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Investment Adviser Duty of Care: SEC Enforcement and Policy

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In 2019, the Securities and Exchange Commission (SEC) finalized a package of rulemakings and interpretive releases that served as the agency's response to a long-running debate concerning the duties of broker-dealers and investment advisers when serving retail investors. Among these was an interpretive release that, in the words of the SEC, would "address in one release and reaffirm—and in some cases clarify—certain aspects of the fiduciary duty an investment adviser owes to its clients under Section 206 of the Advisers Act" (Fiduciary Interpretation).[1] The Fiduciary Interpretation's billing as mere compendium, however, underplays its significance. The release also featured the SEC's first extended articulation of a duty of care under the Investment Advisers Act of 1940 (Advisers Act). While in the two and a half years since its publication we have seen only the first signs of how the SEC will make use of this interpretation, there are indications that the duty of care is poised to emerge as an important tool in the SEC's enforcement, and perhaps policymaking, efforts.

Moreover, although contemporaneous rulemakings focused on retail investors, the Fiduciary Interpretation addresses an adviser's duties as they relate to both institutional and retail clients. Subsequent statements from the SEC further highlight that its views of the duty of care are not limited to retail relationships. For example, the SEC has referenced the duty of care in enforcement actions and deficiency letters concerning advisers to institutional fund clients, and in its proposal to expand regulation of private fund advisers, the SEC explained that, "[a]dvisers have a fiduciary duty to clients, including private fund clients, that is comprised of a duty of care and a duty of loyalty enforceable under the antifraud provisions of Section 206."[2] Accordingly, advisers serving institutional clients should also observe closely the SEC's developing approach to the duty of care.

In this article, we briefly review the background and debate related to the Fiduciary Interpretation and discuss how the SEC has begun to use the duty of care. Finally, we discuss what these changes may mean for advisers and highlight considerations for advisers and their counsel in assessing business practices, disclosures and interactions with the SEC Staff.[3]

Background

The Fiduciary Interpretation and its treatment of the duty of care can be traced to the long-running debate regarding the standard of conduct that applies to broker-dealers when making recommendations to retail customers. A key question in this debate was whether, in the retail context, broker-dealers should be subject to the same standard as advisers. At the same time, although the duties of advisers were widely regarded as stringent, some commenters had criticized the SEC's enforcement of

those duties as overly dependent on identifying disclosure violations. The Fiduciary Interpretation, in expounding on the duty of care, responded to each of these debates.

The Debate Over a Uniform Fiduciary Duty

The debate regarding the broker-dealer standard of conduct has a history extending back at least two decades.[4] The Regulation Best Interest Proposing Release explains that critics had asserted that, "retail customers do not sufficiently understand the broker-dealer relationship," particularly with respect to compensation conflicts, and in addition, that regardless of whether retail customers understand the relationship, existing broker-dealer regulations did "not require a broker-dealer's recommendations to be in a customer's best interest."[5] Congress weighed in with Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[6] Section 913 directed the SEC to study the effectiveness of the broker-dealer and adviser standards of conduct when providing personalized advice to retail customers and granted the SEC additional authority to create parity between the broker-dealer and adviser standards of conduct in that context.[7]

The SEC Staff published its final study under Section 913 in January 2011 (Staff Study).[8] The Staff Study included discussion of the duty of care that presaged both the scope and sources that would later appear in the Fiduciary Interpretation. It also observed that, "[a] number of commenters (particularly investment advisers) stated that the duty of care obligations under the Advisers Act are clear and well-established," while "other commenters (particularly broker-dealers) argued that the duty of care is far more developed for broker-dealers… and that the investment advisers' duty of care is ambiguous."[9] In response, the Staff Study recommended that the SEC consider establishing uniform standards for the duty of care owed to retail investors.[10]

Years of commentary followed, with the SEC issuing requests for information in 2013 and 2017, the SEC's Investor Advisory Committee issuing a recommendation in 2013 (IAC Recommendation) and the Department of Labor (DOL) engaging in an extended rulemaking process to define the scope of fiduciaries covered under its rules.[11] The main thrust of commentary from those calling for change was that the broker-dealer standard, as it was defined and enforced, was insufficient to address the incentives inherent in that business model and that, as a result of divergent standards of conduct for financial professionals, retail investors were not receiving advice in their best interest. However, this dialogue also featured less prominent, but still important, undercurrents. These included criticism of the adviser fiduciary standard as less effective or more ambiguous than broker-dealer regulation.[12] Others expressed concern that a uniform standard could effectively drive the market further toward fee-based advice, potentially reducing investor choice, or worried that implementation of a uniform standard would effectively weaken adviser fiduciary duties.[13] Taken as a whole, this commentary suggested that the SEC could not address the broker-dealer standard without also confronting the market and regulatory effects for advisers.

Accordingly, when the SEC issued its culminating rules, it did not just adopt a broker-dealer standard but also issued the Fiduciary Interpretation. Where Regulation Best Interest sought to enhance the broker-dealer standard of conduct for retail advice beyond existing suitability obligations, the Fiduciary Interpretation served as a buttress, supporting both the scope and details of Regulation Best Interest and bracing against potential criticism of a lagging adviser standard.[14] This relationship between the two SEC releases is critical to understanding the prominence of the duty of care in the Fiduciary Interpretation. Regulation Best Interest imposes on broker-dealers an obligation to act in the best interest of retail customers, which comprises both obligations to disclose all material facts and manage conflicts of interest, as well as "a duty of care that enhances existing suitability

obligations."[15] The Fiduciary Interpretation offers point-for-point parallels to these obligations. The interpretation states that an adviser has an "obligation to act in the best interest of its client," then explains that advisers must make full and fair disclosure of material facts and eliminate (or at least expose) conflicts of interest and asserts that advisers also "owe their clients a duty of care."[16] In other words, the Fiduciary Interpretation articulates a multi-faceted duty of care for advisers in part because the Regulation Best Interest policymaking demanded a close parallel.[17]

Adviser Standard of Conduct and Disclosure

The Fiduciary Interpretation's treatment of the duty of care also can be understood as anticipating, and responding to, criticism of the SEC's enforcement of the Advisers Act. This line of criticism holds that the SEC's statements regarding fiduciary duties under the Advisers Act:

> [bear] little resemblance to the duty as actually enforced by the SEC. In reality, the Commission's enforcement actions almost never turn on whether the adviser acted in the client's best interest or subordinated the client's interests to their own. Instead, such actions almost always turn on whether the adviser fully disclosed the practice that was inconsistent with clients' best interests.[18]

This view is sometimes expressed, in short, as a concern that the SEC has allowed advisers to "disclose away" their fiduciary obligations to clients.[19]

