XII. Regulation Best Interest

A. Introduction

Since the beginning of the Financial Crisis of 2007–08 (Financial Crisis), the Securities and Exchange Commission (SEC) has dealt with the fallout of allegations that broker-dealers knowingly sold their clients faulty securities—namely credit default swaps (CDOs)—that they knew were likely to fail.[1] That is, that brokers used their customers trust to sell them a fundamentally faulty product which their firm's own projections suggested was a timebomb.[2]

As a result of this, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, (Dodd-Frank) Congress ordered the SEC to study, and possibly alter, the standards binding broker-dealers.[3] While the SEC noted its unhappiness with the status quo, it failed to take substantial steps forward to establish an alternate standard.[4] That was until the SEC announced "Regulation Best Interest,"[5] a new standard

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[1] *SEC Enforcement Actions: Addressing Misconduct that Led to or Arose from the Financial Crisis*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/spotlight/enf-actions-fc.shtml [https://perma.cc/78EH-HFLH] (last updated Feb. 22, 2017) (listing successful enforcement actions against banks who bet against the housing market and investors).

[2] *See generally* Gretchen Morgenson & Louise Story, *Banks Bundled Bad Debt, Bet Against It and Won*, N.Y. TIMES (Dec. 23, 2009), https://www.nytimes.com/2009/12/24/business/24trading.html (detailing ongoing SEC investigations into Goldman Sachs and other Wallstreet firms for possible violations of securities laws, for selling clients securities it subsequently bet against).

[3] *See* Thomas Lee Hazen, *Are Existing Stock Broker Standards Sufficient? Principles, Rules, and Fiduciary Duties*, 2010 COLUM. BUS. L. REV., 710, 714 (2010) (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 913(b)(2), 124 Stat. 1376, 1824–25 (2010)).

[4] *See* U.S. SEC. & EXCH. COMM'N, STUDY ON INVESTMENT ADVISORS AND BROKER-DEALERS https://www.sec.gov/news/studies/2011/913studyfinal.pdf (2011) (recommending a uniform fiduciary standard for broker-dealers and investment advisors when providing investment advice regarding retail securities); *see also* Client Memorandum from Paul, Weiss, Rifkind, Wharton & Garrison LLP, Mark S. Bergman, et al., SEC Proposes New Standard of Conduct for Broker-Dealers 1 (May 8, 2018), https://www.paulweiss.com/media/3977764/7may18sec.pdf [https://perma.cc/ND8E-GL32] (hereinafter Paul Weiss Memorandum).

[5] Regulation Best Interest, 83 Fed. Reg. 21,574, 21,576 (proposed May 9, 2018) (to be codified at 17 C.F.R. pt. 240) (reifying the "best interest

which would require that broker-dealers only recommend securities that are in the best interest of their clients.[6] The new standard's place in the regulatory framework is unclear, as it is likely higher than the previous suitability standard but lower than the fiduciary standard to which investment advisors are held.[7] Regardless of the specific standard that one ties to Regulation Best Interest, it represents a beneficial step forward for the industry. The SEC's new regulation helps simplify these standards by ensuring that broker-dealers employ their expertise in their client's interest.

This article seeks to briefly explore the events that led the SEC to proposed Regulation Best Interest, and assess the new rule as it is currently constituted. In Section B, this article discusses the general concerns that led the SEC to consider changing broker-dealer standards, as well as the events that led to the proposed rule. Section C of this article explores the various provisions of Regulation Best Interest and their proposed application. Sections D and E deal with reactions to the proposed rule. Section D examines comment letters submitted the SEC to assess support and opposition to the SEC's changes, whereas Section E examines the work of several scholars in this field, drawn from before and after the promulgation of Regulation Best Interest. Given that Regulation Best Interest is a recent proposal, scholarly work remains somewhat sparse. However, a number of authors have weighed in on the aptness of broker-dealer standards before Regulation Best Interest was announced, and these observations remain germane. Finally, this piece concludes by contending that Regulation Best Interest is a positive and appropriate development.

