THE REVIEW OF
SECURITIES & COMMODITIES REGULATION
AN ANALYSIS OF CURRENT LAWS AND REGULATIONS AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 46 No. 15 September 4, 2013

DUALLY REGISTERED BROKERS AND ADVISERS

Broker-dealers wishing to expand their business by offering investment advisory services must register with the SEC as investment advisers. While such dual registrants will find themselves subject to the separate regulatory regimes applicable to broker-dealers and investment advisers, these two regimes are converging in practice. To a significant degree, broker-dealers may therefore leverage their existing compliance controls and procedures to satisfy the additional regulatory obligations as dual registrants.

By Stephen P. Wink, Stefan Paulovic, and Michael Shaw *

Investment advisers ("Advisers") and broker-dealers ("Brokers") serve different functions under the law, with Advisers providing investment advice to their clients and Brokers effecting transactions in securities for the account of others (in the case of brokers) or for their own account (in the case of dealers). In light of these different functions, Advisers and Brokers have been subject to separate regulatory regimes. Advisers are generally subject to the Investment Advisers Act of 1940 and are regulated by the SEC.[1] Brokers are primarily subject to the Securities Exchange Act of 1934, among other laws, and regulation by the SEC and the Financial Industry Regulatory Authority ("FINRA"), and other self-regulatory organizations. In practice, however, the SEC has "observed that the lines between full-service Brokers and Advisers have blurred. Advisers and Brokers, for example, provide investment advice both on an episodic and on an ongoing basis."[2] As a result, the SEC has repeatedly expressed concern that "specific regulatory obligations depend on the statute under which a financial intermediary is registered instead of the services provided."[3] To avoid both regulatory arbitrage

[1] Registration with the SEC generally is required if an Adviser (1) manages more than $100 million in customer assets, (2) advises certain funds or business development companies, or (3) works in a state that does not register Advisers. 17 C.F.R. § 275.203A-1 (2011). All other Advisers are either subject to state registration systems that have requirements similar to the Advisers Act, or exempt from both regimes, though the exemptions currently available are quite narrow. Advisers are regulated by either the SEC or the states, but not both. This

footnote continued from previous column…

article is limited to a discussion of the regulatory regime applicable to federally registered Advisers.

[2] SEC, *Duties of Brokers, Dealers, and Investment Advisers*, 78 Fed. Reg. 14,848, 14,849 (Mar. 7, 2013).

[3] *Id.*

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RSCR Publications LLC Published 22 times a year by RSCR Publications LLC. Executive and Editorial Offices, 2628 Broadway, Suite 29A, New York, NY 10025-5055. Subscription rates: $1,197 per year in U.S., Canada, and Mexico; $1,262 elsewhere (air mail delivered). A 15% discount is available for qualified academic libraries and full-time teachers. For subscription information and customer service call (866) 425-1171 or visit our Web site at www.rscrpubs.com. General Editor: Michael O. Finkelstein; tel. 212-876-1715; e-mail mofinkelstein@gmail.com. Associate Editor: Sarah Strauss Himmelfarb; tel. 301-294-6233; e-mail shimmelfarb@comcast.net. To submit a manuscript for publication contact Ms. Himmelfarb.

and possible uncertainty for investors, industry professionals and regulators have called for a harmonized, universal standard of conduct that would apply to Advisers and Brokers alike and replace the existing structure.[4] Nonetheless, even now there is considerable overlap and convergence between the two regimes, which Brokers may utilize to leverage their existing compliance structure when moving to a dually registered Adviser platform.