The Fiduciary Interpretation responds to this criticism in two ways. First, it asserts that "an adviser's federal fiduciary duty may not be waived."[20] The SEC acknowledges that, "the fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement," but it maintains that, "the relationship in all cases remains that of a fiduciary to the client."[21] Second, the Fiduciary Interpretation attempts to distance its description of the duty of care from the long-established standard of full and fair disclosure. For the most part, this appears as a literal segregation of the SEC's discussion of duty of care from references to disclosure. The SEC, however, makes its argument most explicit even as it concedes the limits of that argument, stating that:

> We believe that while full and fair disclosure of all material facts relating to the advisory relationship or of conflicts of interest and a client's informed consent prevent the presence of those material facts or conflicts themselves from violating the adviser's fiduciary duty, such disclosure and consent do not themselves satisfy the adviser's duty to act in the client's best interest."[22]

A note accompanying this statement links the assertion in the final clause back to the duty of care, with the SEC explaining that, "an investment adviser's obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty."[23]

In sum, the Fiduciary Interpretation's articulation of the duty of care can be seen as both an effort to keep pace with the broker-dealer standard, as articulated in Regulation Best Interest, and an effort to show that the SEC is not dependent on disclosure violations for its enforcement of the Advisers Act.

The SEC's Characterization of the Duty of Care

According to the SEC, the "duty of care includes, among other things: (i) the duty to provide advice that is in the best interest of the client; (ii) the duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades; and (iii) the duty to

provide advice and monitoring over the course of the relationship."[24]

In order to provide advice that is in the client's best interest, the SEC stated that an adviser must have a reasonable understanding of the client's objectives and must have a reasonable belief that the advice is in the best interest of the client.[25] To establish a reasonable understanding of the client's objectives, the SEC explained that, an "adviser should, at a minimum, make a reasonable inquiry into the client's financial situation, level of financial sophistication, investment experience, and financial goals."[26] To have a reasonable belief that advice is in the best interest of the client, the SEC stated that an adviser must "conduct a reasonable investigation into the investment sufficient not to base its advice on materially inaccurate or incomplete information."[27] In addition, the SEC expects advisers to recommend investments "only to those clients who can and are willing to tolerate the risks of those investments and for whom the potential benefits may justify the risks."

The SEC also characterized the duty of care as encompassing an adviser's obligation to seek best execution when the adviser has the responsibility to select broker-dealers to execute client trades.[28] The SEC explained that, "[a]n adviser fulfills this duty by seeking to obtain the execution of securities transactions on behalf of a client with the goal of maximizing value for the client under the particular circumstances occurring at the time of the transaction."[29]

Finally, the SEC stated that the duty of care encompasses an obligation to provide advice and monitoring over the course of the relationship. This must occur "at a frequency that is in the best interest of the client, taking into account the scope of the agreed relationship." The SEC asserted that, in an ongoing advisory relationship, the duty to monitor would extend to "an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest."

The Emerging Use of the Duty of Care Following the Fiduciary Interpretation

The SEC and its Staff transmit policy through several channels. Recently, the most prominent of these have been the pursuit of enforcement actions, use of examinations, and rulemakings.[30] The channel through which we have seen the clearest evidence of the duty of care emerging as a policy tool is enforcement. There are, however, also indications that the SEC and its Staff may see the duty of care as a tool for shaping policy more directly, inferring from previously articulated principles specific obligations in a variety of contexts.

Investment Adviser Enforcement

For years, the SEC has made enforcement of the Advisers Act a consistent focus, pursuing actions against both retail and private fund advisers. The SEC's recently released enforcement results for fiscal year 2022 highlight this focus, identifying 23 percent of total enforcement actions and 26 percent of standalone enforcement actions as cases against investment advisers and investment companies.[31] These reflect the highest percentages for any of the classifications the SEC used to categorize its 2022 enforcement results and are generally consistent with prior years.

Several factors explain these enforcement results. First, the SEC has focused on advisers because of the dramatic increase in assets under management, as well as in the number of advisers, in recent decades and the emergence of new products in which advisers invest on behalf of clients, among other factors. Second, the SEC has dedicated substantial resources to enforcement in this area. For example, the Division of Enforcement has a specialized unit, the Asset Management Unit (AMU), that is devoted solely to pursuing misconduct across the investment adviser industry. In addition to generating its own investigations and receiving tips and complaints from various sources, the AMU also pursues referrals

from the Division of Examinations (EXAMS), which also has a group that is committed solely to conducting examinations of investments advisers. Third, the SEC Enforcement and EXAMs Staffs are armed with broad antifraud authority under Sections 206(1) and 206(2) of the Advisers Act.[32] Moreover, unlike the SEC's antifraud authority found in the Securities Act of 1933 and the Securities Exchange Act of 1934, Sections 206(1) and 206(2) of the Advisers Act do not require the SEC to show that the conduct was "in the offer or sale of any securities" or "in connection with the purchase or sale of any security."

At the same time, the Advisers Act antifraud authority has its limitations. While the SEC enforces adviser fiduciary duties using Sections 206(1) and 206(2), these sections do not actually refer to or articulate fiduciary duties. For the SEC to prove a violation of these sections, it must demonstrate that the adviser employed a "device, scheme, or artifice to defraud" a client or prospective client or engaged in a "transaction, practice, or course of business which operates as a fraud or deceit upon" a client or prospective client. In other words, the SEC's ability to enforce adviser fiduciary duties is closely tied to concepts of deception and misrepresentation, not affirmative responsibilities. It is this limitation on its antifraud enforcement authority that gives rise to the criticism, from some corners, that the SEC has allowed advisers to "disclose away" their fiduciary duties to clients.

It is not surprising, then, that prior to the Fiduciary Interpretation, the SEC made only sporadic reference to the duty of care in enforcement cases.[33] The duty of care, as articulated in the Fiduciary Interpretation, represents a set of affirmative obligations—demanding reasonable investigations, monitoring, best execution and decisions in the best interests of clients—that do not appear to depend on the disclosures the adviser has made to the client. Cast this way, the duty of care is an appealing enforcement tool for a regulator because it speaks to both the process and substance of investment decisionmaking and appears unencumbered by the disclosure-based constraints of an antifraud provision.

While we have not yet seen the SEC pursue an antifraud case under the Advisers Act without identifying some faulty disclosure, a detailed review of SEC enforcement actions reveals an SEC making efforts to build in that direction. We see the first hints of this in the SEC's *Sofi* enforcement action. In August 2021, the SEC settled an action against SoFi Wealth related to investments in proprietary exchange-traded funds, sponsored by its parent.[34] The SEC order focused on alleged failures to provide full and fair disclosure regarding SoFi Wealth's preference to invest client assets in proprietary funds and its intent to "use client assets to capitalize the new" funds.[35] In addition, the SEC order found that SoFi Wealth, in connection with these investments, sold client holdings of third-party ETFs, "causing many clients to realize taxable gains."[36] Despite the apparent focus on shortcomings in disclosure, at the end of a section titled "SoFi Wealth Failed to Disclose Conflicts of Interest…," the order states that:

> SoFi Wealth represented that taxable account strategies would be optimized using generic tax assumptions. While SoFi Wealth's descriptions about how it formulated its investment advice stated that its algorithms did not take into account the specific tax situation of individual clients, SoFi Wealth's failure to consider the potential tax impact from the April 2019 transactions was inconsistent with its duty to clients.