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obligation" as a way to reduce conflicts of interests while still preserving investor access to professional and quality financial advice).

[6] *See* Paul Weiss Memorandum *supra* note 4, at 1.

[7] *See id.* ("Regulation Best Interest, as proposed establishes a new, higher standard of care for broker-dealers when making recommendations to retail customers, but does not adopt the proposals of the 2011 SEC study and does not establish a uniform fiduciary standard of conduct for both investment advisors and broker-dealers.").

B. Background

1. Initial Concerns Regarding Broker-Dealer and Investment Advisors Standards

Though often conflated, broker-dealers are distinct from investment advisors.[8] Investment advisors are regulated under the Investment Advisors Act of 1940's fiduciary standard, whereas broker-dealers are regulated under the Securities Exchange Act of 1934's suitability standard.[9] Though the distinctions between the two classes can blur, the different standards result in serious market consequences, as the fiduciary standard is generally seen as more stringent than the suitability standard.[10] Goldman Sachs, among others, has drawn law enforcement's interest for walking the boundary between broker-dealers and investment advisors.[11] In the midst of the Financial Crisis, Goldman Sachs began shorting the housing market.[12] While Goldman Sachs undertook this course of action, it failed to disclose to its clients that its own forecasts suggested that those securities were likely to fail.[13] Most investment firms, like Goldman Sachs, end up playing several roles across their practices; i.e., they are investment advisors to some clients and simply broker dealers to others.[14]

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[8] Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 VILL. L. REV. 701, 702 (2010).
[9] *Id.* at 702.
[10] *See generally* MONEY MANAGER'S COMPLIANCE GUIDE ¶ 110 (2018), Westlaw MNYMGUIDE.
[11] Daniel Indiviglio, *Goldman's 'Big Short' Could Be a Big Problem*, ATLANTIC (June 2, 2011), https://www.theatlantic.com/business/archive/2011/06/goldmans-big-short-could-be-a-big-problem/239839/ [https://perma.cc/H334-Z9CP] (reporting accusations made in a Senate report detailing Goldman's "strategy to short the mortgage market while selling its clients exposure to the very mortgage losses from which it profited")
[12] *Id.*
[13] *Id*. (explaining that Goldman Sachs did not disclose, to some of its clients, that the firm believed that "mortgages would sour and the products it was selling would produce losses."). *See also* Press Release, U.S. Sec. & Exch. Comm'n, Goldman Sachs to Pay Record $550 Million to Settle SEC Charges to Subprime Mortgage CDO (July 15, 2010), https://www.sec.gov/news/press/2010/2010-123.htm [http://perma.cc/96KZ-7T4R].
[14] Indiviglio, *supra* note 11.

2. Lead-up to Regulation Best Interest

This practice has drawn heavier scrutiny since the Financial Crisis, leading the SEC to explore the possibility of a uniform standard for both professions.[15] And the SEC plans to move forward with a new standard for broker-dealers titled, "Regulation Best Interest."[16] The SEC has been exploring this change since 2011, and it has not been the only party involved.[17] In 2016, the Department of Labor attempted to raise the standard binding broker-dealers from suitability to fiduciary duty, only to have the measure struck down by the Fifth Circuit Court of Appeals.[18] The Department of Labor's now defunct standard—which only applied to retirement accounts—would have raised broker-dealers to a fiduciary standard.[19] However, the Fifth Circuit held that this was a substantial misreading of ERISA, which could not survive judicial scrutiny, even when deference was afforded.[20]

The current SEC attempts to revise the broker-dealer standard grew out of Dodd-Frank, which ordered the SEC to conduct a study of the standards applied to broker-dealers in order to assess whether statutory and regulatory gap filling was required.[21] The resulting study recommended that broker-dealers be subject to the fiduciary standard when they provided "personalized investment advice;" however, this recommendation was not put into practice.[22]