TOWARD A HARMONIZED STANDARD

Congress included a requirement in the Dodd-Frank Act that the SEC present a report examining "the effectiveness of existing legal or regulatory standards of care for brokers, dealers [and] investment advisers" and to identify "legal or regulatory gaps, shortcomings, or overlaps" in those standards.[5] The SEC released such report (the "Staff Report") on January 21, 2011.[6] The Staff Report indicated that many retail investors are confused by the different roles of Advisers and Brokers, and the different standards of care applicable to each. It recommended that these standards be harmonized into a single, uniform fiduciary standard, such that the duties of Brokers when providing personalized investment advice to retail customers are "no less stringent" than those required of Advisers.[7]

In January 2012, then-SEC Chairman Mary Schapiro indicated that the SEC staff would request additional information and public comment regarding the harmonized standard of care and other potential regulatory alternatives.[8] In March 2013, the SEC published a release seeking such additional information and public commentary on a wide range of issues associated with the potential harmonization of the standards of conduct for Advisers and Brokers (the "March 2013 Release").[9] The SEC indicated that since publishing the Staff Report in 2011, it has continued to review current information and data about the marketplace for personalized investment advice in light of the Staff Report's recommendations.[10] The March 2013 Release solicits further "quantitative and qualitative data and other information about the benefits and costs of the current standards . . . as well as alternative approaches to the standards of conduct, including a uniform fiduciary standard of conduct . . ."[11] In seeking comment on alternative approaches, the SEC also provided an overview of the specific duties that may exist under a harmonized regime, including those with respect to disclosure obligations and the management of conflicts of interest.[12] Although the SEC noted that it has made no determination to proceed with a harmonized regime, the publication of the March 2013 Release provides new momentum for harmonization and greater insight into how a harmonized regime may operate.

FINRA, for its part, has been quite vocal in support of changes in this area. In September 2011 testimony before the House of Representatives, Richard Ketchum, FINRA's Chairman and CEO, commented favorably on the idea of a uniform fiduciary standard for Advisers and Brokers described in the Staff Report, pointing out that "[m]any customers now hold investment adviser and brokerage accounts with the same firm and rely on the

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[4] *See , e.g.*, James S. Wrona, *The Best of Both Worlds: A Fact-Based Analysis of the Legal Obligations of Investment Advisers and Broker-Dealers and a Framework for Enhanced Investor Protection*, The Business Lawyer (Nov. 2012). Mr. Wrona serves as Vice President and Associate General Counsel for FINRA.

[5] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 913, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o).

[6] SEC, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS AS REQUIRED BY SECTION 913 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2011).

[7] Staff Report at 118-20.

[8] Letter from Mary L. Schapiro, SEC Chairman, to Congressman Scott Garrett, Chairman, House Subcomm. on Capital Markets and Gov't Sponsored Entities (Jan. 10, 2012).

[9] SEC, Duties of Brokers, Dealers, and Investment Advisers, 78 Fed. Reg. 14,848 (Mar. 7, 2013).

[10] March 2013 Release at 14,850.

[11] *Id.* at 14,850-51.

[12] *Id.* at 14,856.

same financial professional who is registered as both a broker-dealer and an investment adviser representative."[13] Ketchum expressed the view that FINRA and the SEC too often respond "issue by issue, violation by violation, rather than addressing problems more broadly and prospectively," and called for establishing a uniform fiduciary standard that would serve as a single benchmark for the regulator and the regulated alike. In addition, Ketchum suggested that the SEC, with limited resources available for the examination of a growing number of Advisers, should provide FINRA or other self-regulatory organizations with the authority to supplement and augment the SEC's examination and enforcement efforts regarding Advisers.

Although no harmonized standard applicable to Advisers and Brokers alike has been enacted, dually registered entities may already leverage the significant overlap in the current regulatory regimes and utilize much of their existing compliance controls, procedures, and knowledge base to satisfy the additional regulatory obligations of dual registrants. The following discussion focuses on some of the key similarities and differences between the two regulatory regimes that Brokers may wish to consider as they expand their business by offering investment advisory services.