This statement, on its face, does not appear to address the alleged failure to disclose a conflict of interest, despite the section's title. Rather, the paragraph suggests that the adviser undertook a certain type of tax analysis and that, in allegedly not conducting that analysis, failed to meet a duty it owed clients. While not explicitly referring to the duty of care, this finding that an adviser's failure to conduct

an analysis constituted a violation of that adviser's duty to clients foreshadows the duty of care violations that would begin appearing in SEC orders soon after.[37]

Compensation Conflict Cases

Over the last five years, the SEC has pursued a significant number of enforcement actions focused on various compensation arrangements. These include a variety of cases in which advisers or their affiliates receive compensation, such as 12b-1 fees or revenue sharing, in connection with the purchase of mutual fund share classes, money market funds or cash sweep options (compensation conflict cases). A trickle of enforcement actions starting in 2013 with the *Manarin* case turned into a years-long effort of the Division of Enforcement encompassing well over 100 enforcement actions.[38] The SEC has pursued enough of these cases that a clear template for the orders has emerged, including consistent language describing violations of the settling adviser's best execution obligations.[39]

However, in the last year and a half, the SEC has made a subtle but important change to the template. Prior to the Fiduciary Interpretation, compensation conflict cases that included best execution violations described these under the heading "Best Execution Failures,"[40] "Duty to Seek Best Execution"[41] or "Failure to Obtain Best Execution."[42] Since 2021, however, the SEC has begun recasting these best execution violations as "Duty of Care Failures." Moreover, accompanying this shift in vocabulary has been an expansion in the conduct the SEC views as giving rise to the violation.

The first instance of this appears to be in September 2021, just one month after the *Sofi* action, in the *Rothschild Investment Corp.* enforcement action.[43] Under the heading "Duty of Care Failures," the SEC stated that an adviser's fiduciary duty includes a duty of care and to satisfy that duty, the adviser "must provide investment advice in the best interest of its client based on the client's objectives and seek best execution for client transactions." The order recites the typical formula for best execution violations in these cases, but then it continues:

> Rothschild also did not fulfill its duty of care obligations when it advised clients to invest in money market funds without undertaking any analysis to determine whether the money market funds and share classes it used as cash sweep vehicles were in the best interests of its advisory clients.

This statement does not elaborate on the previously-described best execution failure but rather sets out an additional basis for the duty of care violation. Further, this violation is unlike the best execution issue. Where the best execution violation turns on different transaction costs for otherwise identical investments, the finding here is, in essence, that when picking specific investments the adviser chose incorrectly, or at least arrived at its decision in the wrong way.[44]

The SEC continued to expand on this approach in the *O.N. Investment Management Company* (ONIMCO) enforcement action.[45] Again, under the heading "Duty of Care Failures," the ONIMCO Order first addresses best execution.[46] In a separate paragraph under the heading, however, the SEC continues:

> [i]n the relevant period, ONIMCO determined that government, prime, and municipal money market funds were appropriate cash sweep vehicles for its advisory clients. ONIMCO, however, failed to consider alternative, lower-fee government, prime, and municipal money market funds offered by the Clearing Broker when selecting particular funds.[47]

In other words, similar to *Rothschild Investment Corp.*, this enforcement action leverages the duty of care to move beyond a difference in transaction costs

to find a violation for failing to "consider alternative" funds to those that ONIMCO selected.[48]

Another flavor of these violations appears in the *KM Advisory Services* enforcement action. In this case, the SEC found that the adviser had "breached its duty of care by not routinely comparing [an introducing broker-dealer's] order execution with other broker-dealers, which [its] advisory relationship with its clients required."[49] The SEC found that, as a result, the adviser:

> caused its advisory clients to invest through the [introducing broker-dealer] and in share classes of mutual funds that charged 12b-1 fees when other broker-dealers made available share classes of the same funds to their customers that may have presented a more favorable value.[50]

This case, therefore, extends the scope of duty of care violations that the SEC has pursued to include failing to consider investments available through other broker-dealers.

Account-Type Recommendation

In August and September of 2022, the SEC settled two enforcement actions against advisers focusing on adviser fiduciary duties as applied to recommendations that clients open or remain in certain types of accounts.[51] In these actions, the SEC found that the wrap program sponsors—Kovack Advisors and Waddell & Reed—violated the Advisers Act either by failing to review the continued suitability of wrap accounts for certain clients or failing to take reasonable steps after reviews identified wrap accounts that were no longer in certain clients' best interests.[52] Despite the similarity and proximity of these cases, the SEC's vocabulary in these orders differs. Both orders highlight the SEC's emphasis on advice that is in a client's "best interest," but only the Waddell & Reed Order uses the term "duty of care." In addition, while both orders focus on periodic reviews of account type recommendations, the Waddell order contains additional exposition concerning an adviser's obligation, in general, to provide advice and monitoring over the course of the adviser-client relationship. Although not explained in the orders, the differences may result from the relevant period of the conduct—Kovack terminated its wrap fee program before the SEC issued the Fiduciary Interpretation, while Waddell's program continued until 2021.

Similarly, in September 2022, the SEC found that another adviser "maintained fee-based advisory accounts without monitoring or conducting reviews for account suitability, contrary to representations in its Form ADV Brochures and in breach of [its] duty of care under the Advisers Act."[53]

Duty of Care and Private Funds

While the preceding cases focused on retail advisers, the SEC's *SparkLabs* enforcement action leaves no doubt that the SEC also intends to pursue duty of care violations against private fund advisers.[54] The *SparkLabs* order includes such an extensive list of alleged violations of the duty of care that it required a heading in the settled order titled "Additional Breaches of the Duty of Care." According to the order, the advisers breached their fiduciary duty to their private fund clients by entering into several unauthorized and undisclosed inter-fund loan transactions totaling more than $4.4 million. In entering into these loans, the advisers allegedly violated the lending funds' operating agreements, repeatedly failed to enforce the terms of the loans when they were due and engaged in conflicts of interest between various funds that respondents managed. The SEC found that the advisers:

> also breached their duty of care to Korea Fund II by (1) failing to analyze whether Korea Fund II's loans to SparkLabs affiliated entities at below-market rates were in the best interest of Korea Fund II, (2) failing to enforce the terms of those agreements, and

> (3) recommending that it make additional loans to SparkLabs GVM at a below-market interest rate at the same time Korea Fund II was accruing interest on a higher interest-rate loan to SparkLabs Partners.[55]

As with the retail adviser enforcement actions, we see a duty of care violation tied to a failure to conduct analysis. However, in this case, the focus is not on investments or compensation. Rather, the focus is on loans where the SEC finds violations linked to the advisers' failures to take certain action in connection with such loans and to consider relevant factors when recommending loans based on differential interest rates. While the order, in many cases, ties the fiduciary duty violations back to the terms of the limited partnership agreement, these findings also go beyond a direct tie to the agreement and address the decisions the adviser made on behalf of the client.

