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## Off-Key Regulation: Examining the SEC's and the DOL's Dissonant Regulation of Broker-Dealers

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# OFF-KEY REGULATION: EXAMINING THE SEC'S AND THE DOL'S DISSONANT REGULATION OF BROKER-DEALERS

## ABSTRACT

*In 2016, the Department of Labor (DOL) forecasted that conflicted investment advice provided by broker-dealers may cause IRA investors in the mutual funds segment alone to lose upwards of \$189 billion over the next ten years and \$404 billion over the next twenty. In the same year, the DOL under the Obama Administration issued a final rule, known as the “fiduciary rule,” that aimed to prevent losses due to conflicted investment advice by expanding the meaning of “fiduciary” as defined in the Employee Retirement Income Security Act of 1974 (ERISA). This rule would have required broker-dealers who provide personalized investment advice to satisfy fiduciary standards of conduct, rather than the currently enforced, less stringent suitability standard.*

*But after nearly a year and a half of an uncertain fate under the Trump Administration, the rule was vacated in March 2018 by the Fifth Circuit, which held that the DOL exceeded its authority under ERISA in promulgating the rule. With the Trump-era DOL choosing not to appeal the decision, and third-party efforts to do so failing, the rule is officially dead. And with the DOL's efforts to elevate to fiduciary status those broker-dealers who provide personalized conflicted investment advice to investors halted, the Securities and Exchange Commission (SEC) is now the lone agency working to promulgate a standard that could help save retirement investors billions.*

*After surveying the origins and development of federal securities law and current legislation and regulation governing both broker-dealers and investment advisers, this Comment argues that the SEC should impose a uniform fiduciary standard on broker-dealers and investment advisers who provide personalized investment advice. It also argues that the SEC should collaborate with the DOL to create interagency enforcement guidelines, which will help to resolve the growing tension between the SEC's and the DOL's regulatory agendas and ultimately better protect investors. Until the SEC acts, retirement investors will continue to suffer unnecessary losses on their investments.*

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## INTRODUCTION

In February 2015, the Council of Economic Advisers (CEA) reported that retirement investors lose approximately \$17 billion each year due to receiving investment advice from broker-dealers who have a conflict of interest.<sup>1</sup> The CEA also reported that affected investors lose approximately 1% in investment returns annually.<sup>2</sup> A year later, in April 2016, the Department of Labor (DOL) estimated that underperformance due to conflicted investment advice could cause individual retirement account (IRA) investors in the mutual funds segment alone to lose up to \$189 billion over the next ten years and \$404 billion over the next twenty.<sup>3</sup>

To mitigate these losses, the DOL under the Obama Administration promulgated a final rule, known as the “fiduciary rule.”<sup>4</sup> The primary purpose of this rule was to prevent broker-dealers from providing investment advice when they have a conflict of interest;<sup>5</sup> in other words, the fiduciary rule aimed to prevent broker-dealers from providing investment advice that is influenced by their ability to profit, not their customers’ ability to do so. The practical consequence of this rule would have been to elevate broker-dealers, who usually must adhere to a lower standard of conduct, known as the suitability standard, to fiduciary status.<sup>6</sup> As fiduciaries, broker-dealers would have been required to act in their customers’ best interest, as opposed to an interest suitable to their customers, which is the current standard.<sup>7</sup>

The applicable date of the fiduciary rule was originally scheduled for April 2017.<sup>8</sup> But in early February 2017, just weeks after taking office, President Trump signed a memorandum calling on the DOL to reassess the Obama Administration’s fiduciary rule.<sup>9</sup> Specifically, President Trump directed the

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<sup>1</sup> COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, THE EFFECTS OF CONFLICTED INVESTMENT ADVICE ON RETIREMENT SAVINGS 2 (2015) [hereinafter COUNCIL OF ECON. ADVISERS].

<sup>2</sup> *Id.*

<sup>3</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,950 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550).

<sup>4</sup> *Id.* at 20,946–47.

<sup>5</sup> *Id.*

<sup>6</sup> *See id.* at 20,946; *FINRA Manual: Contents: Rule 2111*, FINRA (May 1, 2014) [hereinafter *FINRA Manual*], [http://finra.complinet.com/en/display/display.html?rbid=2403&element\\_id=9859](http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=9859).

<sup>7</sup> *See* Section I.B.2.c.

<sup>8</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. at 20,946.

<sup>9</sup> Memorandum from Donald J. Trump, President, U.S., to Edward Hugler, Acting Sec’y of Labor, U.S. Dep’t of Labor (Feb. 3, 2017) [hereinafter Trump Memorandum], <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-fiduciary-duty-rule/>.

DOL to review (1) whether the final rule was consistent with the policies of his Administration, and (2) how it would affect retirement investors' access to financial advice.<sup>10</sup> To provide more time to conduct its analysis, the DOL delayed the effective date for full implementation of the rule and its exemptions from January 2018 to July 2019.<sup>11</sup>

President Trump's memorandum and the DOL's ensuing delay in implementing the fiduciary rule as passed not only afforded the DOL additional time to assess the merits of the fiduciary rule, but also had two additional consequences. First, it provided the courts more time to determine whether the DOL exceeded its authority under the Employee Retirement Income Security Act of 1974 (ERISA) in promulgating the fiduciary rule. Although the Tenth Circuit had upheld the fiduciary rule just days earlier,<sup>12</sup> the Fifth Circuit vacated the rule in toto in mid-March 2018.<sup>13</sup> The DOL had until the end of April to file an appeal, but it chose not to,<sup>14</sup> and third-party efforts to intervene were denied by the Fifth Circuit.<sup>15</sup> Thus, the fiduciary rule is officially dead, halting the DOL in its tracks and forcing other interested parties, like academics and professional interest groups, to rethink their arguments either for or against the DOL promulgating its fiduciary rule.<sup>16</sup>

Second, the delay afforded the Securities and Exchange Commission (SEC) additional time to consider the merits of imposing a uniform fiduciary standard that could apply to all broker-dealers who provide personalized investment

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<sup>10</sup> *Id.*

<sup>11</sup> Ashlea Ebeling, *The DOL Fiduciary Rule: A Timeline*, FORBES (Mar. 23, 2017, 11:59 AM), <https://www.forbes.com/sites/ashleaebeling/2017/03/23/the-dol-fiduciary-rule-a-timeline/#773dedf329a1>; Nick Thornton, *Fiduciary Rule Officially Delayed to July 1, 2019*, BENEFITSPRO (Nov. 27, 2017, 10:14 AM), <http://www.benefitspro.com/2017/11/27/fiduciary-rule-officially-delayed-to-july-1-2019>.

<sup>12</sup> *Market Synergy Group, Inc. v. U.S. Dep't of Labor*, 885 F.3d 676, 678–79 (10th Cir. 2018); Tracey Longo, *Appeals Court Upholds DOL Rule, but Battle Continues*, FIN. ADVISOR (Mar. 14, 2018), <https://www.famag.com/news/appeals-court-upholds-dol-rule--but-battle-continues-37636.html>.

<sup>13</sup> *Chamber of Commerce of the U.S. v. U.S. Dep't of Labor*, 885 F.3d 360, 379 (5th Cir. 2018) (explaining in a 2-to-1 split decision that the DOL exceeded its authority under ERISA).

<sup>14</sup> Mark Schoeff Jr., *5th Circuit Denies AARP, States Motion to Defend DOL Fiduciary Rule*, INV. NEWS (May 2, 2018, 1:59 PM), <http://www.investmentnews.com/article/20180502/FREE/180509980/5th-circuit-denies-aarp-states-motion-to-defend-dol-fiduciary-rule>.

<sup>15</sup> Emily Brill, *5th Circuit Won't Rethink Invalidation of DOL Fiduciary Rule*, LAW360 (May 2, 2018, 9:46 PM), <https://www.law360.com/articles/1039563>.

<sup>16</sup> *Compare, e.g., S. Burcu Avci et al., How Should Retirement Plans Be Organized?*, 13 N.Y.U. J.L. & BUS. 337, 345 (2017) (arguing that the DOL's fiduciary rule does not go far enough and proposing that "only passive index funds or well-diversified exchange traded funds (ETFs) consisting of broadly diversified portfolios, such as ETFs that track the S&P 500 Index, [should] be allowed the tax exemption as retirement accounts"), with Anita K. Krug, *The Other Securities Regulator: A Case Study in Regulatory Damage*, 92 TUL. L. REV. 339, 346 (2017) (arguing that "the fiduciary rule imperils investors in ways that are not immediately evident").

advice.<sup>17</sup> The rule being vacated cleared the slate for a possible SEC rule unimpeded by the DOL's fiduciary rule. Indeed, only a month after the fiduciary rule was initially vacated, the SEC proposed multiple rules in mid-April 2018, one of which was called Regulation Best Interest.<sup>18</sup> The SEC's movement here was and is significant because, while the DOL believed it had the authority to modify the standard of conduct for financial advisers of nearly \$19 trillion in retirement assets under ERISA<sup>19</sup> until the Fifth Circuit rejected such a statement of authority, the SEC's authority to regulate financial advisers is far greater, covering nearly \$67 trillion in investment assets.<sup>20</sup> Academics and professional interest groups have also debated the merits of an SEC-imposed uniform fiduciary standard.<sup>21</sup>

Despite the significant amount of literature dedicated to analyzing whether the DOL fiduciary rule was valid or whether the SEC should promulgate its own uniform fiduciary standard, scholars have not identified how the SEC and DOL can collaborate to resolve their overlap in regulatory authority and failed efforts to diverge in policy. This Comment argues for collaboration between the agencies as the means for resolving the growing tension between their regulation of broker-dealers and investment advisers.

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<sup>17</sup> Jay Clayton, *Testimony on Examining the SEC's Agenda, Operation, and Budget*, SEC (Oct. 4, 2017), <https://www.sec.gov/news/testimony/testimony-examining-secs-agenda-operation-and-budget> (explaining that the SEC has been reviewing options for imposing new standards of conduct on investment professionals, namely broker-dealers and investment advisers).

<sup>18</sup> Tim Keehan, *SEC Proposes Best Interest Regulations for Broker-Dealers, Investment Advisers*, ABA BANKING J. (Apr. 18, 2018), [https://bankingjournal.aba.com/2018/04/sec-proposes-best-interest-regulations-for-broker-dealers-investment-advisers/#\\_ga=2.106055875.1129312188.1537201265-2028325836.1536180171](https://bankingjournal.aba.com/2018/04/sec-proposes-best-interest-regulations-for-broker-dealers-investment-advisers/#_ga=2.106055875.1129312188.1537201265-2028325836.1536180171).

<sup>19</sup> John Iekel, *U.S. Retirement Assets Grow in 3rd Quarter*, ASPPA (Dec. 27, 2017), <https://www.asppa.org/news/browse-topics/us-retirement-assets-grow-3rd-quarter> (adding together the reported value of assets for IRAs, defined-contribution plans, and private defined-benefit plans as of September 2017).

<sup>20</sup> SEC, AGENCY AND MISSION INFORMATION 4 (2017), <https://www.sec.gov/about/reports/sec-fy2017-agency-mission-information.pdf>.

<sup>21</sup> Compare Ira D. Hammerman, Lecture, *SEC—Don't Throw Away Your Shot! A Renewed Call for a Uniform Fiduciary Standard to Protect Individual Investors*, 22 FORDHAM J. CORP. & FIN. L. 310, 319–20 (2017) (arguing against the DOL's fiduciary rule and in favor of the SEC exercising its authority under Section 913 of Dodd-Frank), and Polina Demina, Note, *Broker-Dealers and Investment Advisers: A Behavioral-Economics Analysis of Competing Suggestions for Reform*, 113 MICH. L. REV. 429, 459 (2014) (relying on a behavioral-economics analysis to argue that the SEC should adopt a uniform fiduciary standard for broker-dealers and investment advisers), with Arthur B. Laby, *Reforming the Regulation of Broker-Dealers and Investment Advisers*, 65 BUS. LAW. 395, 395 (2010) (“[I]mposing fiduciary duties on brokers is incompatible with their historical roles as dealers and underwriters.”), and Ross Jordan, Note, *Thinking Before Rulemaking: Why the SEC Should Think Twice Before Imposing a Uniform Fiduciary Standard on Broker-Dealers and Investment Advisers*, 50 U. LOUISVILLE L. REV. 491, 492–93 (2012) (arguing that it would yield little benefit for the SEC to apply the fiduciary standards under *Capital Gains* to broker-dealers).

