circuit Judge Edith H. Jones, writing for the majority in a 2-1 decision joined by Circuit Judge Edith Brown Clement, missed no opportunity to critique DOL and its Fiduciary Rule.[8] Observing that the Rule "fundamentally transforms over fifty years" of industry practices, affecting a "large swath" of the financial services and insurance industries, Circuit Judge Jones wholeheartedly endorsed the Chamber's arguments throughout her opinion.[9] In turn, the dissent, authored by Chief Judge Carl E. Stewart, quoted liberally from the district court opinion and crafted an opinion in stark contrast to the majority.[10] Neither opinion took notice of, cited, or even acknowledged the Tenth Circuit opinion released just days prior.

While the Tenth Circuit primarily addressed FIA treatment, the Fifth Circuit focused on "whether the new definition of an investment advice fiduciary comports with ERISA Titles I and II," and whether it is reasonable under *Chevron, U.S.A., Inc. v. N.R.D.C., Inc*. and compliant with the Administrative Procedures Act (APA).[11] Going beyond the fiduciary definition, the Fifth Circuit majority also addressed whether the BIC Exemption represented regulatory overreach that violated ERISA and the APA, and whether the best interest contract provisions required under the BIC Exemption created impermissible private rights of action and prohibitions on arbitration waivers.[12] The court reviewed each issue de novo.[13]

DOL's Definition of "Investment Advice Fiduciary" Is an Impermissible Reading of the Statute

Circuit Judge Jones began by applying the "common law presumption," which, she explained, required her to assume that Congress incorporated the common law meaning of the term "fiduciary" when it included that term in ERISA.[14] Like much of ERISA, the meaning of "fiduciary" arises out of the common law of trusts, meaning that the existence of a fiduciary relationship "turns on the existence of a relationship of trust and confidence."[15] The court rejected DOL's argument that the common law presumption should be displaced as inconsistent with the statute, explaining that DOL read the inconsistency exception too broadly, and in any event, the "trust-and-confidence standard" *is* consistent with the statute.[16]

Even setting aside the common law presumption, Circuit Judge Jones explained, the Fiduciary Rule still conflicts with the statute and Congress' "contemporary understanding of its language."[17] Relying on several textual arguments, she explained that Congress knew of the distinction between investment advisers and salespeople when it crafted its definition of an investment advice fiduciary in 1974.[18] She criticized DOL for going "straight to the dictionary" to define "investment" and "advice," stating that doing so effectively "rewr[ote] the law that is the sole source of [DOL's] authority."[19] Circuit Judge Jones took particular issue with DOL's break from its own longstanding interpretation, which required an ongoing relationship between the advisor and client for fiduciary status to attach.[20] The court found further support for its conclusion that Congress intended to link fiduciary status to a special relationship of trust and confidence by examining the statute's subsections immediately preceding and following the investment advice fiduciary definition. Historically, broker-dealers, insurance agents, or others who sell financial products have never been viewed as occupying positions of trust and confidence or giving investment advice.[21] Therefore, in order to avoid a "harmonious-reading problem," the investment advice fiduciary portion of the definition should also be read to require a special relationship.[22]

Finally, Circuit Judge Jones rejected DOL's policy argument that its new definition was needed to further a fundamental purpose of ERISA: protecting plan participants.[23] Instead, she opined that a statute's purpose cannot "overcome the words of its text

regarding the specific issue under consideration."[24] While Circuit Judge Jones acknowledged that the policy reasons cited by DOL may indeed warrant reconsideration of the definition, she clarified that any such action should be left for Congress.[25]

Chevron Step Two and the APA: The Fiduciary Rule is Unreasonable, Arbitrary, and Capricious

In her thorough decision clearly anticipating Supreme Court review, Circuit Judge Jones next addressed the reasonableness of the Fiduciary Rule. Under *Chevron*, when a statute is silent or ambiguous on a particular issue, courts must defer to an agency's permissible construction of the statute. [26] For purposes of this analysis, the court assumed the phrase "investment advice for a fee" contained some ambiguity, meaning that the court must uphold DOL's regulation if it is "reasonable."[27] In addition, under the APA, courts review regulations to ensure they are not arbitrary, capricious, contrary to law, or in excess of statutory authority.[28]

Continuing the pro-Chamber tone of her opinion, Circuit Judge Jones concluded that the Rule was not "salvage[able]" and that DOL had acted "brazenly" in promulgating it.[29] She combined her analyses under *Chevron* step two and the APA, stepping through a number of arguments to support her holding.