Litigating the Duty of Care

Each of the enforcement actions discussed above was settled. The SEC, however, also appears willing to test the duty of care in litigated matters. For example, in *SEC v. Cambridge Investment Research Advisors, Inc.*, the SEC alleges that Cambridge violated its duty of care by failing to seek best execution and evaluate whether clients either should be placed in or moved to a lower-cost fund.[56] In addition, we have seen some courts endorse the SEC's characterization of the duty of care. The District Court of Massachusetts, in *SEC v. Duncan*, recognized that Duncan, an adviser, owed his clients a duty of care, which required him to act in their best interests at all times.[57] The Court then found that Duncan breached his duty of care by failing to investigate the legitimacy of an investment and conduct due diligence. In support of its finding, the Court cited to the Fiduciary Interpretation.[58]

In *SEC v. Lindberg, et al.*, the SEC filed a litigated action in the Middle District of North Carolina alleging that defendants breached their fiduciary duties, including the duty of care.[59] The SEC alleged that these violations resulted from engaging in undisclosed related-party transactions that were not in the best interest of the advisers' client and misappropriating client funds. In paragraph four of the complaint, the SEC alleges that, "[a]s an SEC-registered investment adviser, [defendant] had a fiduciary duty to make full and fair disclosures of all material facts to its clients and to serve the ***best interests of its client*** at all times."[60] Interestingly, the SEC highlights the duty of care's best interest principle by placing "**best interests of its client**" in bold and italics, notwithstanding the allegation's reference to the "duty to make full and fair disclosure." In doing so, the SEC chose to emphasize the best interest obligation over the full and fair disclosure obligation.[61]

As the SEC litigates more cases alleging violations of the duty of care, it will be important to watch whether defendants will challenge the SEC's ability to enforce the duty under Sections 206(1) and 206(2) of the Advisers Act. It seems likely that the SEC will seek to manage this risk both through its selection of cases to litigate and by litigating only where the duty of care claim can still be linked to some type of disclosure failure. The *Cambridge Investment Research Advisors* complaint illustrates this approach. In paragraph eight, when discussing alleged duty of care failures, the SEC states, "[Cambridge's] investment of clients in more expensive funds when lower-cost options were available, and failure to assess whether clients should be converted to lower-cost options, is contrary to [Cambridge's] disclosures to clients that it would 'endeavor at all times to put the interest of [its] clients ahead of [its] own.'"[62]

Enforcement Summation

While reference to the duty of care in enforcement cases is not unique to the period after the Fiduciary Interpretation, the SEC, undoubtedly, is invoking the duty of care more frequently and in a wider range of circumstances, suggesting a programmatic shift in approach. In the span of less

than a year and a half, the SEC's pursuit of duty of care breaches has addressed: (1) failing to invest clients in the least expensive share class available; (2) failing to analyze, evaluate, or assess alternative investment options; (3) failing to provide advice and monitoring over the entire course of the client relationship; (4) failing to monitor and review account types; (5) failing to investigate and conduct due diligence on an investment; (6) engaging in related-party transactions; and (7) failing to follow limited partnership agreement provisions designed for the benefit of fund clients. In other words, the SEC's recent enforcement actions seek to apply the duty of care to nearly all aspects of the client-adviser relationship.

SEC Exams and the Duty of Care

Other SEC Divisions also are more frequently invoking the duty of care. For example, EXAMS has taken advantage of referencing the duty of care in each of its annual Exam Priorities following finalization of the Fiduciary Interpretation. In 2020, EXAMS stated that, "duty of care concerns may arise when an RIA does not aggregate certain accounts for purposes of calculating fee discounts in accordance with its disclosures." The 2021 Exam Priorities stated that, EXAMS "will continue to examine RIAs to assess whether, as fiduciaries, they have fulfilled their duty of care and duty of loyalty," including assessing "whether RIAs provide advice, including whether account or program types continue to be, in the best interests of their clients."

In 2022, EXAMS announced that it would examine for compliance with the adviser's obligation to act in the best interest of clients when focusing on: crypto-assets;[63] practices regarding consideration of alternatives (for example, with regard to potential risks, rewards, and costs); trading (for example, adviser best execution obligations); account selection (for example, brokerage, advisory, or wrap fee accounts); and account conversions and rollovers.[64] EXAMS also stated that it would focus on revenue sharing, 12b1 fees, "recommending wrap fee accounts without assessing whether such accounts are in the best interests of clients" and "recommending proprietary products resulting in additional or higher fees." As detailed above, the Division of Enforcement has announced enforcement actions citing the duty of care in several of these focus areas.

In addition to Exam Priorities, the duty of care has also appeared in EXAMS Risk Alerts focusing on wrap fee programs,[65] the provision of electronic investment advice[66] and private fund advisers.[67] While the public statements of EXAMS reveal a focus on the duty of care, they have not, to date, appeared to articulate new policy. Nevertheless, EXAMS will play a key role in contributing to increased enforcement activity regarding duty of care failures because of its close relationship with the Division of Enforcement. The growing track record of the Division of Enforcement in pursuing duty of care violations is likely to encourage examiners to cite duty of care deficiencies and identify them for enforcement Staff.

SEC Policymaking

In addition to enforcement and exams, there have also been indications that policymakers could seek to use the duty of care to shape adviser behavior. For example, just two months after the Fiduciary Interpretation, the SEC issued guidance to advisers regarding voting proxies on behalf of clients (Proxy Voting Release).[68] In the Proxy Voting Release, we see how the development of a generalized duty of care may enable the SEC to extrapolate toward specific obligations. Much of the Proxy Voting Release is dedicated to guidance on how advisers can ensure that they are acting in the best interests of their clients when voting proxies and when retaining proxy advisory firms, and each of these inferred responsibilities is arguably grounded in the SEC's view of the duty of care. The SEC makes this connection explicit when discussing the scrutiny an adviser should apply when it becomes aware of potential errors or methodological weaknesses of a proxy advisory firm. In this case, the Proxy Voting Release reminds advisers

that, "for an investment adviser to form a reasonable belief that its voting determinations are in the best interest of the client, it should conduct a reasonable investigation into the matter," which the release reminds advisers is an obligation flowing from the duty of care.[69] The Proxy Voting Release again invokes the duty of care when addressing the circumstances under which an adviser that has assumed proxy voting responsibilities may choose to refrain from voting. Here, the SEC explained that, while an adviser may conclude that not voting a proxy is in the best interest of the client, "before refraining from voting under [this circumstance], an investment adviser should consider whether it is fulfilling its duty of care to its client."[70] While the SEC's invocation of the duty of care had some precedent in connection with proxy voting, the Proxy Voting Release includes novel extensions of the duty to infer specific obligations.[71]