This Comment proceeds in three Parts. Part I surveys the origins and development of federal securities law and the current legislation and regulation governing both broker-dealers and investment advisers. It explains how the evolution of securities regulation and financial markets has resulted in a convergence in authority to regulate broker-dealers and investment advisers between the SEC and DOL. It also explains how the DOL's fiduciary rule encroached on and conflicted with the SEC's existing authority and policy, creating a divergence in policy until the fiduciary rule was struck down. Part II then identifies the primary problems stemming from the resultant, still-disjointed regulatory framework, including losses suffered by investors, investor confusion, and rising compliance costs for financial service providers.

Finally, Part III observes that changes in the investment world in recent decades necessitate a uniform legislative and regulatory response to resolve the issues stemming from the agencies' growing overlap in authority to regulate broker-dealers and investment advisers. Given the likelihood of congressional inaction, though, this Part argues for the SEC and DOL to jointly develop an interagency solution to harmonize the administration and enforcement of a uniform fiduciary standard for broker-dealers who provide personalized investment advice to investors.

To effectuate this change, Part III advances two arguments. First, it argues that the SEC should exercise its authority under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) to elevate all broker-dealers who provide personalized investment advice to fiduciary status. Before the SEC implements its own standard, though, the SEC and DOL should first coordinate their efforts. Second, in conjunction with the SEC implementing a uniform fiduciary standard, it argues that the SEC and DOL should publish interagency guidelines to (1) clarify when broker-dealer services implicate fiduciary status and how broker-dealers can avoid fiduciary responsibility and (2) avoid duplicative enforcement mechanisms. If adopted, these proposals would help mitigate the problems stemming from the current regulatory framework and put investors' interests first, in keeping with the SEC's mandate.

#### I. OVERLAP AND DIVERGENCE: THE REGULATORY FRAMEWORK GOVERNING BROKER-DEALERS AND INVESTMENT ADVISERS

The distinction between the services offered by broker-dealers and investment advisers, two types of financial service providers, has become

increasingly blurred over the past three decades.<sup>22</sup> By definition, a “broker-dealer” is any person (individual or entity) who executes securities transactions for the account of others and engages in the purchase and sale of securities on such person’s own account.<sup>23</sup> On the other hand, an “investment adviser” is any person that is compensated for providing advice relating to the value, investment, purchase, or sale of securities to investors.<sup>24</sup> This Part seeks to explain why the services offered by these two types of financial service providers has become so difficult to distinguish. It first provides a brief history of federal securities legislation and regulation and an overview of the current framework governing broker-dealers and investment advisers. It then highlights that, while the SEC and DOL both exist in part to protect investors, their authority and policies to do so differ in meaningful ways.

Notably, this Part reviews the creation and current state of a complex, two-tiered regulatory framework that imposes different standards of conduct on similar actions to the detriment of investors. Section A describes the development of federal securities regulation and the creation of the SEC as the original—and still primary—securities regulator.<sup>25</sup> It explains how, in 2010, Congress amended its earlier legislation to provide the SEC with increased authority to impose stringent standards of conduct on broker-dealers who provide personalized investment advice to retirement investors. Section A also identifies how the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization (SRO), operates under SEC oversight. Finally, section B examines how the DOL’s authority to regulate broker-dealers and investment advisers working with retirement investors encroaches on the SEC’s authority to regulate all broker-dealers and investment advisers.

### A *The Securities and Exchange Commission*

As the primary regulator of federal securities markets,<sup>26</sup> the SEC is authorized to regulate broker-dealers and investment advisers.<sup>27</sup> Despite its

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<sup>22</sup> Laby, *supra* note 21, at 398.

<sup>23</sup> 15 U.S.C. § 78c(a)(4)(A), (a)(5)(A) (2012).

<sup>24</sup> Michael Knes, *Investment Advisers Act of 1940*, REFERENCE FOR BUS., <http://www.referenceforbusiness.com/encyclopedia/Int-Jun/Investment-Advisers-Act-of-1940.html> (last visited Oct. 20, 2018) (“Whether . . . a person is . . . an investment adviser under the [Investment Advisers Act] generally depends on three criteria: the type of advice offered, the method of compensation, and whether or not a significant portion of the ‘adviser’s’ income comes from proffering investment advice.”).

<sup>25</sup> Krug, *supra* note 16, at 340.

<sup>26</sup> *Id.*

<sup>27</sup> See Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2012); Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1–80b-21 (2012).

authority, the SEC has failed to satisfy its mission—to protect investors—by not promulgating a fiduciary rule to prevent broker-dealers from providing conflicted investment advice to their customers.<sup>28</sup> Even so, the agency remains best suited to impose industry-wide standards regulating broker-dealers and investment advisers.

To help illustrate this point, this section begins with a brief history of federal securities regulation. It then discusses the evolution of the SEC's authority to regulate broker-dealers and investment advisers due to changes in legislation over the past eighty years; it places emphasis on Section 913 of Dodd-Frank, which allows the SEC to impose fiduciary obligations on broker-dealers who provide personalized investment advice to investors.<sup>29</sup> It concludes by describing how the SEC administers and enforces its current regulation of broker-dealers and investment advisers.

### *1. The Development of Federal Securities Regulation and the Creation of the SEC*

The stock market crash of October 1929 precipitated the longest recessionary period in the United States since the 1880s.<sup>30</sup> Prior to the crash, “there was little support for federal regulation of the securities markets.”<sup>31</sup> However, after the crash, when investor confidence plummeted and the need for securities regulation became evident,<sup>32</sup> Congress enacted comprehensive securities legislation to restore the public's faith in capital markets, spur economic recovery, and protect investors' interests.<sup>33</sup>

The comprehensive securities legislation that was enacted in the years following the stock market crash of October 1929 governed any offer, sale, or trade of securities.<sup>34</sup> Namely, Congress enacted the Securities Act of 1933

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<sup>28</sup> See generally John A. Turner, *The Pension Mis-Selling Scandal, the SEC, and the Fiduciary Standard*, 23 CONN. INS. L.J. 263 (2016) (comparing pension mis-selling scandals in the United Kingdom and United States and concluding that the SEC's fiduciary standard is weak).

<sup>29</sup> SEC, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS i-ii (2011) [hereinafter SEC 913 Study], <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

<sup>30</sup> *U.S. Business Cycle Expansions and Contractions*, NAT'L BUREAU ECON. RES., <http://www.nber.org/cycles.html> (last visited Oct. 20, 2018).

<sup>31</sup> *What We Do*, SEC, <https://www.sec.gov/Article/whatwedo.html#org> (last visited Oct. 20, 2018); see also Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 348, 348 (1991) (explaining that states were responsible for regulating the sale of securities prior to the crash).

<sup>32</sup> See THOMAS K. MCCRAW, *AMERICAN BUSINESS SINCE 1920*, at 60 (2009) (explaining that the number of shares traded on the New York Stock Exchange in 1932 was approximately one-third the 1929 figure).

<sup>33</sup> *What We Do*, *supra* note 31.

<sup>34</sup> See 15 U.S.C. § 77b(a)(3) (2012); 15 U.S.C. § 78b (2012).

(Securities Act) and the Securities Exchange Act of 1934 (Exchange Act) to help restore the public's faith in capital markets.<sup>35</sup> These Acts accomplished two primary goals. First, they required all publicly-traded companies to disclose truthful information about their businesses and the character of their securities.<sup>36</sup> Second, they established that “[p]eople who sell and trade securities . . . must treat investors fairly and honestly, [by] putting investors’ interests first.”<sup>37</sup> Together, these requirements fostered an investment landscape focused on guaranteeing that all investors are privy to the same information and can rely on fair and honest treatment in the execution of their investments.

Under the Exchange Act, Congress established the SEC, a federal agency and non-partisan commission “to be composed of five commissioners . . . appointed by the President by and with the advice and consent of the Senate.”<sup>38</sup> The SEC’s founding mandate was to create securities-related rules and regulations that would protect investors, regardless of their purpose for investing.<sup>39</sup> This included the authority to regulate broker-dealers, national securities exchanges, and registration requirements for securities.<sup>40</sup> In 1940, Congress further defined the SEC’s authority to regulate financial markets by enacting the Investment Advisers Act of 1940.<sup>41</sup> While the Investment Advisers Act defined investment adviser, it did not modify the SEC’s mandate, which was—and remains<sup>42</sup>—to protect investors, nor did it expressly establish a required standard of conduct for broker-dealers or investment advisers.<sup>43</sup> Instead, until 2010 when Congress passed Section 913 of Dodd-Frank, the SEC was limited in its ability to modify the standard of conduct that broker-dealers were required to satisfy.<sup>44</sup>

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<sup>35</sup> *What We Do*, *supra* note 31.

<sup>36</sup> *Id.*; *see also* 15 U.S.C. § 77c(b)(4) (2012).

<sup>37</sup> *What We Do*, *supra* note 31.

<sup>38</sup> 15 U.S.C. § 78d(a) (2012) (“Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.”).

<sup>39</sup> *What We Do*, *supra* note 31.

<sup>40</sup> 15 U.S.C. §§ 78f, 78o(a)–(b) (2012).

<sup>41</sup> *See* Investment Advisers Act of 1940, 15 U.S.C. § 80b-1–b-21 (2012).

<sup>42</sup> Under its current mandate, the SEC is responsible for protecting investors and facilitating efficiency, competition, and capital formation. 15 U.S.C. § 78c(f) (2012).

<sup>43</sup> *See* 15 U.S.C. § 80b-2(a)(3), (7), (11) (2012) (defining “broker,” “dealer,” and “investment adviser” without including a standard of conduct therein for each).

<sup>44</sup> *See infra* Section I.A.2. (explaining that the SEC was granted the authority to elevate broker-dealers who provide personalized investment advice to fiduciary status in 2010).

## 2. *The SEC's Authority to Impose Fiduciary Obligations*

By enacting the Investment Advisers Act, Congress achieved three outcomes: defining “investment adviser,” establishing that investment advisers must operate as fiduciaries on behalf of their clients, and limiting the SEC’s authority to define broker-dealers’ fiduciary obligations, though the latter two outcomes were not evident until courts later held as much.<sup>45</sup> Motivated by the financial crash of 2008, under Section 913 of Dodd-Frank, Congress amended the Investment Advisers Act in 2010 to grant the SEC broader, yet still limited, authority to impose fiduciary obligations on broker-dealers who provide personalized investment advice to their customers.<sup>46</sup> However, the SEC has not yet exercised that authority.

Under the SEC’s current regulatory framework, broker-dealers typically do not qualify as investment advisers and thus are not required to adhere to a fiduciary standard of conduct when acting on behalf of their customers.<sup>47</sup> Consequently, broker-dealers do not need to act in their customers’ best interests and are not prevented from providing investment advice where a conflict of interest may exist.<sup>48</sup>

The Investment Advisers Act broadly defines “investment adviser” as follows:

[A]ny person<sup>49</sup> who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities<sup>50</sup> or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . . .<sup>51</sup>

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<sup>45</sup> 15 U.S.C. § 80b-2(a)(11); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963) (explaining that the “Investment Advisers Act . . . reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship”); *Fin. Planning Ass’n v. SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007) (vacating a rule promulgated by the SEC that sought to exempt certain broker-dealers from the Investment Advisers Act).

<sup>46</sup> 15 U.S.C. § 78o(k)(1) (2012).

<sup>47</sup> *FINRA Manual*, *supra* note 6 (stating that broker-dealers must have a “reasonable basis” to believe that their recommendations are suitable for their customers).

