

US

Morrisson & Foerster

Fiduciary duty for US broker-dealers?

We'll know for sure in January. The Securities and Exchange Commission (SEC) is required to report to Congress concerning its view of the efficacy of existing legal and regulatory standards of care for brokers, dealers and investment advisers and associated persons who provide personalised investment advice to, and make recommendations about securities to, retail customers. The Dodd-Frank Act requires that this report be submitted within six months' time.

There were quite a number of factors outlined by Congress that should be considered in connection with the study, including whether retail customers understand the different standards of care currently owed by broker-dealers and investment advisers, and the impact of subjecting broker-dealers to the same standard of care applied to investment advisers.

Although broker-dealers are not subject to a fiduciary standard, they are subject to standards of conduct, including a duty of fair dealing, which includes a suitability obligation, and a duty of best execution.

Moreover, broker-dealers are subject to relatively prescriptive self-regulatory organisation regulations and to oversight and supervision by the SEC and the Financial Industry Regulatory Authority.

Moving toward a heightened duty will require acknowledging that clients should be able to continue to seek out and obtain different levels of service, different types of accounts and different relationships with their providers.

As a general matter, moving toward a new standard of care is likely to result in substantial costs for service providers. It may also have the unintended consequences of limiting customer choice, raising costs for advice and curtailing retail participation in certain markets.

But we're just going to have to wait a bit longer to see the SEC's conclusions. Until then, commentators will be commenting and industry leaders will be speaking and otherwise attempting to anticipate the many other unintended consequences that will result from enhanced duties.

Contacts:

1290 Avenue of the Americas
New York, NY 10104-0050
United States

Tel: +1 212 468 8000
Fax: +1 212 468 7900
Web: www.mofo.com