The SEC Staff has also pointed to the duty of care in guidance concerning the obligations of advisers. For example, Division of Investment Management Staff posted FAQs in October 2019 addressing disclosure of conflicts of interest related to adviser compensation (Compensation Conflict FAQs).[72] The Compensation Conflict FAQs explain that, because they focus on disclosure of conflicts, they do not address the obligations advisers may have under the duty of care.[73] However, after discussing at length the disclosures advisers should make when faced with a compensation conflict, the Staff warns, "[a]dvisers should also be aware that the recommendation of a higher-cost share class when a lower-cost class of the same fund is available to the client could violate an adviser's duty of care, including, depending on the facts and circumstances, its obligation to seek best execution."[74] In other words, in the Staff's view, this obligation is apart from, and in addition to, the obligations to disclose the information described in the FAQs.

Similarly, in a recent bulletin, the Staff leaned heavily on the obligations of broker-dealers and advisers to act in the best interest of retail investors when recommending account types to retail investors (Account Recommendation Bulletin).[75] In this bulletin, the Staff states that, "unless you obtain and evaluate sufficient information about a retail investor, you will not have the ability to form a reasonable basis to believe your account recommendations are in the retail investor's best interest."[76] In an accompanying note, the Staff further explains that,

> [f]or investment advisers, the duty to provide advice that is in the best interest of the client based on a reasonable understanding of the client's objectives and a reasonable investigation into the investment is a critical component of the duty of care, which includes obtaining a range of personal and financial information about the client.[77]

The Staff goes on to state that, to have a reasonable basis for recommending an account type, a broker-dealer or adviser should consider reasonably available alternatives, gather a range of information about the investor and the account, weigh a variety of costs related to the account and, when recommending a rollover, consider leaving the investor's investments in their employer's plan.[78]

The Staff followed up with a second bulletin, focused on conflicts of interest, in which it invoked the duty of care to remind broker-dealers and advisers to

> carefully consider how their product menu choices—which could include limitations such as offering only proprietary products… comply with the firm's obligations to act in the best interest of retail investors....[79]

As with the Proxy Voting Release and prior Staff guidance, these bulletins demonstrate how the SEC and Staff may seek to employ the duty of care to support specific policy views. The Fiduciary Interpretation serves as a scaffold on which the SEC

may seek to erect further layers of specific, inferred obligations.

Implications for Advisers and How Advisers Can Prepare

The SEC is, by its own account, in a historically active period for enforcement.[80] While the 2022 enforcement results make clear that investment advisers are a primary focus and subject of the SEC's active enforcement, intense scrutiny of investment advisers has been consistent across prior SEC administrations and is unlikely to change. With the Fiduciary Interpretation in hand, the SEC now appears to be looking beyond conflicts and disclosures, leveraging the duty of care to scrutinize investment decisions and processes. However, advisers and their counsel can take steps to prepare for this scrutiny.

For example, although the emphasis on the duty of care appears to be partially aimed at reducing the importance of disclosure to the enforcement of adviser fiduciary duties, disclosure continues to be critical to shaping an adviser's obligations. The SEC acknowledged in the Fiduciary Interpretation that an adviser's fiduciary duties will follow "the contours of the relationship between the adviser and its client."[81] Accordingly, "the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent." For this reason, carefully describing the scope of and expectations for the advisory relationship can provide valuable clarity for both the adviser and client, including with regard to the adviser's potential liability.

This may include addressing, for example, the services the adviser is (or is not) undertaking to perform, including the extent to which the adviser will monitor an account. Advisers also should consider their disclosures concerning compensation and expenses, particularly when compensation will include revenue sharing, 12b-1 fees or other remuneration the amount of which will depend on recommendations made by the adviser. If, for example, an adviser selects investments that result in greater compensation to the adviser or its affiliates, the adviser will find it easier to respond to SEC inquiries if it has made clear to its clients that the additional compensation is part of its total, negotiated remuneration, where that is the case. The SEC will, of course, also look for whether an adviser's practices are consistent with any disclosure the adviser has made.

In addition, recent enforcement actions make clear that advisers should expect questions regarding how they have determined a recommendation or investment decision is in a client's best interest. The cases repeatedly emphasize failures to analyze whether choices were in a client's best interest. Accordingly, advisers should expect that the SEC Staff will scrutinize the process they have employed to make a determination. SEC cases and Staff statements suggest this is likely to take the form of questions regarding whether the adviser has considered the client's best interest, the amount of diligence or investigation the adviser performed and whether the adviser considered alternatives. Advisers should also anticipate that the SEC Staff will request documentation to support the responses to each of these questions. While advisers should consider the sophistication of each client, the SEC is likely to pose questions like these regardless of whether the clients are retail, institutional or private fund clients.

Advisers will be well served by having an awareness of the SEC's increasing reliance on the duty of care and a keen understanding of how it is pursuing duty of care violations. With this awareness and understanding in mind, advisers will be in a good position to consider appropriate steps to take when addressing questions about the duty of care from the SEC Staff.

Mr. Bartels and **Mr. Kelly** are with Dechert LLP.

NOTES

1 *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Release No. IA-5248 (June 5, 2019), at 3-4. The Fiduciary Interpretation explains, in the Economic Considerations section, that, "[t]he Final Interpretation does not itself create any new legal obligations for advisers." Fiduciary Interpretation, at 29.

2 *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, SEC Release No. IA-5955 (Feb. 9, 2022) (Private Fund Adviser Proposal), at text accompanying note 227.

3 We do not focus in this article on whether the Fiduciary Interpretation or subsequent SEC or SEC Staff statements accurately characterize the fiduciary duty. For commentary addressing this issue and the SEC's support, generally, for a federal fiduciary duty, *see*, *e.g.*, Comment Letter of Dechert LLP Regarding Investment Advisers Act Release No. 4889 (File No. S7-09-18): Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation (Aug. 7, 2018), available at *https://www.sec.gov/comments/s7-09-18/s70918-4185802-172678.pdf* (Dechert Comment Letter on Fiduciary Interpretation).

4 The proposing release for Regulation Best Interest explains that, as early as the 1990s SEC Chairman Arthur Levitt formed "the Committee on Compensation Practices to review industry compensation practices, identify actual and perceived conflicts of interest, and identify 'best practices' to eliminate, reduce or mitigate these conflicts." *Regulation Best Interest*, SEC Release No. 34-83062 (Apr. 18, 2018) (Reg BI Proposing Release), at note 19.