COMPARING BROKER AND ADVISER COMPLIANCE CONTROLS

Rules-Based versus Principles-Based Regulatory Regimes

As a general matter, the Broker regulatory regime is more mechanical and rules-based than the more principles-based Adviser regime. For example, where Rule 206(4)-7 under the Advisers Act requires a registered Adviser simply to "review, no less frequently than annually, the adequacy of the policies and procedures established pursuant to this section and the effectiveness of their implementation," FINRA Rule 3130 spells out in great detail the specific content and certifications required of Brokers in connection with their annual review.[14] FINRA regulations further include registration, admission, qualification, licensing, supervision, and continuing education requirements, as well as suitability and antifraud-related provisions.

As a result of both this fundamentally different approach to regulation and the historically different functions served by Advisers and Brokers, the two regulatory regimes describe the regulatory obligations in different terms. However, once the different regimes are parsed, one can identify considerable substantive overlap. Even in areas where there is not substantive overlap, Brokers seeking to expand their business into the Adviser sphere may draw heavily from their experience in the Broker regime to elucidate and guide their compliance with Adviser regulatory principles.

Compliance Programs

The requirements of Adviser and Broker compliance programs share several common elements, including (i) having a designated, knowledgeable Chief Compliance Officer, (ii) tailoring the requirements of the compliance program to the particular firm such that it is dynamically and effectively supporting compliance with the applicable laws and regulations, (iii) conducting periodic reviews, and, at least once each year, evaluating the effectiveness of the firm's compliance program, and (iv) "reporting up" on the effectiveness of firm compliance policies and procedures.[15]

Use of Customer Information and Employees' Securities Transactions

Brokers face a variety of specific rules governing the use of customer information. Under Exchange Act

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[13] *Hearing Before the H. Subcomm. on Capital Markets and Gov't Sponsored Enterprises, Comm. on Fin. Services* 110th Cong. (2011) (statement of Richard Ketchum); *see also* Richard Ketchum, Address before FINRA Annual Conference (May 24, 2011) ("How to disclose information, from accounts to conflicts, is really the challenge. We need to figure out the right combination of how to capture investors' attention up front; how to provide detail from a Web-based standpoint; and how to use minimalist but effective point-of-sale disclosure, to remind customers of the questions they should be asking again and again."); Richard Ketchum, Address before CCOutreach Broker National Seminar (Feb. 8, 2011) (supporting a uniform fiduciary standard and advocating for "more Web-based, brochure-like disclosure that provides – in plain-English – information about conflicts and fees, and range of products").

[14] *See* PRICEWATERHOUSECOOPERS, COMPLIANCE PROGRAMS OF BROKER-DEALERS AND INVESTMENT ADVISERS: MORE SIMILAR THAN DIFFERENT, *available at* http://www.pwc.com/en_US/us/financial-services/regulatory- services/publications/assets/pwc-broker-dealer-investment-adviser-compliance-programs.pdf; *see also* PRICEWATERHOUSECOOPERS, INTEGRATING TECHNOLOGY INTO YOUR COMPLIANCE PROGRAM TO IMPROVE EFFECTIVENESS AND EFFICIENCY, *available at* http://www.pwc.com/en_US/us/financial-services/regulatory-services/publications/assets/integrating-technology-into-your-compliance- program.pdf; 17 C.F.R. § 275.206(4)-7 (2003).

[15] PRICEWATERHOUSECOOPERS, COMPLIANCE PROGRAMS OF BROKER-DEALERS AND INVESTMENT ADVISERS: MORE SIMILAR THAN DIFFERENT, *supra* note 14.

Section 15(g), Brokers must establish and enforce written policies to prevent the misuse of customer material non-public information by the Broker or its associated persons.[16] In addition, NASD Rule 3040 sets forth requirements for private securities transactions of associated persons, which apply regardless of whether the associated person receives any compensation for such transaction,[17] while NASD Rule 3050 regulates transactions executed by one associated person on behalf of another associated person.[18] NYSE Rule 407, in turn, prohibits New York Stock Exchange member firms from opening accounts for employees of another firm without first obtaining written consent of such other firm, and requires that duplicate confirmations and statements be sent to such other firm.[19] These rules applicable to Brokers seek to ensure that firms properly monitor and, to the extent possible, prevent any potential market manipulation and/or insider trading by their employees.