<sup>48</sup> In other words, a broker-dealer may make recommendations that are *suitable* to a customer’s needs, but not in a customer’s *best* interest.

<sup>49</sup> “‘Person’ means a natural person or a company.” 15 U.S.C. § 80b-2(a)(16).

<sup>50</sup> As defined in the Investment Advisers Act, “‘security’ means any note, stock [common or preferred], treasury stock, security future, bond, debenture, [or] evidence of indebtedness,” among other interests. 15 U.S.C. § 80b-2(a)(18).

<sup>51</sup> 15 U.S.C. § 80b-2(a)(11) (footnotes added).

Interpreting this language alone, it would appear that a person's title would not dictate whether a person qualifies as an investment adviser. However, the Investment Advisers Act carves out an exception by categorically excluding persons registered as broker-dealers from the definition of "investment adviser" so long as they satisfy a two-part conjunctive test.<sup>52</sup>

Under the two-part test, broker-dealers are not considered investment advisers if: (1) performance of their services "is solely incidental to the conduct of [their] business as a broker or dealer";<sup>53</sup> and (2) they receive no "special compensation" for that business.<sup>54</sup> When considered together, these factors mean that a broker-dealer may provide investment advisory services that are incidental to its primary business, so long as it only earns brokerage commissions, without being considered an investment adviser.<sup>55</sup> Consequently, this two-part test enables broker-dealers to avoid qualifying as an "investment adviser" under the Investment Advisers Act. By excluding broker-dealers from the definition of "investment adviser," Congress created a two-tier framework, with one set of standards governing broker-dealers and another governing investment advisers.

This framework is meaningful because broker-dealers need only adhere to the less exacting suitability standard when acting on behalf of their customers, while investment advisers must adhere to a fiduciary standard of conduct when doing so. Although the Investment Advisers Act does not expressly impose a fiduciary standard on investment advisers, the Supreme Court interpreted the Investment Advisers Act as implicitly establishing such a standard in 1963.<sup>56</sup> In *SEC v. Capital Gains Research Bureau, Inc.*, the Court explained that "[t]he Investment Advisers Act . . . reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship."<sup>57</sup> Thus, any person who

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<sup>52</sup> 15 U.S.C. § 80b-2(a)(11)(C).

<sup>53</sup> *Id.* As used in the first prong of this test, a "broker" is "any person engaged in the business of effecting transactions in securities for the account of others," 15 U.S.C. § 78c(a)(4)(A) (2012), and a "dealer" is "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise." 15 U.S.C. § 78c(a)(5)(A).

<sup>54</sup> 15 U.S.C. § 80b-2(a)(11)(C). As used in the second prong of this test, "special compensation" means non-commission-based compensation. See Laby, *supra* note 21, at 403. Broker-dealers typically earn commissions, whereas, investment advisers typically earn fees on the amount of assets under management. *Id.* at 395. The former incentivizes trade activity, whether good or bad, and the latter incentivizes maximizing returns on investments.

<sup>55</sup> Knes, *supra* note 24.

<sup>56</sup> *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963).

<sup>57</sup> *Id.*

satisfies the definition of investment adviser must adhere to fiduciary standards of conduct.<sup>58</sup>

To satisfy fiduciary standards, an investment adviser must satisfy “an affirmative duty of utmost *good faith*, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable *care* to avoid misleading his clients,” or it will be subject to civil liability.<sup>59</sup> The first requirement, the duty of good faith, requires fiduciaries to act in their clients’ best interest,<sup>60</sup> whereas, the second requirement, the duty of care, requires fiduciaries to seek the best execution in securities transactions executed for their clients.<sup>61</sup> Together, these requirements demand investment advisers to act in their clients’ best interest when rendering investment advice.

Until 2010, the SEC did not have the authority to modify the definition of “broker” or “dealer” as defined in the Investment Advisers Act—either to broaden or narrow the scope of those definitions.<sup>62</sup> Its lack of authority was evidenced by its failed efforts to expand those definitions nearly two decades ago. In 1999, the SEC proposed a rule aimed at broadening the scope of brokers and dealers exempt from fiduciary status.<sup>63</sup> After facing backlash from investment advisers who argued that the proposal would unduly benefit broker-dealers by enabling them to provide investment advice without serving as fiduciaries, “[t]he SEC did not act on the proposal for nearly five years.”<sup>64</sup> However, it “reopened the comment period . . . in January 2005” and adopted a substantially similar re-proposal in April 2005.<sup>65</sup>

In response to the rule’s adoption, the Financial Planning Association<sup>66</sup> petitioned for judicial review, challenging the SEC’s authority to modify the conditions under which a broker or dealer could be excluded from the definition of investment adviser.<sup>67</sup> In March 2007, the D.C. Circuit applied the two-step analysis under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 194 (emphasis added).

<sup>60</sup> Jordan, *supra* note 21, at 502–03.

<sup>61</sup> *Id.* at 510.

<sup>62</sup> Laby, *supra* note 21, at 411.

<sup>63</sup> *Id.* at 408 (“The proposed rule was designed to prevent application of the [Investment Advisers] Act to broker-dealers solely because they repriced full service brokerage to a fee-based structure or established a two-tier system of pricing, one for full-service brokerage and one for execution-only or discount brokerage.”).

<sup>64</sup> *Id.* at 409.

<sup>65</sup> *Id.* 409–10.

<sup>66</sup> “The Financial Planning Association [is] an advocacy group for persons who provide and receive financial planning services . . .” *Id.* at 409.

<sup>67</sup> *Id.*

holding that the SEC did not have the authority to rewrite the terms of the statutory exclusion in the Investment Advisers Act because the text of the exception was unambiguous.<sup>68</sup> A few months later, as Professor Arthur B. Laby described, “the SEC announced it would stand down.”<sup>69</sup>

By standing down, the SEC implicitly acknowledged that it did not have the authority to modify the definition of broker or dealer under existing legislation. This left in place the existing two-tiered structure governing investment advisers and broker-dealers. So, unlike investment advisers, who must adhere to fiduciary standards under the Investment Advisers Act,<sup>70</sup> broker-dealers needed (and still need) to comply only with general anti-fraud provisions,<sup>71</sup> including the suitability standard.<sup>72</sup>

This all changed in 2010 when Congress expanded the SEC’s authority to regulate broker-dealers by passing Section 913 of Dodd-Frank.<sup>73</sup> Section 913 amended the Securities Exchange Act to enable the SEC to impose the same fiduciary standard of conduct that applies to investment advisers to broker-dealers who provide personalized investment advice to their customers.<sup>74</sup> Not only that, Congress required the SEC to conduct a study evaluating “the effectiveness of existing legal or regulatory standards of care” for broker-dealers and investment advisers.<sup>75</sup> In the corresponding study that was conducted by a task force within the SEC and published in January 2011, the task force recommended that the SEC exercise its new authority under Section 913 by imposing a higher standard of conduct on broker-dealers who provide personalized investment advice.<sup>76</sup>

But despite having the authority to impose fiduciary obligations on broker-dealers who provide personalized investment advice and a recommendation

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<sup>68</sup> *Id.* at 411.

<sup>69</sup> *Id.*

<sup>70</sup> *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963).

<sup>71</sup> *Guide to Broker-Dealer Registration*, SEC, <https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbguidehtm.html#V> (last visited Oct. 20, 2018) (listing other requirements, including, but not limited to, the duty of fair dealing, duty of best execution, and the customer confirmation rule).

<sup>72</sup> *Compare id.* (stating that the suitability standard requires that broker-dealers “recommend only those specific investments or overall investment strategies that are suitable for their customers”), with *Capital Gains*, 375 U.S. at 194 (stating that an investment adviser acting as a fiduciary must satisfy “an affirmative duty of utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading . . . clients”).

<sup>73</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 913, 124 Stat. 1376, 1824 (2010) (codified at 15 U.S.C. 78o(k)(1) (2012)).

<sup>74</sup> 15 U.S.C. § 78o(k)(1).

<sup>75</sup> § 913(b)(1), 124 Stat. at 1824.

<sup>76</sup> SEC 913 STUDY, *supra* note 29, at vi.

from a task force within the SEC to exercise that authority, the SEC has not yet done so. The two-tiered structure for broker-dealers and investment advisers remains in place. While the SEC is making progress towards promulgating a new standard of conduct for broker-dealers, the specifics of that new standard are unclear.<sup>77</sup> In April 2018, a month after the Fifth Circuit vacated the DOL's fiduciary rule, the Commission proposed two new regulations and an interpretation by a 4-to-1 vote.<sup>78</sup> The stated goal of these proposals, one of which is called Regulation Best Interest, is to increase disclosure requirements and mitigate conflicts of interest that arise from broker-dealer services.<sup>79</sup> The comment period for these proposals closed in early August 2018, and the SEC is currently considering the comments as it drafts what is likely to become the new standard for broker-dealers who provide investment advisory services.<sup>80</sup> Until a final rule is adopted, though, it will be hard to predict what the SEC will do. As such, the next section provides an overview of the SEC's existing apparatus for administering and enforcing its two-tiered framework.

### 3. *Enforcement by the SEC*

To support the SEC's mandate, Congress initially granted the SEC the authority "to appoint . . . such officers . . . and other experts as may be necessary to carry out [the Commission's] functions under" the Exchange Act.<sup>81</sup> In addition, the SEC is now responsible for enforcing the Investment Advisers Act, the Sarbanes-Oxley Act of 2002, Dodd-Frank, and the Jumpstart Our Business Startups Act.<sup>82</sup>

Two of the SEC's five divisions, the Divisions of Investment Management and the Division of Enforcement, are primarily responsible for assisting the Commission in enforcing the aforementioned securities legislation and related regulation.<sup>83</sup> The Division of Investment Management assists "the Commission in enforcement matters involving investment companies and advisers," and the

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<sup>77</sup> See Clayton, *supra* note 17.

<sup>78</sup> Ed Beeson, *SEC Unveils Plans for "Best Interest" Standard for Brokers*, LAW360 (Apr. 18, 2018, 9:40 PM), <https://www.law360.com/articles/1034840/sec-unveils-plans-for-best-interest-standard-for-brokers>.

<sup>79</sup> *Id.* Although the name "Regulation Best Interest" suggests that the proposal would effectuate a fiduciary standard of care, which would require broker-dealers to act in their customers' best interest, multiple Commissioners say the new proposals merely tweak the existing suitability standard. *Id.*

<sup>80</sup> *Id.*; see Regulation Best Interest, 83 Fed. Reg. 21,574, 21,574, 21,681 (May 9, 2018) (to be codified at 17 C.F.R. pt. 240).

<sup>81</sup> See Securities Exchange Act of 1934, ch. 404, § 4(b), 48 Stat. 881, 885 (1934) (current version codified at 15 U.S.C. § 78d(b)(1) (2012)).

<sup>82</sup> *What We Do*, *supra* note 31.

<sup>83</sup> 15 U.S.C. § 78d(h)(2); *What We Do*, *supra* note 31.

Division of Enforcement makes recommendations to the Commission about whether it should “bring civil actions in federal court or as administrative proceedings before an administrative law judge.”<sup>84</sup> The Division of Enforcement also prosecutes cases on the Commission’s behalf against broker-dealers and investment advisers who violate their respective standards of conduct.<sup>85</sup> Thus, when broker-dealers or investment advisers fail to adhere to suitability standards or fiduciary obligations, respectively, then such persons will be subject to civil liability and sanctions enforced by the SEC.

#### 4. *The Financial Industry Regulatory Authority*

In addition to being subject to the SEC’s direct regulatory authority, broker-dealers are also subject to FINRA’s regulatory authority under SEC oversight.<sup>86</sup> This section discusses how FINRA operates under SEC oversight and how its mandate, authority to regulate broker-dealers, and enforcement procedures overlap with the SEC’s. Particularly, it highlights how FINRA Rule 2111, regarding the suitability of broker-dealer recommendations, is administered and enforced by FINRA. It also briefly discusses the history and mission of FINRA’s predecessor, the National Association of Securities Dealers (NASD).