5 Reg BI Proposing Release, at text accompanying note 18.

6 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 913(a), 913(g) Stat. 1376 (2010) (Dodd-Frank Act).

7 Dodd-Frank Act, Sections 913(a) and 913(g). Notably, Section 913 of the Dodd-Frank Act also amended Section 15 of the Securities Exchange Act of 1934 and Section 211 of the Advisers Act to add provisions of the "Harmonization of Enforcement," which provide in substance that the "enforcement authority of the Commission with respect to violations of the standard of conduct applicable to an investment adviser shall include" both the authority under the Advisers Act and "the enforcement authority of the Commission with respect to violations of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer…." Each section further instructs the Commission to "seek to prosecute and sanction violators of the standard of conduct" for each of the broker-dealers and advisers in the retail context "to the same extent as the Commission prosecutes and sanctions violators of the standard of conduct applicable" to the other type of professional. Other Dodd-Frank Act changes to Section 211 of the Advisers Act are also notable. For example, in the Private Fund Adviser Proposal, the SEC proposed to rely on its authority under Section 211(h) to significantly expand its regulation of private fund advisers.

8 Study on Investment Advisers and Broker-Dealers, Study of the Staff of the US Securities and Exchange Commission (Jan. 2011), available at *https://www.sec.gov/news/studies/2011/913studyfinal.pdf*.

9 Staff Study, at 121-122.

10 Staff Study, at 109-110.

11 *See Request for Data and Other Information: Duties of Brokers, Dealers and Investment Advisers*, Exchange Act Release No. 69013 (Mar. 1, 2013), available at *http://www.sec.gov/rules/other/2013/34-69013.pdf*; Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers, Chairman Jay Clayton (June 1, 2017), available at *https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31*; Recommendation of the Investor Advisory Committee: Broker-Dealer Fiduciary Duty (Nov. 2013), available at *https://www.sec.gov/spotlight/investor-advisory-committee-2012/*

fiduciary-duty-recommendation-2013.pdf; Definition of the Term "Fiduciary" Conflict of Interest Rule – Retirement Investment Advice, Employee Benefits Security Administration, Department of Labor, 81 FR 20945, 20958-59 (Apr. 8, 2016).

12 *See*, *e.g.*, *supra* n.9; comment letter of Financial Services Institute (Jul. 5, 2013), available at *https://www.sec.gov/comments/4-606/4606-3138.pdf* ("Simply imposing the amorphous standard of care and other Advisers Act requirements on broker dealers and registered representatives would subject these firms to tremendous uncertainty as to their compliance obligations").

13 For example, the IAC Recommendation, in discussing the challenges of a uniform fiduciary standard, noted that, "[d]epending on how certain of these provisions are interpreted and enforced – particularly those with regard to selling from a limited menu of products and the on-going duty of care—such an approach could result in a significant weakening of the existing Advisers Act standard." IAC Recommendation, at 7. *See also* comment letter of the Investment Adviser Association (Aug. 31, 2017), available at *https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2266053-160963.pdf* ("Moreover, pursuing a single 'harmonized' standard of conduct also would not effectively serve investors because it would result in a weakening or 'watering down' of the existing robust fiduciary standard applicable to investment advisers").

14 *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, SEC Release No. 34-86031 (June 5, 2019) (Reg BI Adopting Release), at 1. The issuance of the Fiduciary Interpretation did not, of course, head off some criticism of the SEC's approach. *See*, for example, "Regulation Best Interest and the Investment Adviser Fiduciary Duty: Two Strong Standards that Protect and Provide Choice for Main Street Investors," Chairman Jay Clayton (Jul. 8, 2019), available at *https://www.sec.gov/news/speech/clayton-regulation-best-interest-investment-adviser-fiduciary-duty* (discussing criticisms of Regulation Best Interest and the Fiduciary Interpretation).

15 Reg BI Adopting Release, at 61. *See also* rule 15l-1 under the Securities Exchange Act of 1934 (§240.15l1).

16 Fiduciary Interpretation, at 8 and 12.

17 *See*, *e.g.*, Testimony on "Oversight of the U.S. Securities and Exchange Commission", Chairman Jay Clayton (June 21, 2018), available at *https://www.sec.gov/news/testimony/testimony-oversight-us-securities-and-exchange-commission* ("The proposed broker-dealer best interest obligation draws from the principles underlying an investment adviser's fiduciary duty, recognizing that both broker-dealers and investment advisers often provide advice in the face of conflicts of interest. These common principles are easier to compare given that as another part of our reform package we issued a proposed interpretation reaffirming—and in some cases clarifying—the fiduciary duty that investment advisers owe to their client. The interpretation is designed to provide advisers with a reference point for understanding their obligations to clients and reaffirms that an investment adviser must act in the best interests of its client.").

18 Consumer Federation of America, comment letter re: File Number S7-07-18, Regulation Best Interest, et al. (Aug. 7, 2018), available at *https://www.sec.gov/comments/s7-07-18/s70718-4181971-172530.pdf*.

19 *Id*.

20 Fiduciary Interpretation, at text accompanying note 29.

21 Fiduciary Interpretation, at text accompanying note 26 and text following note 28.

22 Fiduciary Interpretation, at text accompanying note 58.

23 Fiduciary Interpretation, at note 58.

24 Fiduciary Interpretation, at 12. Before the Fiduciary Interpretation, SEC statements concerning a duty of care under the Advisers Act are scant. *See* Dechert Comment Letter on Fiduciary Interpretation, at 6-7.

25 *Id*. at 12-18.

26 In addition, the SEC expects that, for retail clients, an adviser will "update the client's investment profile in order to maintain a reasonable understanding of the client's objectives and adjust the advice to reflect any

changed circumstances." Fiduciary Interpretation, at text accompanying note 37.

27 This reasonable investigation may encompass "[t]he cost (including fees and compensation) associated with investment advice" as well as "an investment product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility, likely performance in a variety of market and economic conditions, time horizon, and cost of exit." The SEC characterized cost as "one of many important factors" and stated that, "[w]hen considering similar investment products or strategies, the fiduciary duty does not necessarily require an adviser to recommend the lowest cost investment product or strategy." The SEC further explained that, "an adviser would not satisfy its fiduciary duty to provide advice that is in the client's best interest by simply advising its client to invest in the lowest cost (to the client) or least remunerative (to the investment adviser) investment product or strategy without any further analysis of other factors in the context of the portfolio that the adviser manages for the client and the client's objective."

28 The SEC most recently repeated this characterization in the proposing release for broker-dealer's Regulation Best Execution. *Regulation Best Execution*, SEC Release No. 34-96496 (Dec. 14, 2022), at note 11.