First, ERISA Titles I and II grant DOL only limited authority to regulate IRAs, and the Fiduciary Rule overreaches by subjecting IRA fiduciaries to the ERISA duties of prudence and loyalty through the BIC Exemption.[30] Circuit Judge Jones highlighted DOL's acknowledgement that the Fiduciary Rule covers "actors and transactions" that Congress did not intend to cover.[31] Referencing Congress' "nuanced" prohibited transaction exemption for "eligible investment advice arrangements," she found the Fiduciary Rule unreasonable and overbroad, admonishing DOL that "[w]hen Congress has acted with a scalpel, it is not for the agency to wield a cudgel."[32] In response to DOL's argument that the BIC Exemption was necessary to appropriately limit application of the new definition of "investment advice fiduciary," she chided DOL for creating the very problem (the overbroad definition) it used as a justification for the BIC Exemption.

Next, the majority sided with the Chamber in concluding that the BIC Exemption violates the separation of powers. Circuit Judge Jones explained that "[o]nly Congress may create privately enforceable rights," so DOL overstepped by creating a private right of action enabling IRA owners to bring quasi-ERISA suits.[33] Further, she concluded that the prohibition in best interest contracts of clauses that permit arbitration of class actions violates the Federal Arbitration Act.[34]

Additionally, the majority condemned DOL's attempt to "outflank" Congress' intent to regulate broker-dealers involved in IRAs and FIAs through the 2010 Dodd Frank Act, which permitted the SEC to issue standards further regulating broker-dealers and investment advisors, and allowed states to regulate FIAs.[35] Finally, the Supreme Court instructs courts to question any agency regulation issued under a "long-extant" statute, when that regulation exerts "novel and extensive power over the American economy."[36] Skepticism is appropriate here, Circuit Judge Jones explained, because DOL issued the Fiduciary Rule under such a statute, and because DOL readily acknowledged the significant economic effect the Rule will have on the "trillion-dollar" investment industry.[37]

In the end, the Fifth Circuit panel majority accordingly reversed and vacated the Fiduciary Rule "*in toto*."[38]

The Dissent

Chief Judge Carl E. Stewart's dissenting opinion would uphold the Fiduciary Rule. His opinion largely tracked those issued by Chief Judge Barbara Lynn in the Northern District of Texas and Judge Randolph D. Moss in the District of Columbia (even heavily quoting from the latter), in finding the Fiduciary Rule a "statutorily permissible and

reasonable exercise of [DOL's] regulatory authority."[39] He argued that the common law of trusts only serves as a starting point for interpreting certain areas of ERISA, including the definition of "fiduciary," and courts must look beyond it in instances like the one at issue.[40] Conducting his own *Chevron* analysis, Chief Judge Stewart first found DOL's regulation not foreclosed by the statute, that it "passe[d] muster under step two of *Chevron*," and complied with the APA because changes in the retirement investment advice market necessitated increased protections for retirement investors.[41] Chief Judge Stewart saw no issue with DOL's use of its exemption authority and did not share the majority's view that the BIC Exemption created a private right of action.[42]

View from the Tenth Circuit

On March 13, 2018, the Tenth Circuit, in *Market Synergy Group, Inc. v. United States Department of Labor*, upheld a part of the Fiduciary Rule concerning FIAs.[43] Unlike the Fifth Circuit's decision, *Market Synergy* addressed only DOL's decision to exclude transactions involving FIAs from PTE 84-24, and did not address the broader legality of the Fiduciary Rule and the BIC Exemption.[44] And, unlike the *Chamber of Commerce* appeal, Market Synergy challenged the FIA portion of the rule under the APA only. Affirming the decision of the district court, Judge Paul J. Kelly—joined by Judges Carlos F. Lucero and Scott Matheson Jr.—rejected Market Synergy's attacks on DOL's treatment of FIAs as "arbitrary and capricious" agency action, upholding that portion of the Fiduciary Rule under the APA and not engaging in a *Chevron* analysis.