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[15] Paul Weiss, *supra* note 4 at 1.
[16] *Id.*
[17] *Id*. (mentioning the Department of Labor's adoption of a rule that finance professionals "adhere to a fiduciary standard when advising clients on retirement accounts").
[18] Darla Mercado, *Here's What You Need to Know About This New 'Investor Protection' Rule*, CNBC, (Aug. 8, 2018, 11:07AM), https://www.cnbc.com/2018/08/08/what-you-need-to-know-about-this-new-investor-protection-rule.html [http://perma.cc/R8ZQ-E2RE]. *See also* Chamber of Commerce of U.S. of Am. v. U.S. Dep't of Labor, 885 F.3d 360, 379 (5th Cir. 2018) (holding that the Department of Labor's interpretation of ERISA was not reasonable).
[19] *Chamber of Commerce*, 885 F.3d at 379.
[20] *Id.*
[21] Dodd-Frank Wall Street Reform and Consumer Protect Act, Pub. L. No. 111-203, §124 Stat. 1376, 1824–25 (2010) (directing the SEC to assess whether consumers understood the varying standards governing broker-dealers and investment advisors).
[22] *See* Regulation Best Interest, 83 Fed. Reg. 21,574, 21,575 (proposed May 9, 2018) (to be codified at 17 C.F.R. pt. 240).

However, the debate did not end there.[23] In 2017, the SEC decided to reassess the regulatory climate to gauge the necessity of an adjusted regulatory standard for broker-dealers.[24] The SEC noted that its proposal was an attempt to "engage constructively" with the Department of Labor's proposal, as well as address new developments in the financial sector.[25] In particular, the SEC noted that the new standard was called for due to several factors including the following: (i) confusion among retail investors regarding the standard of conduct their counterparties were held to, (ii) potential conflicts of interest in compensatory models, and (iii) technological developments altering traditional models of advice.[26] After inviting interested parties to submit their comments in June of 2017, the SEC released its proposed rule in April 2018.[27]

C. Requirements of Regulation Best Interest

The new standard would raise broker-dealer obligations from suitability to "best interest."[28] This standard consists of four requirements: a disclosure obligation, a care obligation, and two conflict of interest obligations.[29]

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[23] *See generally id*. (calling for a new standard for broker-dealers).

[24] *Id.* at 6–8 (highlighting the importance of broker-dealers to the lives consumers as one of the primary reasons to bring the standard into uniformity).

[25] Public Statement, Chairman Jay Clayton, U.S. Sec. & Exch. Comm'n, Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisors and Broker-Dealers (June 1, 2017), https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31[https://perma.cc/DGP8-ZCXH] ("I welcome the Department of Labor's invitation to engage constructively as the Commission moves forward with its examination of the standards of conduct applicable to investment advisers and broker-dealers, and related matters.").

[26] *Id.* ("I believe clarity and consistency . . . are key elements of effective oversight and regulation. We should have these elements in mind as we strive to best serve the interest of our nation's retail investors in this important area.")

[27] *See id.* (announcing a search for a new standard for broker-dealers on June 1, 2017). *See also* Regulation Best Interest, 83 Fed. Reg. at 21,575.

[28] *See* Regulation Best Interest, 83 Fed. Reg. at 21,575 ("Accordingly, we are proposing a new rule under the Exchange Act that would establish an express best interest obligation. . . .").

[29] *Id.* at 21,576.

The disclosure requirement obligates broker-dealers to "reasonably disclose to the retail customer, in writing, the material facts relating to the scope and terms of the relationship with the retail customer and all material conflicts of interest associated with the recommendation."[30] Material conflicts would include such things as the cost of the broker's fees, but also the capacity of the broker's recommendation; i.e., the broker would have to disclose whether the recommendation came from the individual's role as an investment advisor, or simply as a broker.[31] As part of this recommendation, broker-dealers would also be obligated to provide clients with writing summarizing their relationship, in which broker-dealers cannot use the word "advisor."[32] These disclosure obligations mirror those that were already applied to broker-dealers when their contact with customers created a fiduciary relationship.[33] Broker-dealers were already under duties to disclose under the anti-fraud provisions of the securities laws, as well as various SEC and Financial Industry Regulatory Authority rules; however, the SEC thought that a more general duty to disclose was necessary.[34]