29 The SEC acknowledged, however, that, "[m]aximizing value encompasses more than just minimizing cost." Fiduciary Interpretation, at 19.

30 In addition, the SEC and its Staff provide formal and informal guidance in a variety of forms, including disclosure review comments, no-action letters, speeches, responses to public inquiries and FAQs.

31 "SEC Announces Enforcement Results for FY22," SEC Press Release 2022-206 (Nov. 15, 2022), available at *https://www.sec.gov/news/press-release/2022-206*.

32 Sections 206(1) and 206(2) provide that, "[i]t shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly (1) to employ any device, scheme, or artifice to defraud any client or prospective client; or (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." The SEC is required to prove scienter (*i.e.*, intentional or reckless conduct) for a violation of Section 206(1), but it relies heavily on its negligence-based authority under Section 206(2) when pursuing enforcement against advisers. SEC v. Steadman, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) (*citing* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194-95 (1963)).

33 These cases include a 2016 case involving the sale by an adviser of proprietary products to clients, in which the SEC cited the duty of care to suggest that an investment adviser representative should have conducted "heightened due diligence" on the proprietary products he recommended to clients. *In the Matter of Biscayne Capital International, et al.*, SEC Release No. IA-4399 (May 27, 2016), at paragraph 45. In a 2014 Initial Decision, the SEC's Chief Administrative Law Judge similarly stated that an adviser violated his duty of care by failing to conduct "adequate due diligence" in connection with client investments. *In the Matter of Larry C. Grossman and Gregory J. Adams*, Initial Decision Release No. 727 at 37 (Dec. 23, 2014). While not specifically referring to the duty of care, on appeal from that initial decision, the SEC stated that "[a]n investment adviser has a fiduciary duty to independently investigate securities before recommending them to clients." *In the Matter of Larry C. Grossman*, SEC Release No. IA-4543 at 8 (Sept. 30, 2016) (SEC Opinion). In addition, the SEC cited the duty of care in a 2009 case in which an adviser chose to follow a voting policy at a time when it had a material potential conflict of interest in connection with the use of that policy. *In the Matter of INTECH Investment Management LLC and David E. Hurley*, SEC Release No. IA-2872 (May 7, 2009).

34 *In the Matter of SoFi Wealth, LLC*, SEC Release No. IA-5826 (Aug. 19, 2021) (SoFi Order).

35 SoFi Order, at page 2.

36 *Id.*

[37] The Division of Examinations confirmed in a risk alert a few months later that the SoFi order included an alleged violation of the duty of care. *See* Observations from Examinations of Advisers that Provide Electronic Investment Advice, SEC Division of Examinations (Nov. 9, 2021), available at *https://www.sec.gov/files/exams-eia-risk-alert.pdf* ("The Commission has recently brought an action against a robo-adviser that did not uphold its duties of loyalty and care. *See* In re SoFi Wealth, LLC… (alleging that the adviser harmed clients by investing in certain affiliated securities and lacked written policies and procedures designed to prevent such harm)") (Robo-Adviser Risk Alert).

[38] *In the Matter of Manarin Investment Counsel, Ltd.*, Advisers Act Release No. 3686 (Oct. 2, 2013) (settled order).

[39] The Division brought many of these case as part of the Share Class Selection Disclosure Initiative, launched in 2018 (SCSD Initiative). As part of the SCSD Initiative, the Staff agreed not to recommend to the Commission best execution charges for those advisers who self-reported "even where the facts would support these charges." However, the Staff pursued best execution charges in *Manarin* and many other share class selection cases brought outside the SCSD Initiative. Share Class Selection Disclosure Initiative, announcement of the SEC Division of Enforcement (May 1, 2018), available *at https://www.sec.gov/enforce/announcement/scsd-initiative#_ftn1.*

[40] *See, e.g.*, *In the Matter of BFC Planning, Inc.*, SEC Release No. IA-5863 (Sept. 16, 2021).

[41] *In the Matter of Harbour Investments, Inc.*, SEC Release No. IA-5006 (Sept. 13, 2018).

[42] *In the Matter of Credit Suisse Securities (USA) LLC*, SEC Release No. IA-4678 (Apr. 4, 2017).

[43] *In the Matter of Rothschild Investment Corporation*, SEC Release No. IA-5860 (Sept. 13, 2021).

[44] A similar, separate statement regarding the failure to conduct an analysis to determine whether a share class is in the client's best interest has appeared in other recent orders as well. *See, e.g.*, *In the Matter of 1st Global Advisors, Inc., now known as Avantax Advisory Services, Inc.*, SEC Release No. IA-5932 (Dec. 20, 2021); *In the Matter of Ameritas Advisory Services, LLC*, SEC Release No. IA-5970 (Feb. 25, 2022); *In the Matter of HighPoint Advisor Group, LLC*, SEC Release No. IA-6003 (Apr. 27, 2022).

[45] *In the Matter of O.N. Investment Management Company*, SEC Release No. IA-5944 (Jan. 11, 2022) (ONIMCO Order).

[46] The order states that, "ONIMCO violated its duty to seek best execution" by "causing certain advisory clients to invest in certain mutual fund share classes when share classes of the same fund were available to the clients that presented a more favorable value." ONIMCO Order, at paragraph 21.

[47] ONIMCO Order, at paragraph 22.

[48] The SEC suggested similar conduct was at issue in *In the Matter of Madison Avenue Securities, LLC*, SEC Release No. IA-6036 (May 31, 2022), at paragraph 20. In *Madison*, the SEC stated, "Madison also did not fulfill its duty of care obligations when it advised clients to invest in mutual fund *share classes and money market funds* without undertaking any analysis to determine whether these investments were in the best interests of its advisory clients." (emphasis added) The words "share classes" modifies only "mutual fund" and the preceding paragraph (addressing best execution failures) pertains only to mutual fund share classes, making clear that the SEC viewed the duty of care failure as extending to the selection across different money market funds, not share classes of the same money market funds. *See also In the Matter of First Republic Investment Management, Inc.*, SEC Release No. IA-6030 (May 19, 2022), at paragraph 17 ("[the adviser] also did not fulfill its duty of care obligations when it recommended money market funds without determining whether the money market funds it used as cash sweep vehicles were in the best interests of its advisory clients.").

[49] *In the Matter of Kathryn Jane Meredith, d/b/a KM Advisory Services*, SEC Release No. IA-6044 (June 6, 2022), at paragraph 1.

[50] *Id*.

[51] *In the Matter of Kovack Advisors, Inc.*, SEC Order, SEC Rel. No. IA-6098 (Aug. 26, 2022); *In the Matter of Waddell & Reed, LLC*, SEC Order, SEC. Rel. Nos. 34-95828 and IA-6136 (Sept. 19, 2022) (Waddell Order).