The Maloney Act of 1938 amended the Exchange Act to authorize the SEC “to register voluntary national associations of broker[-]dealers” that regulate themselves while operating under SEC oversight.<sup>87</sup> One year after Congress passed the Maloney Act, securities industry representatives created NASD, an SRO that regulated broker-dealers.<sup>88</sup> “NASD’s founding mandate was . . . to advance just and equitable principles of trade for the protection of investors,” and was later charged with promoting capital formation and regulating fair and efficient securities markets.<sup>89</sup> In 2007, the SEC approved the merger of NASD and the NYSE’s member regulation to form FINRA.<sup>90</sup>

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<sup>84</sup> *What We Do*, *supra* note 31.

<sup>85</sup> *Id.*

<sup>86</sup> NAT’L ASS’N OF SEC. DEALERS, INC., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. i (1997), <https://www.finra.org/sites/default/files/Corporate/p009762.pdf> (last visited Oct. 20, 2018); *see infra* note 90 and accompanying text.

<sup>87</sup> NAT’L ASS’N OF SEC. DEALERS, *supra* note 86.

<sup>88</sup> *Id.*; Press Release, FINRA, FINRA Marks 75th Anniversary of Protecting Investors (Sept. 18, 2014).

<sup>89</sup> NAT’L ASS’N OF SEC. DEALERS, *supra* note 86 (“The NASD, taking direction from the SEC in 1963, has also adopted, as another tenet of its self-regulatory mandate, the promotion of capital formation by developing, operating, and regulating fair and efficient . . . securities markets.”).

<sup>90</sup> Press Release, FINRA, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority – FINRA (July 30, 2007).

FINRA exists to protect investors and strengthen market integrity through regulation of its registered members,<sup>91</sup> which includes regulation of “[e]very firm and broker that sells securities to the public in the United States.”<sup>92</sup> Firms and brokers are required by legislation to register with FINRA.<sup>93</sup> Consequently, FINRA currently regulates approximately 3,700 brokerage firms and nearly 630,000 registered brokers under SEC oversight.<sup>94</sup>

This regulatory authority includes the power to establish standards of conduct that member broker-dealers must adhere to when operating on behalf of their clients.<sup>95</sup> One key area of regulatory overlap between FINRA and the SEC is Rule 2111.<sup>96</sup> Under Rule 2111, a broker-dealer can only recommend a transaction or investment strategy if it has “a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer.”<sup>97</sup> This means that a broker-dealer must select within a range of suitable investment options based on, for example, the client’s age, investment objectives, and risk tolerance.<sup>98</sup> Thus, a broker-dealer is not required to act in its customers’ best interests,<sup>99</sup> nor is it required to obtain its customers’ written consent before principal trading—that is, buying or selling stocks on its own behalf.<sup>100</sup> Both of which are required for investment advisers.<sup>101</sup>

Although multiple departments within FINRA collaborate to enforce Rule 2111, its Enforcement Department is primarily responsible for bringing disciplinary actions.<sup>102</sup> These actions include fines, suspensions, or even barring broker-dealers from the industry when they commit egregious violations.<sup>103</sup> The disciplinary actions are resolved by the Enforcement Department either settling

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<sup>91</sup> *Id.*

<sup>92</sup> *Member Regulation*, FINRA, <http://www.finra.org/industry/member-regulation> (last visited Oct. 20, 2018).

<sup>93</sup> *Id.*

<sup>94</sup> *About FINRA*, FINRA, <http://www.finra.org/about> (last visited Oct. 20, 2018).

<sup>95</sup> *Rules and Guidance*, FINRA, <https://www.finra.org/industry/rules-and-guidance> (last visited Oct. 20, 2018). FINRA’s standards do not limit the SEC’s powers or duties. 15 U.S.C. § 78o-3(c) (2012).

<sup>96</sup> *See supra* note 72; *see also FINRA Manual: Contents: Rule 2310*, FINRA, [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=3638NASD](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3638NASD) (last visited Oct. 20, 2018) (“This rule is no longer applicable. NASD Rule 2310 has been superseded by FINRA Rule 2111.”).

<sup>97</sup> *FINRA Manual*, *supra* note 6.

<sup>98</sup> *Id.*

<sup>99</sup> *Compare* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191–94 (1963) (discussing investment advisers’ fiduciary obligations), *with FINRA Manual*, *supra* note 6 (defining the suitability standard).

<sup>100</sup> Jordan, *supra* note 21, at 503.

<sup>101</sup> *Id.*

<sup>102</sup> *Enforcement*, FINRA, <http://www.finra.org/industry/enforcement> (last visited Oct. 20, 2018).

<sup>103</sup> *Id.*

with offending broker-dealers or filing a formal complaint with FINRA's Office of Hearing Officers, an office of impartial adjudicators, for its determination.<sup>104</sup> Either way, the notable difference between enforcement by FINRA versus that of the SEC is less about policy or procedural differences than it is about funding. FINRA is a profitable, self-funded SRO; whereas, the SEC relies on government funding.<sup>105</sup> Despite their similarities, however, the SEC's and FINRA's policies and procedures remain at odds with the DOL's attempted regulatory efforts.

### *B. The Department of Labor*

In addition to the SEC and FINRA, the DOL also has regulatory authority over broker-dealers when they provide investment advice to pension plans or other retirement accounts. This authority, or any authority the DOL has to regulate financial service providers for that matter, derives from ERISA,<sup>106</sup> which was enacted in response to a crisis in the early 1970s involving widespread private-sector pension plan failures, and is the most comprehensive legislation governing private-sector pension plans to date.<sup>107</sup>

This section begins by providing a brief history of retirement investing and retirement investment legislation leading to ERISA in 1974 as a foundation for later comparison of the SEC and DOL's convergence in authority and recent divergence in regulatory policy. Primarily, it focuses on the fact that total retirement assets in the United States amounted to around \$369 billion when Congress enacted ERISA in 1974.<sup>108</sup> But by 2018, that number grew nearly 77 times, totaling approximately \$28.3 trillion in retirement assets in the United States.<sup>109</sup> Concurrently, the proportion of private-sector defined-benefit plans to total retirement assets declined significantly, and the proportion of defined-contribution plans and IRAs, which look more like non-retirement investments

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<sup>104</sup> *Id.*; *Office of Hearing Officers*, FINRA, <http://www.finra.org/industry/oho> (last visited Oct. 20, 2018).

<sup>105</sup> FINRA, FINRA 2018 ANNUAL BUDGET SUMMARY 4 (2018).

<sup>106</sup> *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (current version codified in scattered sections of 29 U.S.C.).

<sup>107</sup> SUBCOMM. ON LABOR OF THE COMM. ON LABOR & PUB. WELFARE, 94TH CONG., LEGIS. HISTORY OF THE EMP. RET. INCOME SEC. ACT OF 1974, at 1580, 1635 (Comm. Print 1974); AON HEWITT, CHRONOLOGICAL SUMMARY OF MAJOR POST-ERISA BENEFIT LEGISLATION (2012), [http://www.aon.com/attachments/human-capital-consulting/summary\\_of\\_major\\_post-erisa\\_legislation\\_07.2012.pdf](http://www.aon.com/attachments/human-capital-consulting/summary_of_major_post-erisa_legislation_07.2012.pdf); *see also* PENSIONS: THE BROKEN PROMISE (NBC News 1972).

<sup>108</sup> *Retirement Assets Total \$28.3 Trillion in Second Quarter 2018*, INV. CO. INST., [https://www.ici.org/research/stats/retirement/ret\\_18\\_q2](https://www.ici.org/research/stats/retirement/ret_18_q2) (last visited Oct. 20, 2018) (relying on the data in Table 1 of "The U.S. Retirement Market, Second Quarter 2018" spreadsheet available on the page cited).

<sup>109</sup> *Id.*

than defined-benefit plans, grew significantly.<sup>110</sup> This section then discusses the DOL's regulation of broker-dealers and investment advisers since 1974, with an eye toward comparing its regulation to that of the SEC. Finally, this section concludes with a review of how the DOL administers and enforces ERISA and its regulations.

### 1. *The Development of Retirement Investment Regulation Prior to ERISA*

There was not a great need for regulation of retirement investing in the first half of the twentieth century. The average age of retirement was seventy in 1940,<sup>111</sup> but the average life expectancy was sixty-four.<sup>112</sup> With the average age of retirement surpassing the average life expectancy, it is unsurprising that only 15% of all private-sector employees were covered by a pension plan in 1940.<sup>113</sup> By 1970, though, the average age of retirement dropped to sixty-five<sup>114</sup> and the average life expectancy rose to over seventy.<sup>115</sup> This inversion, along with legislation that provided tax benefits for pension trusts,<sup>116</sup> likely led to the huge growth in the number of private-sector employees covered by pension plans, with approximately 45% of all private-sector employees covered by these plans in 1970.<sup>117</sup>

Despite the growth in popularity of pension plans between 1940 and 1970, Congress failed to enact legislation that would prevent pension plan sponsors, namely employers, from mismanaging the benefits they guaranteed to their beneficiaries, namely employees.<sup>118</sup> Instead, Congress introduced piecemeal legislation to regulate how plan sponsors must fulfill their pension promises.<sup>119</sup> Congress enacted legislation in 1947 to create guidelines for “the establishment and operation of pension plans administered jointly by an employer and a union.”<sup>120</sup> Eleven years later, in 1958, Congress enacted the Welfare and Pension

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<sup>110</sup> *Id.* (showing that private-sector defined-benefit plans declined from 35% of all retirement assets in 1974 to just under 11% in 2018).

<sup>111</sup> *The Average Retirement Age in the United States from 1900 to 2010*, STATISTA, <https://www.statista.com/statistics/319983/average-retirement-age-in-the-us/> (last visited Oct. 20, 2018).

<sup>112</sup> Elizabeth Arias, Ctrs. for Disease Control & Prevention, *United States Life Tables, 2003*, 54 Nat'l Vital Stat. Rep. 1, 30 (2006).

<sup>113</sup> *History of Pension Plans*, EMP. BENEFIT RES. INST., <https://www.ebri.org/publications/facts/index.cfm?fa=0398afact> (last visited Oct. 20, 2018).

<sup>114</sup> *The Average Retirement Age in the United States from 1900 to 2010*, *supra* note 111.

<sup>115</sup> Arias, *supra* note 112.

<sup>116</sup> *History of Pension Plans*, *supra* note 113.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (describing legislative changes passed concerning pension plans).

<sup>120</sup> *Id.* (also known as the Taft-Hartley Act).

Plans Disclosure Act (Disclosure Act), which required plan sponsors to provide plan beneficiaries the necessary information to “monitor their plans to prevent mismanagement and abuse of plan funds”<sup>121</sup> by disclosing pension plan-related information, including plan descriptions and annual financial reports.<sup>122</sup> And in 1962, just four years after placing the burden on beneficiaries to monitor their plans, Congress shifted plan oversight responsibility to the DOL by amending the Disclosure Act to grant the Secretary of Labor “enforcement, interpretative, and investigatory powers over employee benefit plans to prevent mismanagement and abuse of plan funds.”<sup>123</sup> Even after this shift, however, disclosure requirements proved to be an inadequate means of preventing pension plan mismanagement.

The flood of pension fund failures in the 1960s and early 1970s illustrates just how futile these legislative acts were in preventing private pension plan mismanagement.<sup>124</sup> Perhaps the best known example of pension plan failure involves the Studebaker Corporation, a wagon and automobile manufacturer located in South Bend, Indiana.<sup>125</sup> When it closed its plant in 1963, more than 6,000 employees lost their jobs,<sup>126</sup> and over 4,500 of them lost 85% of their vested benefits because Studebaker failed to maintain sufficient funds to pay their pension plan liabilities.<sup>127</sup> But this was not an isolated incident.<sup>128</sup> The problem was pervasive and continued into the 1970s. Over 19,000 workers lost

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<sup>121</sup> *History of EBSA and ERISA*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-crisa> (last visited Oct. 20, 2018).