First, Market Synergy argued that DOL had failed to provide sufficient notice in its proposed rule that it was considering moving FIAs from PTE 8424 to the BIC Exemption.[45] The panel disagreed, finding that DOL's proposed rule "clearly asks for comment on whether removing variable annuities from PTE 84-24 but leaving FIAs and fixed rate annuities struck the appropriate balance."[46] This request, as well as comments on whether to keep FIAs within PTE 84-24, the panel held, show that the proposed rule had given adequate notice and that the final PTE 84-24 was a "logical outgrowth" of the proposed rule.[47]

Second, Market Synergy asserted that DOL acted arbitrarily and capriciously by retaining fixed rate annuities under PTE 84-24 but moving FIAs to the BIC Exemption, arguing that the two types of annuities are indistinguishable and DOL was dismissive of state regulations, "thereby missing an 'important aspect of the problem'."[48] The court disagreed, reasoning that it was not the role of the court to "displace the agency's choice between two fairly conflicting views," where DOL had evidentiary support showing that: FIAs are more complex than fixed rate annuities (for example, with respect to additional surrender terms and charges, interest rate caps, etc.); FIAs are riskier investments because their returns can be affected by additional variables, such as a market index; and the greater complexity and risk of FIAs heighten the conflicts of interest experienced by investment advisors recommending them.[49] The court also found that DOL was not dismissive of state regulations, which DOL had found "'particularly concerning' for complex and risky products such as FIAs."[50] DOL adequately considered state regulations of FIAs and sought to ensure that the final PTE 84-24 works cohesively with existing state law requirements.[51]

Third, Market Synergy contended that DOL improperly failed to consider how its new regulation—subjecting FIAs to the more onerous requirements of the BIC Exemption, including the written contract requirement—would impact the insurance industry.[52] The panel rejected this argument, reasoning that DOL reasonably considered the fact that "the FIA market relies 'heavily' on independent insurance agents."[53] Ultimately, DOL reasonably concluded that the fear of adjusting to the BIC Exemption was "overstated and counteracted by the benefit to investors" to the tune of "millions of dollars by reducing or curtailing conflicted advice from fiduciaries."[54]

Status of the Rule in the DC Circuit and District of Minnesota

In the DC Circuit, the challenge to the Fiduciary Rule brought by the National Association for Fixed Annuities (NAFA) had been held in abeyance pursuant to NAFA's unopposed motion to postpone oral argument pending the Fifth Circuit's decision in the *Chamber of Commerce* appeal.[55] The DC Circuit's November 2017 order directed the parties to ultimately file a joint status report within ten days of the Fifth Circuit's decision, which they did in the form of a March 23, 2018 stipulation of dismissal.[56] One week later, the court issued an order dismissing the case.[57]

Litigation is still ongoing in the US District Court for the District of Minnesota, however, where Thrivent Financial for Lutherans also filed suit against the Fiduciary Rule, arguing against the prohibition on contracts containing class action waivers.[58] The court granted a preliminary injunction in November 2017 in an order that also granted a stay in the case and required the parties to file a joint status report every 60 days.[59] The parties most recently filed a joint status report on March 5, 2018, stating that the matter should remain stayed pending DOL's further review of the Fiduciary Rule, with the next status report due on May 4, 2018.[60]

Conflicting Opinions?

Because the Fifth Circuit vacated the Fiduciary Rule "*in toto*," while the Tenth Circuit, on narrower grounds, upheld the restrictions placed on FIAs, there is some question whether an actual conflict exists between the two circuits. If Market Synergy pursues rehearing or petitions the Supreme Court, that point may be clarified. For now, however, there is a chance that an individual selling FIAs in a state within the Fifth Circuit (Texas, Louisiana, and Mississippi) would be subject to different rules than in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, which are within the jurisdiction of the Tenth Circuit. Perhaps partially in response to the problems that a circuit split would create, DOL informally announced, "pending further review," a temporary hiatus on the Rule's enforcement. Subsequently, DOL issued Field Assistance Bulletin 2018-2, extending the temporary enforcement policy that, until DOL issues further guidance, DOL and the Internal Revenue Service will not treat investment advice fiduciaries "working diligently and in good faith" to comply with the Impartial Conduct Standards as violating the prohibited transaction rules.

What to Watch

The fight over the Fiduciary Rule may be headed for a quiet détente, but for now the future of the Rule could track several fronts.

- **Fifth Circuit**. The April 30, 2018 deadline by which DOL had to request en banc rehearing in the Fifth Circuit has come and gone, so DOL now has just two options in the Fifth Circuit: (1) appeal the decision to the Supreme Court by June 13, 2018; or (2) accept defeat, in which case the decision will take effect on May 7, 2018. Regardless of its decision, it could also continue its work to modify the Fiduciary Rule to a more palatable form that is less likely to face court challenges.