[52] The SEC charged the advisers with non-scienter-based violations of the antifraud provisions of the Advisers Act under Section 206(2) and with failing to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act under Section 206(4) and Rule 206(4)7.

[53] *In the Matter of NPA Asset Management, LLC*, SEC Release No. IA-6110 (Sept. 8, 2022) (NPA Order). According to the Order, "[a]n investment adviser's fiduciary duty includes a duty of care that requires the adviser to determine whether a client's account type is suitable. In an ongoing advisory relationship, this duty of care requires that an adviser conduct periodic monitoring of client accounts for suitability."

[54] *SparkLabs Global Venture Management, LLC, et al.*, SEC Release No. 6121 (Sept. 12, 2022) (SparkLabs Order).

[55] The SEC found that the respondents breached their duty of care by: (i) recommending that a fund enter into loans at a below-market interest rate that did not account for the risk of default; (ii) failing to enforce timely repayment of loans; (iii) accepting payment in a form not authorized by the loan agreements; (iv) not obtaining a current valuation of stock accepted as repayment of overdue loans; and (v) recommending that a fund client make additional loans to the adviser at a below-market interest rate at the same time that fund was accruing interest on a higher interest-rate loan to an affiliate of the adviser. *See* SparkLabs Order.

[56] SEC v. Cambridge Investment Advisors Research, Inc., *et al.*, No. 22-cv-00071-SMR-SBJ (S.D. Iowa filed Mar. 1, 2022).

[57] SEC v. Duncan, No. 19-cv-11735-KAR, 2021 WL 4197386, (D. Mass. Sept. 15, 2021).

[58] *Id.*

[59] SEC v. Lindberg, No. 22-cv-00715 (M.D.N.C. filed Aug. 30, 2022).

[60] *Id.* at ¶4 (emphasis in the original).

[61] Additional litigated complaints referencing the duty of care include SEC v. Frankel, No. 22-cv-06500 (C.D. Cal. Filed Sept. 12, 2022) and SEC v. Buttonwood Financial Group, LLC, *et al.*, No. 21-cv-0686 (W.D. Mo. Filed Sept. 23, 2021).

[62] *Supra* note 56 at ¶8 (emphasis added).

[63] Specifically, EXAMS explained, it "will review whether market participants involved with crypto-assets: (1) have met their respective standards of conduct when recommending to or advising investors with a focus on duty of care and the initial and ongoing understanding of the products (*e.g.*, blockchain and cryptoasset feature analysis)." "2022 Examination Priorities," SEC Division of Examinations (Mar. 30, 2022), available at *https://www.sec.gov/news/press-release/2022-57* (Exams 2022 Priorities).

[64] *Id.*

[65] Observations from Examinations of Investment Advisers Managing Client Accounts That Participate in Wrap Fee Programs, SEC Division of Examinations (Jul. 21, 2021), available at *https://www.sec.gov/files/wrap-fee-programs-risk-alert_0.pdf*. This risk alert explains that, "an adviser's duty to monitor extends to all personalized advice it provides to the client, including, for example, in an ongoing relationship, an evaluation of whether a client's fee wrap account continues to be in the client's best interest. In providing advice about account type, an adviser should consider all types of accounts offered by the adviser and acknowledge to a client when the account types the adviser offers are not in the client's best interest." It further states that, "[t]he most common duty of care issue was the examined advisers' failure to monitor for 'trading-away' from the broker-dealers providing bundled brokerage services to the wrap fee programs and the associated costs of such trading-away practices."

[66] Robo-Adviser Risk Alert, *supra* n.37.

[67] Observations from Examinations of Private Fund Advisers, SEC Division of Examinations (Jan. 27, 2022), available at *https://www.sec.gov/files/private-fund-risk-alert-pt-2.pdf*.

[68] *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, SEC Release No. IA-5325 (Aug. 21, 2019).

[69] *See, e.g.*, Proxy Voting Release, at Response to Question 4 and text accompanying notes 13-15. See also Fiduciary Interpretation at text accompanying note 40.

[70] Proxy Voting Release, at text following note 58.

[71] A year later, the SEC also supplemented this proxy voting guidance. While this later release does not explicitly mention the duty of care, it again invokes the obligation to make a "reasonable investigation," to suggest specific steps that an adviser should take to fulfill its fiduciary duties. *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, SEC Release No. IA-5547 (Jul. 22, 2022) (rescinded in *Proxy Voting Advice*, SEC Release No. 34-95266 (Jul. 13, 2022)).

[72] Frequently Asked Questions Regarding Disclosure of Certain Financial Conflicts Related to Investment Adviser Compensation, SEC Staff (originally posted Oct. 18, 2019), available at *https://www.sec.gov/investment/faq-disclosure-conflicts-investment-adviser-compensation#_ftnref16*, at note 16 (*citing In the Matter of American Portfolios Advisors*, SEC Release No. IA-5083 (Dec. 20, 2018) (settled order) and *Manarin*).

[73] Compensation Conflict FAQs, at text accompanying note 3.

[74] Compensation Conflict FAQs, at note 16.

[75] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors, SEC Staff Bulletin (Mar. 30, 2022), available at *https://www.sec.gov/tm/iabd-staff-bulletin#_ftnref10*.

[76] Account Recommendation Bulletin, at text accompanying note 7.

[77] Account Recommendation Bulletin, at note 7.

[78] For example, the Account Recommendation Bulletin states that, "it would be difficult to form a reasonable basis to believe that a rollover recommendation is in the retail investor's best interest and does not place your or your firm's interests ahead of the retail investor's interest, if you do not consider the alternative of leaving the retail investor's investments in their employer's plan, where that is an option."

[79] The sentence reads in full: "[t]he staff believes that firms should carefully consider how their product menu choices—which could include limitations such as offering only proprietary products (*i.e.*, any product that is managed, issued, or sponsored by the firm or any of its affiliates), a specific asset class, or products that pay revenue sharing or feature similar third-party arrangements—comply with *the firm's obligations to act in the best interest* of retail investors when providing investment advice and recommendations and to disclose conflicts." (emphasis added) Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, SEC Staff Bulletin (Aug. 3, 2022), available at *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest#_ftnref31*. The bulletin explains that, "[t]he duty of care requires, among other things, investment advisers to provide investment advice *in the client's best interest*, based on a reasonable understanding of the client's objectives." (emphasis added) The Staff addressed similar themes in the Account Recommendation Bulletin when it stated, "you cannot recommend an account that is not in a retail investor's best interest solely based on your firm's limited product menu or arising from limitations on your licensing."

[80] "SEC Announces Enforcement Results for FY22," SEC press release 2022-206 (Nov. 15, 2022), available at *https://www.sec.gov/news/press-release/2022-206*.

[81] Fiduciary Interpretation, at 9.