<sup>122</sup> Comment, *The Welfare and Pension Plans Disclosure Act*, 8 DEPAUL L. REV. 59, 65 (1958); see also *History of Pension Plans*, *supra* note 113.

<sup>123</sup> *History of EBSA and ERISA*, *supra* note 121 (granting the Secretary of Labor the authority to regulate pension plans for the first time). In March 1962, President Kennedy also commissioned a committee to “conduct a review of . . . the role and character of the private pension and other retirement systems in the economic security system of the Nation.” PRESIDENT’S COMM. ON CORP. PENSION FUNDS & OTHER PRIVATE RET. & WELFARE PROGRAMS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS 39 (1965).

<sup>124</sup> SUBCOMM. ON LABOR OF THE COMM. ON LABOR & PUB. WELFARE, 94TH CONG., LEGIS. HISTORY OF THE EMP. RET. INCOME SEC. ACT OF 1974, at 1619, 1653 (Comm. Print 1974).

<sup>125</sup> *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 n.22 (1980).

<sup>126</sup> Kelli Stopczynski, *Remembering Studebaker 50 Years Later*, WSBT (Dec. 9, 2013), <http://wsbt.com/news/local/remembering-studebaker-50-years-later>.

<sup>127</sup> SUBCOMM. ON LABOR OF THE COMM. ON LABOR & PUB. WELFARE, 94TH CONG., LEGIS. HISTORY OF THE EMP. RET. INCOME SEC. ACT OF 1974, at 1599 (Comm. Print 1974).

<sup>128</sup> *Id.* Another well-known example of pension plan failure resulted from the sale of P. Ballantine and Sons, an American brewery and “substantial contributor to a multiemployer plan.” *Nachman Corp.*, 446 U.S. at 374 n.22. The sale of the brewery in 1972 resulted in the shutdown of a plant that employed nearly 2,000 employees. Ronald Sullivan, *Newark Losing Ballantine Plant*, N.Y. TIMES (Mar. 4, 1972), <http://www.nytimes.com/1972/03/04/archives/brewery-is-sold-to-falstaff-which-will-keep-brand-ballantine-sold.html>. As part of the sale, P. Ballantine and Sons withdrew from the multiemployer pension plan, resulting in “several hundred employees, with as many as 30 years [of] service, [losing] a substantial portion of their vested benefits.” *Nachman Corp.*, 446 U.S. at 374 n.22.

an average of more than \$4,000 due to unexpected pension plan termination in 1972 alone.<sup>129</sup> Having seen enough by 1974, Congress enacted ERISA,<sup>130</sup> the most comprehensive pension legislation to date, to address the crisis stemming from private pension plan mismanagement.<sup>131</sup>

## 2. *The DOL's Authority to Impose Fiduciary Obligations*

Congress enacted ERISA to protect pension plan beneficiaries without discouraging employers from maintaining or creating pension plan offerings.<sup>132</sup> Title I of ERISA governs the management of voluntarily established pension plans in private industry, including defined-benefit and defined-contribution plans.<sup>133</sup> But it does not apply to state- or federally-sponsored pension plans,<sup>134</sup> nor does it require private-sector employers or employees to create pension plans.<sup>135</sup> It instead establishes standards for employers and employees that do.<sup>136</sup> Title II of ERISA substantively reflects Title I, but it governs IRAs, not pension plans.<sup>137</sup> The following sections proceed by further detailing ERISA's scope.

### a. *An Overview of the Retirement Accounts Regulated Under ERISA*

This section provides a brief comparison of the three types of retirement investments that this Comment discusses—defined-benefit plans, defined-contribution plans, and traditional IRAs—and non-retirement investment accounts. Defined-benefit and defined-contribution plans are retirement accounts that are typically created and maintained by employers for the benefit of their employees.<sup>138</sup> In a defined-benefit plan, an employer guarantees its

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<sup>129</sup> SUBCOMM. ON LABOR OF THE COMM. ON LABOR & PUB. WELFARE, 94TH CONG., LEGIS. HISTORY OF THE EMP. RET. INCOME SEC. ACT OF 1974, at 1872–73 (Comm. Print 1974).

<sup>130</sup> Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (current version codified in scattered sections of 29 U.S.C.).

<sup>131</sup> See AON Hewitt, *supra* note 107, at 1.

<sup>132</sup> Britni A. Summers, Comment, *Called to the Principal's Office: How Principal Would Have Been Held Accountable in McCaffree v. Principal Under the New ERISA Fiduciary Standard*, 62 S.D. L. REV. 183, 189 (2017).

<sup>133</sup> ERISA also governs the management of health benefit plans, 29 U.S.C. § 1002(1) (2012), but those are not the focus of this Comment.

<sup>134</sup> 29 U.S.C. § 1003(b) (2012).

<sup>135</sup> 29 U.S.C. § 1003(a) (stating that ERISA covers a pension plan “if it is established or maintained”).

<sup>136</sup> *Id.*

<sup>137</sup> See I.R.C. § 4975 (2012); Chamber of Commerce of the U.S. v. Hugler, 231 F. Supp. 3d 152, 162 (N.D. Tex. 2017).

<sup>138</sup> 29 U.S.C. § 1002(2) (2012).

employee “a fixed, pre-established benefit . . . at retirement”;<sup>139</sup> whereas, in a defined-contribution plan, an employer only guarantees an employee a defined contribution for the account today, not a fixed benefit at retirement.<sup>140</sup> With defined-contribution plans, the benefit depends on “the amount saved and the investment returns net of fees on those assets.”<sup>141</sup> Unlike both defined-benefit and defined-contribution plans, however, traditional IRAs are created and maintained by individuals outside of their employment.<sup>142</sup>

Defined-benefit plans, defined-contribution plans, and traditional IRAs are different from non-retirement investment accounts in two keys ways. First, all contributions to pension plans and traditional IRAs are tax-advantaged.<sup>143</sup> That is, the IRS collects taxes on the funds when retirees make withdrawals, rather than taxing contributions when invested during employment.<sup>144</sup> Generally, deferred compensation retirement accounts are beneficial for investors because they allow investors to accumulate capital gains free of taxation until the funds are drawn down during retirement, when investors are typically taxed at a lower rate.<sup>145</sup> Second, there are annual limitations on the amount of contributions employees and individuals can make to their plans and accounts, respectively.<sup>146</sup>

Although defined-benefit plans, defined-contributions plans, and traditional IRAs are similar in the two respects mentioned above, they are in different in one key way: risk allocation—specifically, the risk related to fluctuations in pricing in invested capital due to market movements. For defined-benefit plans, plan sponsors bear the risk of ensuring that employees receive a fixed amount of funds at retirement.<sup>147</sup> Fluctuations can be good or bad for employers. If the return on invested contributions is higher than forecasted, then the pension plan

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<sup>139</sup> *Choosing a Retirement Plan: Defined Benefit Plan*, IRS, <https://www.irs.gov/retirement-plans/choosing-a-retirement-plan-defined-benefit-plan> (last visited Oct. 20, 2018). Contributions are commonly based on several factors, including “age, earnings, and tenure.” COUNCIL OF ECON. ADVISERS, *supra* note 1, at 4.

<sup>140</sup> COUNCIL OF ECON. ADVISERS, *supra* note 1, at 4.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*; see also I.R.C. § 408(a) (2012).

<sup>143</sup> *Taxation of Retirement Income*, FINRA, [www.finra.org/investors/taxation-retirement-income](http://www.finra.org/investors/taxation-retirement-income) (last visited Oct. 20, 2018).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See *Retirement Topics – Contributions*, IRS, <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-contributions> (last visited Oct. 20, 2018).

<sup>147</sup> COUNCIL OF ECON. ADVISERS, *supra* note 1, at 4. This means that plan sponsors are responsible for investing enough funds to ensure its plan’s assets (investments) equal its plan’s liabilities (benefits promised), which is an inherently risky task given the unpredictability of market fluctuations.

will be overfunded.<sup>148</sup> If the return on invested contributions is lower than forecasted, however, then plan sponsors will be required to contribute additional funds to the plan.<sup>149</sup> In contrast, employees and individuals bear the risk of loss on invested contributions for defined-contribution plans and IRAs, respectively, but yield the gains from overperformance.<sup>150</sup>

*b. Who Qualifies as a Fiduciary Under ERISA*

The definition of “fiduciary” in Title I of ERISA more broadly elevates persons to the status of fiduciary than does the definition of investment adviser in the Investment Advisers Act.<sup>151</sup> Title I states:

[A] person is a fiduciary with respect to a[n employee pension benefit] plan to the extent . . . he *renders investment advice* for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so.<sup>152</sup>

In other words, an individual or entity must adhere to a fiduciary standard of conduct when acting on behalf of their client if the individual or entity receives compensation for “rendering investment advice.” Before discussing the DOL’s interpretation of “rendering investment advice” momentarily, it is useful to compare the definition of fiduciary under ERISA to the one set forth in *Capital Gains* (and enforced by the SEC).

Under Title I of ERISA, which governs the administration and enforcement of pension plans, including defined-benefit and defined-contribution plans, a fiduciary must satisfy two different standards of conduct—one standard is principles-based and the other is rules-based.<sup>153</sup> The principles-based standard is the prudent man standard of care,<sup>154</sup> which is similar to the fiduciary standard

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<sup>148</sup> *Id.*; see also *How Do Defined Benefit and Cash Balance Plans Become Overfunded?*, QBI, <http://qbillc.com/blog/how-do-defined-benefit-and-cash-balance-plans-become-over-funded> (last visited Oct. 20, 2018) (discussing the problems associated with overfunded defined-benefit pension plans).

<sup>149</sup> COUNCIL OF ECON. ADVISERS, *supra* note 1, at 4.

<sup>150</sup> *Id.*

<sup>151</sup> Compare 29 U.S.C. § 1002(21)(A) (2012) (explaining that qualifying persons—regardless of whether they are a broker-dealer—are considered fiduciaries under ERISA if they meet certain conditions), with 15 U.S.C. § 80b-2(a)(11)(C) (2012) (excluding broker-dealers from the definition of investment adviser, thereby exempting them from fiduciary status).

<sup>152</sup> 29 U.S.C. § 1002(21)(A) (emphasis added).

<sup>153</sup> 29 U.S.C. §§ 1104(a)(1), 1106(a) (2012); see also STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 54 (10th ed. 2015) (discussing the concepts of fiduciary duty that apply to legal and other professionals).

<sup>154</sup> Compare 29 U.S.C. § 1104(a)(1) (defining the prudent man standard of care), with *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191–94 (1963) (discussing investment advisers’ fiduciary obligations).

imposed on investment advisers under *Capital Gains*.<sup>155</sup> It establishes that a fiduciary must

discharge his duties with respect to a plan solely in the interest of the . . . beneficiaries . . . with the care, skill, prudence, and diligence . . . that a prudent man acting a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.<sup>156</sup>

Alternatively, the rules-based standard restricts a fiduciary from entering into specified prohibited transactions.<sup>157</sup> Among other restrictions, fiduciaries are also prohibited from “receiv[ing] any consideration for [their] own personal account from any party dealing with [a] plan in connection with a transaction involving the assets of the plan.”<sup>158</sup> If a fiduciary fails to comply with either of these standards, the individual or entity will be subject to civil liability enforceable by the Secretary of Labor or a pension plan participant or beneficiary, all of whom have standing under Title I.<sup>159</sup>

In addition to giving the DOL the authority to interpret whether a person is fiduciary under Title I (and thus subject to the stringent standards of conduct mentioned above), Congress authorized the DOL to grant conditional or unconditional exemptions from the prohibited transactions (and thus the authority to grant exemptions from fiduciary status), so long as the Secretary of Labor “finds that such exemption is[] (1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.”<sup>160</sup> If the DOL grants an exemption, a fiduciary may act in an otherwise prohibited manner without concern for civil or criminal liability under Title I.<sup>161</sup>

Title II, which governs the administration and enforcement of IRAs, provides an identical definition of “fiduciary” and list of prohibited transactions as Title I.<sup>162</sup> It varies from Title I, however, in two meaningful ways. First, “Title II . . . does not expressly impose the duties of loyalty and prudence on

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<sup>155</sup> See Section I.A.