These rules share many similarities with the broad requirements applicable to Advisers under the rules promulgated under Advisers Act Section 204A. For example, Rule 204A-1 requires an Adviser to maintain a code of ethics (as discussed in greater detail below).[20] An Adviser's code of ethics must set forth the principles and rules governing the conduct of personnel that effectively address the same concerns underlying the rules discussed above applicable to Brokers, such as insider trading and market manipulation, including the requirement to review the personal trading activity of employees. The code of ethics must also require that those employees of an Adviser who have access to customer information abide by the federal securities laws. While there are no rules explicitly restricting the use of customer information by Brokers in connection with the applicable insider trading policies described above, FINRA has found use of such information to be a violation of the Broker's duties to its customers.[21]

Conflicts of Interest

In its Staff Report, the SEC principally based its advocacy for a uniform regulatory standard on the management of conflicts of interest, noting that "[c]larification will be particularly important in applying the [Broker] obligation to eliminate or at least disclose all material conflicts of interest, as contemplated by the Dodd-Frank Act," and emphasizing that such disclosures must be clear and specific enough to provide sufficient facts for the retail investor to understand the nature of the applicable conflicts.[22] Thus, particular attention should be paid to the management of conflicts of interest, even in the absence of a harmonized regulatory regime.

Conflicts of interest may arise in various scenarios. Compensation arrangements may generate conflicts to the extent that incentives exist for an Adviser or Broker to place investors in accounts with high fee structures relative to the services provided, or where the Adviser or Broker may be financially rewarded for recommending inappropriately risky instruments given an investor's level of sophistication.[23] Other conflicts may be more subtle, such as where an investor holds a position that is illiquid or difficult to value, and an Adviser or Broker stands to earn higher fees by valuing the position at the high end of a given range. Other examples of typical conflicts include (i) Adviser favoritism between accounts managed side-by-side, (ii) affiliations between Advisers and Brokers, (iii) preferential execution of trades of certain customers, and (iv) research coverage conflicts where an Adviser or Broker firm's research analysts are incentivized to advise customers to buy into companies in which such firm holds a proprietary or creditor interest.

In 2012, the SEC's Office of Compliance Inspections and Examinations issued a report highlighting three specific areas of concern with respect to failures of internal conflict of interest controls: first, undocumented informal interactions between groups with material non-public information, and internal and external groups with sales and trading responsibilities; second, "above-the-

[16] 15 U.S.C. § 78o-15(g) (2012).

[17] NASD RULE 3040 (2004).

[18] NASD RULE 3050 (2002).

[19] NYSE RULE 407 (2009).

[20] 17 C.F.R. § 275.204A-1 (2011).

[21] A recent FINRA enforcement action found certain Brokers liable for "shadowing" the trades of third-party managers in accounts managed for a joint customer, *see Department of Enforcement v. Michael Jennings* et. al., FINRA Amended Hearing Panel Decision No. 2008013864401, *available at* http://disciplinaryactions.finra.org/viewdocument.aspx?DocNB=33242.

[22] Staff Report at 112. To satisfy this disclosure requirement, a Broker may present the customer with a summary of the potential conflicts of interest at the time the client opens an account, and then update such customer both periodically and at the time of any conflicted trade; *see also* Staff Report at 116, 120.

[23] *See* Carlo V. di Florio, Director, Office of Compliance Inspections and Examinations, SEC, Address before the National Society of Compliance Professionals (Oct. 22, 2012).

wall" senior executives who received material non-public information without any monitoring systems; and third, a lack of focused follow-up review of trading after documented formal communications between internal business groups in which material non-public information was passed for legitimate business purposes.[24] Particular attention should be paid to these areas when implementing conflicts management strategies at both the Adviser and the Broker level.