The care obligation supplements the existing suitability requirements by requiring the broker-dealer to use reasonable care, diligence, skill, and prudence in making recommendations to customers so that the broker-dealer can: (i) understand the risks associated with the recommendation and believe it to be in the customer's best interest; (ii) reasonably believe that the recommendation is in the customer's best interest based on the customer's investment portfolio and the risks of the investment; and (iii) reasonably believe that a series of recommended transactions is in the customer's best interest when viewed together, even if they were appropriate individually.[35] In

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[30] *Id.* at 21,599.
[31] *Id.* at 21,575.
[32] *Id.* at 21,576 (explaining that the proposed rule would restrict broker-dealers and their affiliates from using the words "advisor" and "adviser" when communicated with clients in specific circumstances).
[33] *See id.* at 21,599 (observing that the duty resembles previous broker-dealer obligations that arose in fiduciary situations). *See, e.g.,* Hazen *supra* note 3 at n.160 (citing United States v. Szur, 289 F.3d 200, 2012 (2d Cir. 2002) (finding that the broker-dealer's fiduciary relationship with the customer created a duty to disclose)).
[34] *See* Regulation Best Interest, 83 Fed. Reg. at 21,599–21,600 (summarizing various other duties already binding broker-dealers and observing that a more general duty was needed).
[35] *See id.* at 21,609.

order to comply with this duty, a broker-dealer must use reasonable diligence when recommending securities and have a reasonable belief that their recommendation is in the best interest of at least some of their retail customers.[36] As with most rules of reasonableness, the inquiry will be fact-intensive and specific to both the broker-dealer and the particular investment strategy being pursued.[37] The thrust of this obligation is that a broker-dealer must put their customers first, e.g., between two suitable and similar securities, the broker-dealer should recommend the less expensive one to the customer.[38]

Finally, Regulation Best Interest places two conflict of interest obligations on broker-dealers.[39] Broker-dealers would have to (i) establish, maintain, and enforce written conflicts of interest policies that are "reasonably designed to identify, and disclose, or eliminate, all material conflicts;" and (ii) establish, maintain, and enforce written policies which would discover, disclose and eliminate conflicts of interest sparked by financial incentives from broker-dealer recommendations.[40] Broker-dealers craft their own mechanisms to address conflicts, provided that their means of choice are, "reasonably designed."[41] As with the other elements of Regulation Best Interest, assessment of the reasonable design of the disclosure mechanisms will be fact-specific and dependent on the attendant circumstances.[42] Given the wide array of services that broker-dealers provide, the SEC has limited this duty to "material conflicts arising from financial incentives, that are *associated with a recommendation*."[43] This obligation differs from the requirements that would have accompanied a uniform fiduciary

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[36] *Id.*
[37] *See id.* at 21,611–12.
[38] *But see id.* at 21,588 (stating that that the broker-dealer may recommend the more expensive security but must have a reasonable basis for the recommendation absent compensation to the broker).
[39] *Id.* at 21617–18 (outlining obligations to mitigate materials conflicts of interests associated with recommendations covered by Regulation Best Interest and those arising from "financial incentives associated with such recommendations").
[40] *Id.*
[41] *See id.* at 21619–20 (stressing that there is "no one-size-fits-all framework, and broker-dealer should have flexibility to tailor the policies and procedures to account for, among other things, business practices, size and complexity of the broker-dealer, range of services and products offered and associated conflicts present").
[42] *Id.* at 21618.
[43] *Id.* at 21618.

standard, which would have obligated broker-dealers to disclose all conflicts of interest.[44] Under Regulation Best Interest, the broker-dealer must only disclose all conflicts affiliated with the particular recommendation made.[45]

Curiously, the SEC did not define what it means to act in an investor's best interest. The proposed rule has been put forward for comment.[46] Though the rule is still under consideration, reactions to it have varied, with some lauding it as bringing transparency to the process while others have attacked it as stifling existing business practices.[47]

D. Institutional Impact of, and Reaction to, Regulation Best Interest

The SEC hopes that this new regulation will "enhance investor protection while generally preserving (to the extent possible) the range of choice and access—both in terms of services and products—that is available to brokerage customers today."[48] It hopes that Regulation Best Interest will promote transparency, particularly to retail investors who interact with broker-dealers that provide them with a range of

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[44] *See id.* at 21623 (contrasting the requirements of Regulation Best Interest with the requirements of the unenacted uniform fiduciary standard).