<sup>156</sup> 29 U.S.C. § 1104(a)(1).

<sup>157</sup> 29 U.S.C. § 1106(a) (including sales or exchanges, loans, and transfers, among others).

<sup>158</sup> 29 U.S.C. § 1106(b)(3).

<sup>159</sup> 29 U.S.C. § 1132(a)(1) (2012).

<sup>160</sup> 29 U.S.C. § 1108(a) (2012).

<sup>161</sup> *Id.*

<sup>162</sup> I.R.C. § 4975(c)(1)–(2), (c)(3)(B) (2012); Chamber of Commerce of the U.S. v. Hugler, 231 F. Supp. 3d 152, 162 (N.D. Tex. 2017).

fiduciaries.”<sup>163</sup> Second, it does not grant IRA beneficiaries the right to file a civil action against fiduciaries who fail to satisfy the appropriate standards of conduct described above.<sup>164</sup> Instead, under Title II, Congress subjected an offending fiduciary to a 15% tax on each prohibited transaction.<sup>165</sup>

*c. Regulation by the DOL After ERISA*

In 1975, the DOL issued a regulation defining “renders investment advice” in the definition of “fiduciary.”<sup>166</sup> The regulation established the following five-part conjunctive test for determining whether a person “renders investment advice,” and thereby invokes fiduciary status:

(1) [A] person renders advice as to the value of securities or other property . . . , (2) [o]n a regular basis, (3) [p]ursuant to a mutual agreement . . . with the plan or plan fiduciary, (4) [t]he advice will serve as the primary basis for investment decisions with respect to plan assets, and (5) [t]he advice will be individualized based on the particular needs of the plan.<sup>167</sup>

By not satisfying any one of these elements, broker-dealers are able to circumvent fiduciary responsibility under ERISA despite rendering what looks like investment advice.

The circumvention of fiduciary status by broker-dealers has become more common due to the increased popularity of rollovers—transferring retirement assets from a pension plan to an IRA upon switching careers or retiring—which enable broker-dealers to provide one-time investment advice and avoid providing advice on a regular basis.<sup>168</sup> In fact, “rollovers are expected to approach \$2.4 trillion cumulatively from 2016 to 2020.”<sup>169</sup> Consequently, under the 1975 regulation, broker-dealers regularly “have no obligation to adhere to ERISA’s fiduciary standards or to the prohibited transactions rules,”<sup>170</sup> “even

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<sup>163</sup> *Chamber of Commerce of the U.S.*, 231 F. Supp. 3d at 162.

<sup>164</sup> I.R.C. § 4975(a).

<sup>165</sup> *Id.*

<sup>166</sup> Definitions of Terms Used in Subchapters C, D, E, F, and G of this Chapter, 40 Fed. Reg. 50,842 (Oct. 24, 1975) (defining the term “fiduciary”).

<sup>167</sup> *Chamber of Commerce of the U.S.*, 231 F. Supp. 3d at 163; Summers, *supra* note 132, at 192.

<sup>168</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,949 (Apr. 8, 2016) (to be codified at 29 C.F.R. 2509, 2510, 2550).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 20,946.

though rollovers commonly involve the most important financial decisions that investors make in their lifetime.”<sup>171</sup>

Similarly, when the DOL first interpreted “renders investment advice” in 1975, defined-contribution plans and IRAs together accounted for approximately 20% of the total retirement assets in the United States.<sup>172</sup> By June 2018, those same accounts comprised approximately 60% of total retirement assets.<sup>173</sup> This proportional growth in popularity of defined-contribution plans and IRAs as alternatives to defined-benefit plans, which have concurrently declined in popularity, has blurred the lines—at least from an investor’s perspective—between regulation of retirement and non-retirement accounts.

Recognizing that its 1975 interpretation of “renders investment advice” was failing to govern the new retirement investment landscape, the DOL issued a final rule in April 2016 to reinterpret what constitutes rendering investment advice, thereby expanding the scope of who must adhere to fiduciary standards under ERISA.<sup>174</sup> Under the fiduciary rule, “rendering investment advice” required broker-dealers to maintain fiduciary standards while providing one-time recommendations, like rollovers.<sup>175</sup> These one-time recommendations also would have included any investment recommendations regardless of whether the advice was individualized, based on a mutual understanding of the parties, or the primary basis for the pension plan’s decision.<sup>176</sup> Accordingly, under the final rule, an individual who or entity that makes an investment recommendation would have been able to escape liability for violating fiduciary responsibility only if the DOL expressly exempted the prohibited transaction.<sup>177</sup>

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<sup>171</sup> *Id.* at 20,949.

<sup>172</sup> *Retirement Assets Total \$28.3 Trillion in Second Quarter 2018*, *supra* note 108.

<sup>173</sup> *Id.*

<sup>174</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. at 20,946. “In adopting the Fiduciary Rule, the DOL emphasized changes in the U.S. retirement savings landscape since the enactment of ERISA, particularly the shift from employer sponsored defined benefit pension plans to participant-directed defined contribution plans, such as 401(k) plans.” U.S. DEP’T OF TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: ASSET MANAGEMENT AND INSURANCE 65 (2017).

<sup>175</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. at 20,948. While the fiduciary rule explains what constitutes a “recommendation,” for the purposes of this Comment, it is enough to know that “recommendation” generally refers to the act of giving advice regarding the purchase, sale, or holding of securities or other investment property. *Id.* at 20,948.

<sup>176</sup> Summers, *supra* note 132, at 200–01.

<sup>177</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. at 20,946–47 (discussing a new exemption that would enable broker-dealers to avoid liability for otherwise prohibited transactions under certain conditions).

Along with reinterpreting “renders investment advice” in April 2016, the DOL issued a conditional exemption from prohibited transactions called the Best Interest Contract Exemption (BICE).<sup>178</sup> The BICE created the opportunity for exemption-based relief from liability for fiduciaries engaging in principal trading if they satisfied two conditions.<sup>179</sup> The first condition was that a fiduciary “must adhere to the Impartial Conduct Standards,” which ensures that a fiduciary is not receiving third-party compensation to the detriment of the pension plan or IRA beneficiary, “when making investment recommendations.”<sup>180</sup> The second condition applied to fiduciaries managing IRAs. In that context, the fiduciary’s financial institution would have been required to enter into a written contract with the IRA beneficiary.<sup>181</sup> This would have guaranteed wronged IRA beneficiaries a contractual right to sue an offending fiduciary for breach of contract where it otherwise would have lacked standing to file a claim under Title II.<sup>182</sup>

Despite the DOL issuing the fiduciary rule and the BICE in June 2016 under the Obama Administration,<sup>183</sup> the state of those rules remained in flux throughout the first year and a half of the Trump Administration. They were scheduled to become applicable in April 2017, with full compliance required by January 2018.<sup>184</sup> But in early February 2017, just a few weeks after taking office, President Trump issued a memorandum directing the DOL to reexamine those rules.<sup>185</sup> In response, the DOL pushed the applicable date back sixty days to June 2017, and later extended the effective date for full compliance back eighteen months, to July 2019.<sup>186</sup>

While President Trump’s purported motivation for issuing the memorandum was to determine whether the Obama Administration’s final rule was consistent

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<sup>178</sup> *Id.* at 20,946. The BICE supplemented the Prohibited Transaction Exemption 84-24 (PTE 84-24), an exemptive regulation adopted by the DOL in 1977 that provided for exemptive relief for investment advisers who receive third-party compensation “when plans and IRAs purchased recommended insurance and annuity contracts.” Final PTE 84-24, 81 Fed. Reg. 21,147, 21,148 (Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2550).

<sup>179</sup> *See* Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. at 20,947.

<sup>180</sup> Best Interest Contract Exemption, 81 Fed. Reg. 21,002, 21,007 (Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2550). Specifically, the Impartial Conduct Standards require a broker to “act in the customer’s best interest when making recommendations; receive no more than reasonable compensation; and refrain from making misleading statements.” *Id.* at 21,026.

<sup>181</sup> *Id.* at 21,020.

<sup>182</sup> *Id.*

<sup>183</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. at 20,946; Best Interest Contract Exemption, 81 Fed. Reg. at 21,002.

<sup>184</sup> Ebeling, *supra* note 11.

<sup>185</sup> Trump Memorandum, *supra* note 9.

<sup>186</sup> Ebeling, *supra* note 11; Thornton, *supra* note 11.

with the policies of his Administration,<sup>187</sup> the delay caused one consequence that was almost certainly unintended: it provided the courts more time to determine whether the DOL exceeded its authority under ERISA by promulgating the fiduciary rule and the BICE. After being upheld by the Tenth Circuit,<sup>188</sup> the DOL fiduciary rule was vacated in toto by the Fifth Circuit in March 2018.<sup>189</sup> In a 2-to-1 split decision, the Fifth Circuit also vacated the BICE.<sup>190</sup> It held that the DOL exceeded its authority under ERISA in promulgating the fiduciary rule and the BICE.<sup>191</sup> The DOL had forty-five days from the time of the decision—that is, until April 30—to file an appeal, but it did not.<sup>192</sup> A third-party effort by AARP and multiple states, including California and New York, to defend the fiduciary rule was rejected by the Fifth Circuit in May.<sup>193</sup> Given that the DOL's fiduciary rule was vacated, and the agency is (for better or worse) back to enforcing its 1975 regulation, the next section discusses how the DOL's administration and enforcement of ERISA and that 1975 regulation compare to the enforcement mechanisms employed by the SEC.

### 3. *Enforcement by the DOL*

To protect pension plan and IRA beneficiaries, Congress granted the DOL the authority to carry out the provisions of Title I and to promulgate rules and regulations to protect pension plan investors,<sup>194</sup> leaving the IRS to enforce tax penalties in the Internal Revenue Code for fiduciaries who fail to satisfy their duties to IRA beneficiaries under Title II.<sup>195</sup> Notably, the DOL has the authority to conduct compliance investigations.<sup>196</sup> The Employee Benefits Security Administration (EBSA) is the agency within the DOL that is primarily

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<sup>187</sup> Trump Memorandum, *supra* note 9.

<sup>188</sup> Akira Tomlinson, *Federal Appeals Court Upholds Department of Labor Fiduciary Rule*, JURIST (Mar. 15, 2018, 7:51 AM), <https://www.jurist.org/news/2018/03/federal-appeals-court-upholds-department-of-labor-fiduciary-rule/>.

<sup>189</sup> Chamber of Commerce of the U.S. v. U.S. Dep't of Labor, 885 F.3d 360, 379 (5th Cir. 2018).

<sup>190</sup> *Fifth Circuit Vacates Fiduciary Rule*, DRINKERBIDDLE (Mar. 20, 2018), <https://www.drinkerbiddle.com/insights/publications/2018/03/fifth-circuit-vacates-fiduciary-rule>.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Schoeff Jr., *supra* note 14.

<sup>194</sup> 29 U.S.C. § 1135 (2012). The DOL collaborates with the IRS and the Pension Benefit Guaranty Corporation to enforce ERISA. SAMUEL HENSON, LOCKTON RET. SERVS., ERISA'S THREE-HEADED GUARDIAN 4 (explaining further that the Pension Benefit Guaranty Corporation enforces Title IV, and that Title III establishes the parameters by which the three entities collaborate to enforce ERISA).

<sup>195</sup> HENSON, *supra* note 194.