  Notably, on April 26, 2018, the attorneys general for California, New York, and Oregon filed a joint motion (as did AARP, in a separate motion) to intervene in the Fifth Circuit litigation, requesting leave to file a petition for rehearing *en banc*.[61] The Chamber moved to oppose intervention on several grounds, including the failure of the proposed intervenors to demonstrate their entitlement to emergency relief and their failure to establish an injury-in-fact sufficient to establish Article III standing.[62] The Fifth Circuit held that the states and AARP cannot step in for DOL and request the rehearing *en banc* that DOL chose to forego.
- **Tenth Circuit**. Action could also continue in the Tenth Circuit. While Market Synergy let pass the April 27, 2018 deadline to submit a

rehearing request, it can still submit a petition to the Supreme Court by June 11, 2018.

- **SEC Rulemaking**. The SEC released a proposed rule on April 18, 2018,[63] that contains many elements similar to the Fiduciary Rule and aims to correct many of the same issues.[64] The SEC's rulemaking is "designed to increase investor protection" by "enhanc[ing] the standard of conduct for [broker-dealers] and reaffirm[ing] and, in some instances, clarify[ing] the standard for [investment advisors]."[65] While the SEC rule rings of the Fiduciary Rule, it appears to diverge in key areas. For example, unlike the Fiduciary Rule, the SEC rule does not confer fiduciary status as broadly, applies only on a snapshot basis, and does not contain a private enforcement mechanism.[66] However, given the urgency with which the SEC pushed out its rule, many expect to see the rule transform over time. This uncertainty complicates DOL's decision of whether to allow the SEC to take up the banner or to continue the quest for its own Fiduciary Rule.
- **Congress**. Notably, the entity with ultimate authority—Congress—has remained silent thus far. It could pass legislation to make the entire issue moot, washing away all of the ink spilled in the years of fighting over the Fiduciary Rule.
- **States**. The motion to intervene in the Fifth Circuit litigation filed by California, New York, and Oregon addressed above was denied, but additional state-level activity also warrants ongoing attention. Even if DOL scraps the Fiduciary Rule, the investment services industry may face enforcement of similar rules at the state level. Multiple states have passed laws that mirror the Fiduciary Rule, and at least one company has faced a challenge at the state level under its version of the Fiduciary Rule.[67]

Though difficult to predict DOL's ultimate course of action, it appears to have put the entire Fiduciary Rule into suspense on a nationwide basis for the time being. Even if DOL accepts defeat, reinstating the 1975 investment fiduciary definition, vanquishing the BIC Exemption and the rest of the Fiduciary Rule, or continuing to reevaluate the Rule may trigger additional litigation, thus ensuring that the impact of the Rule continues to have profound and lasting consequences for the financial services industry. Further, most major players in the financial services industry have already modified their practices to comply with the Rule, and reverting back to their old ways may impose transition costs that exceed the benefits. Upcoming developments in the Fiduciary Rule saga will certainly be worth watching, but regardless of the outcome, DOL may have already achieved some of the original goals that it targeted with the Fiduciary Rule with industry-changing practices that the industry may have difficulty walking back.

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NOTES

1 Chamber of Commerce v. United States Dep't of Labor, 885 F.3d 360 (5th Cir. 2018).

2 Mkt. Synergy Grp., Inc. v. United States Dep't of Labor, 885 F.3d 676 (10th Cir. 2018).

3 The definition of an investment advice fiduciary is set forth in ERISA Title I and Title II at 29 U.S.C. §1002 (21)(A)(ii) and 26 U.S.C. §4975(e)(3)(B), respectively.

4 29 C.F.R. §2510.3-21.

5 *See* Final Best Interest Contract Exemption, 81 Fed. Reg. 21,002 (Apr. 8, 2016). The other new exemption is PTE 2016-02, the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transaction Exemption).

6 Final Best Interest Contract Exemption, 81 Fed. Reg. 21,002 (Apr. 8, 2016).

7 *See* PTE 84-24, 81 Fed. Reg. 21,147 (Apr. 8, 2016).