While many of the above mentioned potential conflicts of interest apply equally to Advisers and Brokers, the disclosure obligations differ across the regulatory regimes. For instance, FINRA Rule 5320 allows a Broker to engage in otherwise prohibited trading with appropriate disclosure if the customer is an "institutional account" (as defined in FINRA Rule 4512(c)) or the customer order involves at least 10,000 shares and at least $100,000 in value.[25] Likewise, under FINRA Rule 5121(c), a Broker participating in a public offering of securities issued by an affiliate or other entity with which the Broker has a "conflict of interest" (as defined in the rule) cannot execute a transaction in a discretionary account without the prior specific written approval of the account holder.[26]

On the other hand, Advisers are required to provide a brochure with disclosure of their conflicts of interest at the time the advisory relationship is established, as well as on an annual basis thereafter, which includes the disciplinary history of the Adviser's personnel.[27]

Advisers also face strict rules regarding principal trading. While Advisers are not categorically prohibited from such trading on their own account, they must disclose their conflicts of interest to the client in writing and obtain the client's consent prior to engaging in such principal trades.[28]

ADDITIONAL KEY LEGAL REQUIREMENTS UNDER THE ADVISERS ACT

Prospective dual registrants with pre-existing Broker compliance controls and procedures will need to expand their compliance programs to satisfy the requirements of the Advisers Act. For purposes of this article, we have limited our discussion to a broad overview of (i) fiduciary duties of Advisers, (ii) the Adviser code of ethics, (iii) pay-to-play rules, and (iv) the different dispute resolution mechanisms applicable to Advisers and Brokers.

Fiduciary Duties

As enunciated by the Supreme Court in *SEC v. Capital Gains Research Bureau, Inc.*,[29] and as subsequently interpreted by the SEC, the Advisers Act implicitly imposes a fiduciary duty on Advisers that does not apply to Brokers. In *Capital Gains*, the Court held that an Adviser's fiduciary standard is a high one, and plaintiffs need not prove scienter on the part of an Adviser to demonstrate that such Adviser engaged in a breach of its duty. Subsequent case law expanded upon this requirement and explained that an Adviser owes several specific fiduciary duties to its clients, including: (i) a duty of loyalty to serve the best interests of clients and not to subordinate its clients' interests to its own; (ii) a duty of loyalty requiring such Adviser to disclose conflicts of interest to clients; (iii) a duty of care requiring such Adviser to provide suitable investment advice based on clients' individual financial situations and investment objectives; and (iv) a duty of care to seek best execution of clients' securities transactions where

[24] SEC, *Staff Summary Report on Examinations of Information Barriers: Broker-Dealer Practices Under Section 15(g) of the Securities Exchange Act of 1934* (Sep. 27, 2012). For surveys of recent enforcement activity, *see* SEC, *Select SEC and Market Data Fiscal 2012*, *available at* http://www.sec.gov/about/secstats2012.pdf, *and* FINRA, *2012: FINRA Year in Review*, *available at* http://www.finra.org/Newsroom/NewsReleases/2013/P197624. The SEC filed 734 enforcement actions during FY 2012, with cases against Brokers, Advisers, and investment companies accounting for 38% of the enforcement docket, while FINRA brought a record 1,541 disciplinary actions in 2012 against its member firms and associated persons, and ordered more restitution to investors ($34 million) than ever before.

[25] FINRA RULE 5320 (2012).

[26] FINRA RULE 5121(c) (2010).

[27] 17 C.F.R. § 275.204-3 (2010). Although Brokers are not currently required to disclose their disciplinary history to customers, such information is available to the public through BrokerCheck on FINRA's website *at* http://brokercheck.finra.org/Search/Search.aspx.

[28] 17 C.F.R. § 275.206(3)-3T (2009).

[29] *See* 375 U.S. 180 (1963); *see also* James S. Wrona, *The Best of Both Worlds: A Fact-Based Analysis of the Legal Obligations of Investment Advisers and Broker-Dealers and a Framework for Enhanced Investor Protection*, The Business Lawyer (Nov. 2012).

such Adviser is responsible for the selection of Brokers[30] to execute client trades.