[45] *Id.* ("We are not proposing to change the disclosure obligations associated with these services under the general antifraud provisions of the federal securities laws.").

[46] *Id.* at 5 ("The SEC will seek public comment on the proposed rule and its interpretations for ninety days.").

[47] *Compare* Dale Brown, *SEC Regulation Best Interest an important step for our industry*, INVESTMENTNEWS: OUTSIDE-IN (Aug. 29, 2018, 4:21PM), https://www.investmentnews.com/article/20180829/BLOG09/180829909/sec-regulation-best-interest-an-important-step-for-our-industry (lauding the SEC for strengthening and clarifying standards to ensure that the clients' bests interests are served), *with* D. Bruce Johnsen, Public Interest Comment, *Response to the SEC's Proposed Regulation On The Best Interest For Retail Securities Broker-Dealers*, https://www.sec.gov/comments/s7-07-18/s70718-4251407-173061.pdf [https://perma.cc/3Q9E-HJ2J] (arguing that the "SEC's discussion of broker conflicts rests on the unsupported, and unsupportable conclusion, that any system of compensation other than one that is entirely neutral across different investment products necessarily taints the broker's advice . . . .").

[48] Regulation Best Interest, 83 Fed. Reg. at 21,584.

services.[49] However, despite the largely positive press[50] and the reputable goals, the SEC still worries the rule could cause investors to lose access to "products, services, service providers, and payment options."[51] Of particular concern is the effect of the proposed regulation on broker-dealer commissions.[52] This difficulty is particularly hard to address because compensatory models based on commission generate some of the very same conflicts of interest that Regulation Best Interest sought to clarify and curtail.[53] Some criticisms of the rule contended that middle-income investors using a simple buy-and-hold approach likely would favor commissions, rather than an annual percentage rate.[54] For investors who undertake a low volume of transactions, broker-dealer commission fees, which are attached to each specific transaction, may be more affordable and easier to understand, than the annual fee approach that Regulation Best Interest appears to endorse.[55]

The SEC has attempted to limit the fallout of Regulation Best Interest by tailoring it so that it only applies in a limited set of circumstances, i.e., to broker-dealer recommendations.[56] If a broker-dealer is providing "services that . . . are distinct from . . . recommendation," such as executing an unsolicited transaction, then Regulation Best Interest would not apply.[57] Similarly, an investment advisor, who was also registered as a broker-dealer, would not be subject to Regulation Best Interest when furnishing recommendations, the fiduciary standard would apply instead.[58] These restrictions aside, the SEC acknowledges that this new regulation could change the risk calculus

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[49] *Id.* at 21,583 ("We also recognized the importance of providing, to the extent possible, clear, understandable, and consistent standards for brokerage recommendations across a brokerage relationship . . . .").
[50] *See id.* at 21,582.
[51] *Id.* at 21,583.
[52] *Id.* (referencing concerns raised by State Farm Mutual Insurance Company).
[53] *See id.* at 21,584 n.82.
[54] *See* Regulation Best Interest, 83 Fed. Reg. at 21,584 (referencing the "State Farm Letter" which contended that commission-based compensation is generally easy for customers to understand).
[55] *Id.*
[56] *Id.* at 21,584.
[57] *Id.*
[58] *Id.* (explaining that that Regulation Best Interest would not apply to a dually-registered broker-dealer, when making a recommendation in their capacity as an investment advisor).

employed by a number of firms and result in products leaving the market, or heightened costs simply pushed on consumers.[59]