<sup>196</sup> *Id.* at 5.

responsible for enforcing pension-related legislation and regulation.<sup>197</sup> Particularly, EBSA's Offices of Regulations and Interpretations, Exemption Determinations, and Enforcement collaborate to administer and enforce the fiduciary-related provisions of Title I.<sup>198</sup>

As described in the preceding section, the standards of conduct that EBSA enforces include a fiduciary's obligations to comply with the prudent man standard of care and avoid entering into prohibited transactions, while providing exemptions for certain otherwise prohibited transactions. Like the SEC's Division of Enforcement, which files civil actions under the Commission's authority, EBSA's Office of Enforcement has the authority to file civil actions and prosecute cases against offending fiduciaries under the Secretary of Labor's authority.<sup>199</sup> EBSA's Office of Enforcement is also supported by individuals who have a private right of action to sue investment advisers for violations of their fiduciary obligations.<sup>200</sup> Despite the DOL's and SEC's enforcement mechanisms being in place, both agencies have failed to promulgate regulation that properly protects retirement investors from suffering financial losses due to receiving conflicted investment advice.

## II. EFFECTS AND THE AFFECTED: PROBLEMS ARISING FROM THE REGULATORY FRAMEWORK

Having described the overlap between and gaps in the regulation of broker-dealers and investment advisers by the SEC and DOL in Part I, this Part proceeds by identifying the ensuing problems for investors, financial service providers, and the federal government.<sup>201</sup> These problems include (1) lack of transparency regarding the distinction between broker-dealers and investment advisers, and the investment losses suffered partly because of that opacity, (2) rising compliance costs for broker-dealers, and (3) inadequate administration of

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<sup>197</sup> *History of EBSA and ERISA*, *supra* note 121 (“Until February 2003, EBSA was known as the Pension and Welfare Benefits Administration (PWBA). Prior to January 1986, PWBA was known as the Pension and Welfare Benefits Program. At the time of this name change, the Agency was upgraded to a sub-cabinet position with the establishment of Assistant Secretary and Deputy Assistant Secretary positions.”).

<sup>198</sup> *Organization Chart*, EMP. BENEFITS SEC. ADMIN., <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/organization-chart> (last visited Oct. 20, 2018).

<sup>199</sup> *Id.* The Office of Regulations and Interpretations interprets the scope of fiduciary responsibility and prohibited transactions, and the Office of Exemption Determinations analyzes applications for individual and class exemptions from ERISA's prohibited transactions. *Id.* Together, EBSA's offices are “developed and implemented to assure the security of the retirement . . . benefits of America's workers and their families.” EMP. BENEFITS SEC. ADMIN., FY 2018 CONGRESSIONAL BUDGET JUSTIFICATION 15 (2018).

<sup>200</sup> 29 U.S.C. § 1132(a) (2012).

<sup>201</sup> Because FINRA promulgates its rules under SEC oversight, this Part assumes that FINRA's contribution to the problems, to the extent that it does contribute, is attributable to the SEC.

fiduciary-related law due to the promulgation of deficient regulation by the SEC and DOL.

### A. *The Problem for Investors*

Most investors do not understand the distinction between broker-dealer and investment advisory services, and this misunderstanding, coupled with receiving conflicted investment advice, is costing them their savings. In a study commissioned by the SEC in 2008, the RAND Institute for Civil Justice found that despite investors' high level of satisfaction with their own financial service providers, they "typically fail[ed] to distinguish broker-dealers and investment advisers along [regulatory lines]."<sup>202</sup> While lack of transparency is not inherently bad, it is when it results in billions of dollars of investment losses annually for unwitting investors, and that is exactly what is happening. The remainder of this section explains how the distinction between services offered by broker-dealer and investment advisers has become blurred since the early 1990s, and how that opacity has likely resulted in retirement investors losing money.

The New York Stock Exchange invested \$1 billion in technology throughout the 1980s and 1990s to advance the efficiency of processing investment orders by broker-dealers.<sup>203</sup> Since then, trade execution has evolved from a process reliant on human interaction to one driven by algorithms and electronic processing, now resulting in nearly instantaneous trade execution upon ordering.<sup>204</sup> Coinciding with this technological advancement, services offered

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<sup>202</sup> ANGELA A. HUNG ET AL., INVESTOR AND INDUSTRY PERSPECTIVES ON INVESTMENT ADVISERS AND BROKER-DEALERS, RAND INST. FOR CIVIL JUSTICE xiv (2008). The SEC commissioned the RAND Institute to conduct a study to assess (1) the current business practices of broker-dealers and investment advisers, and (2) whether "investors understand the differences between and relationships among broker-dealers and investment advisers." *Id.* To do so, the RAND Institute collected and analyzed a wide range of data from a diverse set of financial service providers. *Id.* It also surveyed a diverse set of investors to better understand their perception of the roles of broker-dealers and investment advisers and said financial service providers' obligations to investors. *Id.*; see also Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,949 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550) ("Plan participants and IRA owners often lack investment expertise and must rely on experts—but are unable to assess the quality of the expert's advice or guard against conflicts of interest.")

<sup>203</sup> Laby, *supra* note 21, at 422–23.

<sup>204</sup> See *id.* at 419–24. To buy and sell securities, investors used to rely on brokers on the trading floor. *Id.* at 421. An investor would arrive at a branch office of an NYSE member firm, place an order with an order clerk at that firm, and then the order clerk would transmit the order to a floor broker. *Id.* The floor broker, acting as the investor's representative on the trading floor, would execute the order by physically going onto the trading floor and placing the order. *Id.* After executing the order, the floor broker would report the order details back to the order broker, who would then report back to the investor. *Id.* at 421–22. Sensibly, floor brokers earned a commission on each transaction they executed. *Id.* at 400. This antiquated process is no longer the common method for buying and selling stock, however. *Id.* at 422.

by broker-dealers have evolved and now commonly resemble the services provided by investment advisers.<sup>205</sup>

In the past three decades, it has become increasingly common for broker-dealers to market investment advisory services and earn fee-based compensation, both of which are characteristic offerings of investment advisers.<sup>206</sup> In 2010, approximately 20% of the broker-dealers registered with the SEC and approximately 37% of those registered with FINRA indicated that they were engaged in investment advisory services.<sup>207</sup> And in 2016, an independent survey of broker-dealers found that over one-third of the participating broker-dealers' revenue was comprised of fee-based compensation.<sup>208</sup>

Again, while lack of transparency stemming from the evolution of broker-dealer services into something more akin to investment advisory services is not inherently bad, an investor failing to understand what duties her financial service provider owes her can and has resulted in significant losses for those saving for retirement. In February 2015, the CEA estimated that \$1.7 trillion of IRA assets are invested in products that generate conflicts of interests, and those conflicted investments result in aggregate losses to retirement investors of about \$17 billion annually.<sup>209</sup> It also found that retirement investors "receiving conflicted advice earn returns roughly [one] percentage point lower each year."<sup>210</sup> A year later, in April 2016, the DOL forecasted that conflicted investment advice could cost IRA investors in the mutual funds segment alone "between \$95 billion and \$189 billion over the next [ten] years and between \$202 billion and \$404 billion over the next [twenty]."<sup>211</sup> Even if the DOL's figures are substantial overestimates,

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<sup>205</sup> *Id.* at 404.

<sup>206</sup> *Id.* at 404–08.

<sup>207</sup> SEC 913 STUDY, *supra* note 29, at 8 & n.14.

<sup>208</sup> Greg Iacurci, *DOL Fiduciary Rule Pushing Broker-Dealer Assets to Fee-Based Accounts, Away from Commissions*, INV. NEWS (May 24, 2017, 2:43 PM), <http://www.investmentnews.com/article/20170524/FREE/170529958/dol-fiduciary-rule-pushing-broker-dealer-assets-to-fee-based>.

<sup>209</sup> COUNCIL OF ECON. ADVISERS, *supra* note 1.

<sup>210</sup> *Id.*

<sup>211</sup> Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946, 20,950 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, 2550). In April 2016, the DOL also reported that "rollovers [from defined-benefit plans to IRAs] are expected to approach \$2.4 trillion cumulatively from 2016 through 2020." *Id.* at 20,949. Although the DOL did not forecast the expected aggregate losses, it did report that, without modifying its fiduciary standard, a retirement investor who rolls over retirement funds "into an IRA could lose 6 to 12 and possibly as much as 23 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial adviser." *Id.* These calculations "are based on a large body of literature cited in the 2015 NPRM Regulatory Impact Analysis, comments on the 2015 NPRM Regulatory Impact Analysis, and testimony at the DOL hearing on conflicts of interest in investment advice in August 2015." *Id.* at n.8.

and even if the CEA's are too, the scale of loss does not change: retirement investors have lost and will continue to lose billions of dollars annually due to conflicted investment advice, especially now that the DOL's fiduciary rule has been vacated.

### *B. Problems for Financial Service Providers and the Federal Government*

The shifting regulatory landscape has created problems for both broker-dealers and the federal government. As discussed momentarily, several studies show that the DOL's fiduciary rule, as well as changes in legislation and regulation generally, have contributed to increased compliance costs that force broker-dealers to adapt or even abandon their service offerings. Similarly, while the costs associated with enforcing later-vacated regulations are not readily available, it is likely that these changes have resulted in increased costs for the SEC and DOL as well. The shifting regulatory landscape also has the effect of expending political and regulatory capital in an era when reaching consensus has become difficult. The remainder of this section takes these issues in turn.

The DOL's fiduciary rule is the perfect example of a well-intentioned regulation promulgated with the illusory belief that it will effect positive, long-term change, only to have those illusions turned into a reality of further muddied regulatory waters. As discussed in section A, the DOL passed the fiduciary rule to prevent losses for retirement investors stemming from conflicted investment advice from broker-dealers. But the long-term benefit to investors will never be realized. Instead, the fiduciary rule merely increased compliance costs for broker-dealers in the short-term before being vacated by the Fifth Circuit.

In an August 2017 study commissioned by the Securities Industry and Financial Markets Association, Deloitte analyzed broker-dealers' response to the DOL's final rule and found it significantly increased compliance costs.<sup>212</sup> It found that "start-up" compliance costs for the DOL's final rule alone cost broker-dealers approximately \$4.7 billion in 2016, and estimated that ongoing costs to comply with the rule will be around \$700 million dollars annually—assuming then, of course, that the rule would not be vacated.<sup>213</sup> This study also surveyed broker-dealers who together managed approximately 27% of the assets

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<sup>212</sup> See DELOITTE, THE DOL FIDUCIARY RULE: A STUDY ON HOW FINANCIAL INSTITUTIONS HAVE RESPONDED AND THE RESULTING IMPACTS ON RETIREMENT INVESTORS 3, 6 (2017).

<sup>213</sup> *Id.* at 19. Deloitte reported that these costs were incurred investing in the "people, processes, and technology" necessary to comply with the fiduciary rule. *Id.* at 17. In terms of human capital, the funds were spent on new or reallocated full-time employees and third-party activities, such as developing legal and business strategy, rule understanding, and technology initiatives. *Id.* at 20.

regulated by ERISA.<sup>214</sup> Fifty-three percent of the respondents indicated that they had limited or eliminated their advised brokerage services, “impacting 10.2 million accounts and \$900 [billion]” in assets under management.<sup>215</sup> To maintain their relationships with these accounts, “62% of study participants broadened access to advice through fee-based programs by lowering account minimums, launching new offerings, or both.”<sup>216</sup>

With the fiduciary rule now vacated, Deloitte’s projected figure of \$700 million in additional compliance costs annually for broker-dealers is likely no longer accurate. It is not yet clear whether the benefits, if any, stemming from nearly \$5 billion in additional compliance in 2016 alone will be salvaged. For example, out of an abundance of caution some broker-dealers may voluntarily maintain their efforts to abandon or modify conflicted advisory services that purport to be brokerage services, but there are no guarantees.

In addition to expending its regulatory capital, if the DOL’s fiduciary rule was not vacated, it likely would have increased the costs associated with the SEC and DOL administering increasingly duplicative enforcement mechanisms. Thus, while some believe that the DOL’s fiduciary rule was a necessary step towards protecting investors given the SEC’s apparent reluctance in promulgating a uniform fiduciary standard that applies to broker-dealers who provide personalized investment advice,<sup>217</sup> the rule would have only provided a partial solution while exacerbating the overlap between the SEC’s and DOL’s enforcement mechanisms. The Fifth Circuit vacating the fiduciary rule provided a unique opportunity for the SEC and DOL to coordinate their efforts from a relatively clean slate before adopting industry-changing regulation. Given that the SEC is currently working to promulgate a rule that will elevate broker-dealers responsibilities to clients who receive investment advice, now is the time for said coordination.