8 Chamber of Commerce v. United States Dep't of Labor, 885 F.3d 360 (5th Cir. 2018).

[9] *Id*. at 363.
[10] *Id*. at 388.
[11] *Id*. at 368; *see also* 5 U.S.C. §706(2)(A).
[12] *Chamber of Commerce*, 885 F.3d at 388.
[13] *Id*.
[14] *Id*. at 369–70. Under the "common law presumption," courts must presume that Congress intended to incorporate the common law meaning of terms it uses, absent indication to the contrary. *Id*.
[15] *Id*. at 370.
[16] *Id*. at 371–72.
[17] *Id*. at 372.
[18] *Id*. at 373–74.
[19] *Id*. at 373.
[20] *Id*. at 377.
[21] *Id*. at 376–77.
[22] *Id*. at 376.
[23] *Id*. at 378.
[24] *Id*. (quoting Mertens v. Hewitt Associates, Inc., 508 U.S. 248, 261 (1993)).
[25] *Id*. at 379.
[26] Chevron, U.S.A., Inc. v. N.R.D.C., Inc., 467 U.S. 837, 843 (1984).
[27] *See Chevron*, 467 U.S. at 845.
[28] 5 U.S.C. §706(2)(A).
[29] *Chamber of Commerce*, 885 F.3d at 383.
[30] *Id*. at 381–83.
[31] *Id*. at 381.
[32] *Id*. at 383.
[33] *Id*. at 384.
[34] *Id*. at 385.
[35] *Id*. at 385–86.
[36] *Id*. at 387.
[37] *Id*. at 387–88.
[38] *Id*. at 388.
[39] *Id*. at 390.
[40] *Id*. at 391–92.
[41] *Id*. at 395.
[42] *Id*. at 395–96.
[43] Mkt. Synergy Grp., Inc. v. United States Dep't of Labor, 885 F.3d 676 (10th Cir. 2018).
[44] *Id*. at 681.
[45] *Id*.
[46] *Id*. at 682.
[47] *Id*. at 682–83.
[48] *Id*. at 683.
[49] *Id*. at 683–85.
[50] *Id*. at 685.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id*. at 686.
[55] *See* Nat'l Ass'n for Fixed Annuities v. Dep't of Labor, No. 16-5345, Appellant's Unopposed Mot. to Continue Oral Arg. (Nov. 6, 2017), Doc. 36.
[56] Nat'l Ass'n for Fixed Annuities v. Dep't of Labor, No. 16-5345, Joint Stipulation of Dismissal (Mar. 23, 2018), Doc. 42.
[57] Nat'l Ass'n for Fixed Annuities v. Dep't of Labor, No. 16-5345, Order (Mar. 30, 2018), Doc. 43.
[58] Thrivent Financial for Lutherans v. United States Dep't of Labor, No. 0:16-cv-03289, Complaint (Sept. 29, 2016), Doc. 1.
[59] Thrivent Financial for Lutherans v. United States Dep't of Labor, No. 0:16-cv-03289, Memor. Op. & Order (Nov. 3, 2017), Doc. 111.
[60] Thrivent Financial for Lutherans v. United States Dep't of Labor, No. 0:16-cv-03289, Joint Status Report (Mar. 5, 2018), Doc. 113.
[61] *See* Chamber of Commerce v. United States Dep't of Labor, No. 16-5345, Mot. to Intervene of the States of Cal., N.Y., & Or. (Apr. 26, 2018), Doc. 150. On the same day, AARP also filed a motion to intervene, seeking the same relief as the states. *See* Chamber of Commerce v. United States Dep't of Labor, No. 16-5345, Mot. of AARP to Intervene as a Defendant-Appellee for the Purpose of Seeking a Rehearing *En Banc* (Apr. 26, 2018), Doc. 152.
[62] *See* Chamber of Commerce v. United States Dep't of Labor, No. 16-5345, Appellants' Consol. Opposition to Mot. of AARP to Intervene as a Defendant-Appellee for the Purpose of Seeking Rehearing *En Banc*, Proposed Intervenor AARP's Mot. for Extension of Time to File Petition for Rehearing *En Banc*, & Mot. to Intervene of the States of Cal., N.Y., & Or., 2–7 (Apr. 30, 2018), Doc. 156

[63] Sec. & Exch. Comm'n, "Regulation Best Interest," Release No. 34-83062 (Apr. 18, 2018), available at *https://www.sec.gov/rules/proposed/2018/34-83062.pdf*; Sec. & Exch. Comm'n, "Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers [hereinafter "Regulation Best Interest"]; Request for Comment on Enhancing Investment Adviser Regulation," Release No. IA-4889 (Apr. 18, 2018), available at *https://www.sec.gov/rules/proposed/2018/ia-4889.pdf*; Sec. & Exch. Comm'n, "Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles," Release No. 34-83063; IA-4888 (Apr. 18, 2018), available at *https://www.sec.gov/rules/proposed/2018/34-83063.pdf*.

[64] Sec. & Exch. Comm'n, "Overview of the Standards of Conduct for Investment Professionals Rulemaking Package" (Apr. 18, 2018), available at *https://www.sec.gov/news/public-statement/clayton-overview-standards-conduct-investment-professionals-rulemaking*.

[65] *Id*.

[66] Regulation Best Interest, at 42, 78–82, 401–02.

[67] *See* In the Matter of Scottrade, Inc., No. E-2017-0045, Administrative Complaint (Feb. 15, 2018).