As the regulatory process is far from complete, the impact of Regulation Best Interest is still theoretical.[60] Of the four SEC commissioners, as of late 2018, two had signaled opposition to Regulation Best Interest in its current form, which could mean substantial revisions before the regulation is finally approved.[61] Furthermore, the Department of Labor could again get involved by attempting to issue further regulation covering retirement accounts.[62] As a result of this, the result of regulation best interest is still up in the air.[63]

Others, such as Dale Brown, have adopted a more positive outlook.[64] Brown argued that this proposal will allow broker-dealers to build on their existing networks, built on the suitability standard, without suffering unduly burdensome regulation.[65] Additionally, the new measures will cut down on problematic broker-dealer practices such as sales contests.[66] The SEC itself appears especially concerned with cutting down on financial incentives, as it noted at length that it sought to disclose, limit and eliminate financial conflicts such as sales contests, variable compensation, and other employee incentives for particular sales.[67]

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[59] *Id.* at 21,583 (stating that the SEC is "sensitive to the potential risk that any additional regulatory burdens may cause investors to lose choice and access to products, services, service providers, and payments options . . . .").

[60] K. Susan Grafton et al., *Simply the Best (Interest)—SEC Proposes New Broker-Dealer Standard and Additional Related Guidance*, 46 TAX MGMT. COMPENSATION PLANNING J. 127 (Aug. 3, 2018).

[61] *Id.* at 7 (highlighting the importance of support from higher-ups in the SEC).

[62] *Id*.

[63] *Id.* at 7–8 ("Now we have the SEC Proposals, taking us down a different branch in the path, and it remains to be seen what happens next.").

[64] Brown, *supra* note 47 (characterizing Regulation Best Interest as "a clear and important step in the right direction").

[65] *Id.* ("By building upon existing suitability standards, the SEC's proposal would strengthen and clarify the requirement that advisers work in the best interest of clients without creating a new and possibly unworkable regulatory framework.").

[66] *Id*.

[67] *See* Regulation Best Interest, 83 Fed. Reg. at 21617-21618.

E. Academic Assessments of Regulation Best Interest and Previous Broker-Dealer Standards

Though the comment process is still ongoing, so far, the SEC notes that reception of Regulation Best Interest has largely been positive.[68] The critiques have largely asserted that the SEC could have achieved equivalent or superior results simply through maintaining the existing standard or raising the penalties.[69] This aside, most of the feedback—including the feedback provided by many major financial institutions—has been positive.[70]

Given that this debate is still fresh, little has formally been published assessing the SEC's new proposal. One early critique has come from Professor D. Bruce Johnsen.[71] Johnsen argues that the SEC has failed to ask the correct question and so its proposal is premature.[72] Johnsen, drawing from economist Ronald Coase, argues that the SEC should not ask whether a proposed rule's benefits are likely to outweigh its costs, but rather, whether the proposed rule is likely to reduce transaction costs.[73] Given that the SEC's proposal did not perform a Coasian cost-benefit analysis, Johnsen argues that there is insufficient evidence to move forward with the rule.[74] Absent a showing that Regulation Best Interest would reduce the party's transaction costs, simply prohibiting parties from contracting to their own solutions is unnecessary.[75] In the absence of evidence that the regulation is efficient, the SEC should focus on identifying: "(1) how brokers and their retail clients have adjusted to minimize any inefficiencies in the

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[68] *See id*. at 21,582 (observing that several parties had objections; however, most responders either supported Regulation Best Interest or advocated for a uniform fiduciary standard for broker-dealers and investment advisors).
[69] *Id.* at 21,582 n.70–71 (listing objections from some securities professionals to Regulation Best Interest).
[70] *See e.g.*, *id.* at 21,583 n.72–73 (explaining that Blackrock, Wells Fargo, TIAA, T. Rowe Price, Fidelity, and Vanguard, among others, voiced support for either a unified standard or Regulation Best Interest).
[71] *See generally* Johnsen, *supra* note 47 (arguing that the SEC economic analysis was clearly insufficient, leaving the new regulation a premature declaration).
[72] *Id.* at 3.
[73] *Id.*
[74] *Id*. at 9 (stressing that there is no such thing as a "conflict-free transaction").
[75] *Id.* at 10.

