S7-09-18

REQUEST FOR COMMENT ON ENHANCING INVESTMENT ADVISER REGULATION[1]

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Disclaimer

The information provided in this document has been specifically tailored to the *Request for Comment on Enhancing Investment Adviser Regulation Regarding S7-09-18* by The Securities and Exchange Commission (SEC) dated April 18th 2018 and availed on the Commission's website (http://www.sec.gov/rules/interp.shtml). The author will not take responsibility for the use of the contents herein by any party/ parties other than The Securities and Exchange Commission (the Commission) and/or any organizations affiliated for policy formulation purposes.

Summary

The post 2007 financial crisis saw the introduction of the *Dodd- Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)*[2] with the purpose of protecting consumers of financial services from non-standard practices, this after building on previous developments in the securities industry such as the *Investment Advisers Act of 1940* (15 U.S.C. 80b) referred here as the Act and specifically for this document; title 17, part 275 of the Code of Federal Regulations (17 CFR 275). The literature contained in the document is intended to serve only one purpose, which is to put forward views on the proposed interpretation of the Standard of Conduct for investment advisers (and automated advisers or "Robo-

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[1] https://www.sec.gov/rules/proposed/2018/ia-4889.pdf

[2] https://legcounsel.house.gov/Comps/Dodd-Frank%20Wall%20Street%20Reform%20and%20Consumer%20Protection%20Act.pdf

advisers"[3]) under the Act (15 U.S Code 80b), while pushing for views that act in the best spirit[4] of the Dodd-Frank Act of 2010[5] and strongly in favor of consumers' rights from investment advisers' fiduciary responsibility of care, best advice, best execution and loyalty among others. Investment advisers and other players in the capital markets are vital to the progress of not only the securities space but the larger economy, it is for this reason that any legislation and regulation in this field must be aimed at promoting innovation within the industry, but most importantly and at the core of the Commission to protect the client but ensure the stability in the capital markets. The contents of this document are focused on these two principles.

LEGALITIES AND BACKGROUND OF LEGAL INTERPRETATIONS

In 1940 the Investment Advisers' Act was put in place to guide the securities industry. In 1973, a Commission advisory committee recommended that Congress authorize the Securities and Exchange Commission (SEC) to adopt minimum financial responsibility requirements for investment advisers, including a minimum capital requirement. In 1976, the Senate *Committee on Banking, Housing and Urban Affairs* considered a bill S. 2849 to further encourage regulatory requirements for investment advisers, but was never enacted. In 1992, the bicameral Congress put forward two bills that required investment advisers to obtain fidelity bonds, but since the two bills were not harmonized, these could not become a "compliance" law. In the years leading to the Financial Crisis of 2007-2008, the SEC, in order to ensure compliance by investment advisers had taken a similar path as one that is the subject of this document (S7-09-18) to further fidelity bonding requirements for IA's (Investment Advisers) but it was not adopted by the SEC. The primary goal being compliance of 17 CFR 275.

IA's are also required within the law to adopt written policies and strategies designed to prevent violations of the Act and as such must have Chief Compliance Officers (CCO's) with a good legal background of the laws around the management of securities.

COMMENTS ON THE ISSUES THAT HAVE BEEN RAISED.

The issue that has been raised on page 4 and 5 regarding SEC's proposal to require registered investment advisers and registered broker-dealers to deliver to retail investors a relationship summary, which would provide these investors with information about the relationships and services the firm offers, the standard of conduct and whether the firm and its financial professionals currently have reportable legal and disciplinary events is something that I agree with. This ensures that IA's meet their legal obligation and their compliance of the same as part of the relationship summary.

On Investment Advisers' Fiduciary Duty

The fiduciary duty to which Investment Advisers are subject is not specifically defined in the Act and in the SEC rules. Reason is the life of the law. The life of the law has not been logic: it has been experience. I hold the view that judicial precedence as a legal concept in the securities

[3] Division of Investment Management Guidance on Robo-advisers, (February 2017): https://www.sec.gov/investment/im-guidance-2017-02.pdf.
[4] https://www.dpc.senate.gov/pdf/wall_street_reform_summary.pdf
[5] https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf

industry may not suffice as per the above aphorisms, this should be a matter of statutory law and not judicial precedence. This view will present a great regulatory path for the SEC as "experience" is not a unifying concept but "logic" is and discussing the duty of care that an agent (Investment Adviser) owes its principal (client/ investor) as a matter of common law does not present the best regulatory path vis-à-vis addressing this as a matter of statutory law. My comment on this subject is that there will be need for tailored legal regimes that caters for each unique case of relationships between an agent and a principal. This will bring about a universal interpretation that is not subject to legal ambiguities and differences in interpretations such as have been presented in the SEC's S7-09-18 where each party has their own interpretation.

On page 20, there is a question: *Would it be beneficial for investors, advisers or broker-dealers for the Commission to codify any portion of our proposed interpretation of the fiduciary duty under section 206 of the Act?* To this, my comment is, there will be benefits for making the decision to codify interpretations under section 206 of the Act.

On Federal Licensing and Continuing Education

Registration with the *Financial Industry Regulatory Authority (FINRA)*, after meeting the set qualifications (passing a securities qualification examination and fulfilling continuing education requirements) for broker-dealers that effect securities transactions is mandatory.

To address the issue by comment that has been raised regarding the SEC's request for comment on whether there should be federal licensing and continuing education requirements for personnel of SEC-registered investment advisers, and specifically this question: *Which advisory personnel should be included in these requirements? For example, should persons whose functions are solely clerical or ministerial be excluded, similar to the exclusion in the FINRA rules regarding broker-dealer registered representatives?* To this my comment is, the persons whose functions are solely clerical or ministerial should be excluded and such registration requirements should not apply to individuals who provide advice on behalf of SEC-registered investment advisers but fall outside the definitions as contained in rule 203A-3 and other steps should be required such as background checks and fingerprinting.

Would competence or other examination be a meritorious basis upon which to determine competency and proficiency? Would a competency or other examination requirement provide a false sense of security to advisory clients of competency or proficiency?

Comment: No, it would not be a meritorious basis and on the second part of the question; Yes, it could provide a false sense of security.

If continuing education requirements are a part of any licensing requirements, should specific topics or types of training be required? For example, these individuals could be required to complete a certain amount of training dedicated to ethics, regulatory requirements or the firm's compliance program.

Comment: Yes, I agree. It is important that these individuals be required to undergo training focused on ethics, regulatory requirements and the firm's compliance programs. On the issue of cost relating to continuing education and the procurement of the license; Yes, they would fall more heavily on smaller advisers. These requirements would result in a barrier to entry that could decrease the number of advisers and advisory personnel and could increase the cost of advice.

Should any requirements to provide account statements have prescriptive requirements as to presentation, content, and delivery? Should they resemble the account statements required to be provided by broker-dealers, under NASD Rule 2340 with the addition of fee disclosure?

Comment: I agree with this.

How often should clients receive account statements?

Comment: Twice annually.

How costly would it be to provide account statements? Does that cost depend on how those account statements could be delivered?

Comment: On cost, account statements could be delivered electronically as a mitigant to cost.

The last question put forward by the request for comment: *Would such a requirement raise privacy concerns for privately held advisers?*

Comment: This would raise privacy concerns.

CONCLUSION

Building on the contents of this document, and as indicated in this literature, "reason" is the life of any regulatory framework. It is important that the Securities and Exchange Commission pursues codification of the regulatory standards and aim at removing any ambiguities as a result of interpretations by different parties.