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<sup>214</sup> *Id.* at 4.

<sup>215</sup> *Id.* at 11.

<sup>216</sup> *Id.* at 12. The fiduciary rule is only part of the calculus for determining compliance costs. A report published by the Department of Treasury in 2017 states that recent legislation and regulation, encompassing everything from Dodd-Frank to the DOL’s fiduciary rule, has “resulted in a median increase in compliance costs of an estimated 20% over the past five years.” U.S. DEP’T OF TREASURY, *supra* note 174, at 25 & n.47 (noting that these results were “based on a survey of 42 member firms accounting for 46% of registered fund assets”).

<sup>217</sup> *See supra* notes 16, 21 and accompanying text.

### III. FINE-TUNING: HARMONIZING REGULATION OF BROKER-DEALERS AND INVESTMENT ADVISERS

As discussed in Part II, the existing legislative and regulatory framework has created problems for investors, broker-dealers, and the federal government. This Part proposes an approach for mitigating the effects of these problems by arguing that the SEC should adopt a uniform fiduciary standard of care for broker-dealers and investment advisers who provide personalized investment advice to investors. Before imposing this standard, though, and considering the high likelihood that Congress will not amend its early legislation because it has opted to defer substantive policy changes to the SEC in the past, the SEC should collaborate with the DOL to develop guidelines to help limit duplicative enforcement efforts and identify when broker-dealer services implicate fiduciary status.

#### A. *Promulgation of a Uniform Fiduciary Standard by the SEC*

In Section 913 of Dodd-Frank, Congress (1) required the SEC to commission a study to evaluate the standards of care for broker-dealers and investment advisers and (2) provided the SEC the authority to impose fiduciary status on broker-dealers who provide investment advice to their customers.<sup>218</sup> In the corresponding January 2011 study conducted by a multi-divisional task force of the SEC, the task force recommended “establishing a uniform fiduciary standard for investment advisers and broker-dealers when providing investment advice about securities to [investors] that is consistent with the standard that currently applies to investment advisers.”<sup>219</sup> Despite its authority to impose fiduciary obligations and the recommendation by task force, the SEC has not yet done so but should for three reasons.

One reason the SEC should impose a uniform fiduciary standard is to protect investors against suffering losses due to receiving conflicted investment advice.<sup>220</sup> With an SEC-imposed uniform fiduciary standard in place, broker-dealers would be required to act in their customers’ best interests when providing investment advice. This means that they would be prohibited from providing investment advice where a conflict of interest exists—or at the very least they would need to notify their investors before rendering them conflicted advice rather than after. Thus, the discord between an investors’ satisfaction with their

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<sup>218</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-2013, § 913(b)(1), 124 Stat. 1376, 1824 (2010) (codified at 15 U.S.C. § 78o(k)(1) (2012)).

<sup>219</sup> SEC 913 STUDY, *supra* note 29, at ii.

<sup>220</sup> *Id.* at viii.

financial services providers and their ability to distinguish between broker-dealers and investment advisers along regulatory lines would be a non-issue. The average investor would be safe to assume that he is receiving advice that is in his best interest because, at least per the regulatory requirements, he should be.

Imposing more stringent standards on broker-dealers could arguably lead to broker-dealers abandoning or modifying their services so much so that it would significantly reduce investors' access to financial services. Some argue that this would disproportionately affect low- and middle-income investors.<sup>221</sup> But even if an elevated standard of conduct imposed on broker-dealers were to reduce these investors' access to financial services and investment options, this would only be detrimental if one assumes those abandoned or otherwise modified services are better than the alternative<sup>222</sup>: investors losing upwards of \$17 billion annually. It may be better for investors, even unsophisticated investors, to shift to passive, low-cost investment options that are growing in popularity anyway. Or perhaps just as likely, a market for new, low-cost advisory services would develop in response to the imposition of more stringent standards of conduct on broker-dealers who are essentially providing investment advisory services.

Another reason the SEC should implement a uniform fiduciary standard is because it has the broadest scope of authority to do so and is uniformly regarded as the primary securities regulator.<sup>223</sup> While the history of legislation dating back to the 1930s supports this view, one need not look further than the past ten years. As of 2015, the SEC regulates nearly \$67 trillion in assets in the U.S. investment management industry, whereas the DOL regulates a growing yet still significantly smaller portion of the industry at approximately \$19 trillion.<sup>224</sup> Further, as discussed in Part I and in the beginning of this section, Congress provided the SEC the authority to assess and respond to the specific problem addressed in this Comment under Section 913 of Dodd-Frank. The fact that the DOL's efforts to impose a fiduciary standard were vacated by the Fifth Circuit should only hasten the SEC's efforts to promulgate a uniform standard unrestrained by another agency's formal rulemaking.

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<sup>221</sup> Michael Finke & Thomas P. Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice*, FIN. PLANNING ASS'N, <https://www.onefpa.org/journal/Pages/The%20Impact%20of%20the%20Broker-Dealer%20Fiduciary%20Standard%20on%20Financial%20Advice.aspx> (last visited Oct. 20, 2018).

<sup>222</sup> Demina, *supra* note 21, at 458 (arguing that "there is no reason to view a reduction in investor choice as antithetical to protecting investors").

<sup>223</sup> Krug, *supra* note 16, at 340.

<sup>224</sup> SEC, *supra* note 20; Iekel, *supra* note 19.

And finally, a third reason the SEC should impose a uniform fiduciary standard is because of its authority to not only directly regulate the investment industry, but also to regulate SROs that can self-regulate.<sup>225</sup> Take as an example of an SRO, FINRA. In 2016, FINRA had a net income of almost \$60 million.<sup>226</sup> By relying on quasi-governmental SROs like FINRA, the SEC could alleviate the financial burden of regulating the investment industry.

Despite its authority to adopt the proposals outlined above, the SEC's power to impose fiduciary obligations on broker-dealers under Section 913 of Dodd-Frank is not absolute. While the SEC does indeed have authority to extend the current fiduciary standard that applies to investment advisers to broker-dealers who provide personalized investment advice,<sup>227</sup> Congress neither authorized the SEC to modify that standard when or if it extends the standard to those broker-dealers,<sup>228</sup> nor did Congress influence the DOL's (or any agency's) authority to impose fiduciary obligations on investment advisers. The latter issue is undoubtedly less of a concern since the Fifth Circuit vacated the DOL's attempt to impose a fiduciary standard on broker-dealers. Still, the SEC should collaborate with the DOL before promulgating whatever new standard it has in the works to ensure a sound result that will remain relevant for longer than a year and a half after it is passed.

### *B. Collaboration Between the SEC and the DOL*

The SEC and the DOL should collaborate to provide external mechanisms, for reference by broker-dealers and investors, and internal mechanisms, for their use to help avoid creating or maintaining duplicative enforcement mechanisms. Although the specifics of these mechanisms will not be addressed in detail below, these agencies will likely need to create a joint taskforce or a standing committee to properly do so.

The SEC and DOL should publish interagency guidelines to help broker-dealers and investors better understand how a uniform standard of conduct would apply to them. These guidelines should address three key areas. First, in

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<sup>225</sup> See 15 U.S.C. § 78s (2012). While collaboration between the SEC and DOL is crucial to harmonizing the existing regulatory framework, the SEC should also work with FINRA to require its members to enter into contracts with their customers to provide those customers a private right of action against broker-dealers who fail to adhere to fiduciary obligations, like the DOL attempted to do with the BICE. See Jordan, *supra* note 21, at 524. This would provide individuals receiving investment advice a private right of action where one is not provided by current legislation, which may help alleviate budget concerns. See *id.*

<sup>226</sup> FINRA, *supra* note 105.

<sup>227</sup> 15 U.S.C. § 78o(k)(1) (2012).

<sup>228</sup> *Id.*

Section 913 of Dodd-Frank, Congress expressly stated that earning brokerage commissions does not inherently qualify a broker-dealer as a fiduciary.<sup>229</sup> If this is the case, then it is unclear what does qualify. Providing examples of when brokerage services do and do not necessitate fiduciary behavior would thus be a good start for these guidelines. Second, the agencies should explain how broker-dealers' responsibilities to their customers would differ from an investment advisers' responsibilities to its clients, if at all, when the former's service implicate fiduciary obligations. In other words, the agencies should determine whether a broker-dealer would have an ongoing obligation to serve as a fiduciary if its services implicate fiduciary status, like an investment adviser does, or whether the obligation would only exist at the time the investment advice is rendered. The former would be a principles-based solution and would likely do a better job than the SEC's heightened disclosure requirements in protecting investors and mitigating issues arising from a lack of transparency. Third, the agencies should provide best practices on how broker-dealers could build on their existing practices to efficiently and effectively ensure compliance moving forward. This would prove especially useful in light of the DOL's fiduciary rule being vacated by the Fifth Circuit after broker-dealers spent billions of dollars adapting their compliance to satisfy the new requirements.

The SEC and DOL should also work together to create internal mechanisms that would help avoid duplicative enforcement efforts in enforcing overlapping legislation and regulation. It might be useful to look to the collaboration by the Department of Justice (DOJ) and Federal Trade Commission (FTC) in administering and enforcing federal antitrust laws.<sup>230</sup> While it would not be possible for the SEC and DOL to create an enforcement apparatus as bifurcated as the one the DOJ and FTC follow, especially early on, the SEC and DOL should attempt to allocate their expertise in the best ways possible; of course, the bifurcation of enforcement responsibilities would need to comport with statutory constraints on their respective authority.

A bifurcation of responsibility could be based on industry expertise or expertise regulating certain types of accounts. If responsibility were based on account type, for example, the SEC could ensure compliance for defined-contribution plans and IRAs, in addition to regulating all non-retirement

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<sup>229</sup> *Id.*

<sup>230</sup> See generally *The Enforcers*, U.S. FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (last visited Oct. 20, 2018) ("In some respects their authorities overlap, but in practice the two agencies complement each other. Over the years, the agencies have developed expertise in particular industries or markets.").

investment accounts,<sup>231</sup> and the DOL could ensure compliance for defined-benefit plans.<sup>232</sup> This arrangement would enable the SEC to regulate accounts that are likely to be maintained by individuals, who might have one set of expectations for their financial service providers, and would leave the DOL to regulate accounts that are typically maintained by employers, who might have another set of expectations. It would also allow the SEC to place greater emphasis on upholding its founding and current mandate—to protect investors—while allowing the DOL to place greater emphasis on its mandate under ERISA—to protect pension plan beneficiaries without discouraging employers from maintaining or creating pension plan offerings.

### CONCLUSION

The private-sector retirement investment market has changed dramatically in scale and composition in the decades since ERISA was enacted in 1974, and the legislative and regulatory response to the changes has been inadequate. The negative consequences of these changes have been exacerbated by advances in trading technology that have made it increasingly difficult for retirement investors to recognize the difference between investment advisers and broker-dealers. As a result, retirement investors are suffering unnecessary investment losses totaling billions of dollars annually.

Despite awareness of this issue, the DOL and SEC have failed to promulgate regulation that will address the problem—that broker-dealers can provide conflicted investment advice without consequence. While the DOL's efforts were struck down by the Fifth Circuit, the SEC has been slow act. To mitigate investors losing out unnecessarily, the SEC should impose fiduciary obligations on broker-dealers who provide investors personalized investment advice, and should collaborate with the DOL to enforce that regulation. If it does not, investors will continue to suffer.

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<sup>231</sup> This is because employees and individuals bear the risk for defined-contribution plans and IRAs, like with non-retirement accounts. COUNCIL OF ECON. ADVISERS, *supra* note 1, at 4.

<sup>232</sup> This is because plan sponsors bear the risk for defined-benefit plans. *Id.*

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