provision of investment advice and (2) what transaction costs prevent them from doing even better."[76]

While research in this area continues to develop; however, the subject was well-studied before the announcement of Regulation Best Interest.[77] Prior to the proposal of Regulation Best Interest, Professor Thomas Hazen argued that despite the well-publicized and troublesome issues posed by the Financial Crisis, the broker-dealer standard is fundamentally sound.[78] Specifically, Hazen noted that while there have been lapses in enforcement, the existing regime of overlapping duties makes it clear that when broker-dealers undertake actions beyond simply processing orders they are already bound by fiduciary-like duties.[79] The existing heightened duties rendered a new fiduciary duty unnecessary, though Hazen noted that a duty like Regulation Best Interest could still serve as a way of reinforcing the importance broker-dealers' obligations.[80] More in line with the approach taken by the SEC in Regulation Best Interest, Professor Arthur Laby argued that broker-dealers should be subject to a fiduciary standard is 2012.[81] Laby argued that conventional arguments—those which addressed investor confusion and regulatory efficiency—were insufficient to support alterations to the broker-dealer standards.[82] However, a stronger argument could be drawn from the reasonable expectations of retail customers of broker-dealers.[83] Laby noted that decades of broker advertising portrayed the broker, "as a trusted adviser" and the reasonable expectations of [the broker-dealer and the retail customer], resulting from the brokers' use of advertising and titles reflecting an advisory role, provide a sound justification to change the law . . . ."[84]

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[76] *Id.*

[77] *See, e.g.,* Hazen, *supra* note 3, at 711 (assessing the broker-dealer standard in the wake of the Financial Crisis).

[78] *Id.* at 714 (arguing for the status quo despite "some apparent enforcement lapses in a few celebrated cases")

[79] *Id*.

[80] *Id.* (conceding "some additional rulemaking may be warranted as a conceptual matter").

[81] *See* Arthur B. Laby, *Selling Advice and Creating Expectations: Why Brokers Should Be Fiduciaries*, 87 WASH. L. REV. 707, 774 (2012) (arguing that the reasonable expectations of customers call for the imposition of a higher standard).

[82] *Id.* at 751–52.

[83] *Id.* at 775 (directing courts to examine the reasonable expectations of both parties).

[84] *Id.* at 775–76.

In summary, while plenty has been written in favor of changing or preserving broker-dealer standards, reactions to the SEC's new proposal is ongoing and a scholarly consensus has yet to emerge.

F. Conclusion

Regulation Best Interest represents a possible answer to a longstanding grievance levied against financial institutions since the Financial Crisis.[85] The SEC's reform, though it stops short of unifying the standards as was proposed in the wake of Dodd-Frank, at least recognizes the various "hats" that broker-dealers wear as part of the suite of services they offer.[86] Given the emphasis that broker-dealers have placed on the relationship of trust with their clients, and the ease with which clients could solicit recommendations, some escalated duty—like Regulation Best Interest—appears well advised.[87] While broker-dealers were already subject to various duties which already provided additional protection when the broker-dealer was providing recommendations, recent history suggests that additional protections would be beneficial.[88] The rule has not been finalized and approved by the SEC, and one can expect further developments developments the matter concludes.[89]

Ian Hunley[90]

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[85] *See* Indiviglio, *supra* note 11 (presenting a critique of broker-dealer conduct during the collapse of 2007).
[86] *See* Paul Weiss Memorandum, *supra* note 4.
[87] Laby, *supra* note 81 at 775.
[88] *See, e.g.,* Hazen, *supra* note 3 at 711.
[89] *See* Grafton et al., *supra* note 60, at 8 (observing that in light of the development of Regulation Best Interest the safest expectation is "that there will be more bends in the road").
[90] Student, Boston University School of Law (J.D. 2020).