As a threshold matter, Rule 206(4)-7 under the Advisers Act provides that it is unlawful for a registered Adviser (or an Adviser required to be registered) to provide investment advice unless it adopts and implements written policies and procedures reasonably designed to prevent violations of the Advisers Act by both the Adviser and its "supervised persons."[31] These compliance policies must be tailored to the specific business operations of the Adviser.[32] Further, Advisers are categorically prohibited from engaging in certain transactions. Section 206 of the Advisers Act sets forth various specifically prohibited transactions; the prohibitions are designed to prevent deception, fraud, manipulation, and principal trading without sufficient disclosure.[33]

While Brokers are not currently subject to a corresponding set of fiduciary duties, FINRA issued a concept proposal to enhance Broker disclosure requirements to track those under the Adviser regime, requiring its member firms to disclose to new retail customers their fees and all types of services they provide, and to identify potential conflicts of interest associated with those services.[34] This is another example of the convergence of these regimes even in the absence of a harmonized fiduciary standard.

Adviser Code of Ethics

Rule 204A-1 under the Advisers Act provides several specific requirements with respect to the Adviser's code of ethics. In particular, an Adviser must establish, maintain, and enforce a written code of ethics that includes standards of business conduct required of such Adviser's employees and supervised persons.[35] An Adviser's employees and supervised persons must also comply with applicable federal securities laws and report any violations of the Adviser's code of ethics promptly to the CCO and to other persons as designated in such Adviser's code of ethics. In addition, an Adviser's access persons must report their personal securities transactions and holdings periodically.[36] In connection with the implementation of the code of ethics, an Adviser must adopt controls encompassing certain policies that need to be periodically reviewed, including those governing (i) trading practices (such as best execution, soft dollars, trade aggregation and allocation, and principal and cross trading procedures), (ii) proprietary and employee trading surveillance, (iii) the advertising and marketing of advisory services, (iv) client communications, (v) the safeguarding of assets and client information, (vi) recordkeeping compliance, (vii) political contributions, and (viii) gifts and entertainment expenditures.[37] Of course, Brokers are already required to maintain policies and procedures relating to each of these categories and may readily

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[30] Advisers should consider execution capability, commission rate, financial responsibility, responsiveness to the Adviser, and the value of any research provided when selecting a Broker for a transaction. *See* Staff Report at 29; *see also* In the Matter of Tilden Loucks & Woodnorth, LLC, et al., Admin. Proc. File No. 3-15081 (Oct. 29, 2012).

[31] The term "supervised person" means any partner, officer, director (or other person occupying a similar status or performing similar functions), or employee of an Adviser, or other person who provides investment advice on behalf of the Adviser and is subject to the supervision and control of the Adviser. 15 U.S.C. § 80b–2(a)(25) (2012).

[32] *See, e.g.*, *In the Matter of Evens Barthelemy and Barthelemy Group LLC*, Admin. Proc. File No. 3-15102 (Nov. 20, 2012); *see also In the Matter of Consultiva Internacional, Inc.*, Admin. Proc. File No. 3-14973 (Aug. 3, 2012); *cf. Morgan Stanley & Co. LLC and Garth Peterson* (Apr. 25, 2012).

[33] 15 U.S.C. § 80b–6 (2012); *see also In the Matter of OMNI Investment Advisors Inc. and Gary R. Benyon*, Admin. Proc. File No. 3-14643 (Nov. 28, 2011).

[34] FINRA REGULATORY NOTICE 10-54 (Oct. 2010). Prior to the expiration of the comment period in December 2010, FINRA received many comments, but, as of the date of this article, has not published a rule proposal with respect to these requirements.

[35] 17 C.F.R. § 275.204A-1 (2011).

[36] In the investment advisory sphere, "access persons" are any supervised persons who have access to non-public information regarding client transactions or holdings, make securities recommendations to clients, or have access to such recommendations, and, for most Advisers, all officers, directors, and partners. 17 C.F.R. § 275.204A-1(e)(1) (2011); *see also* In the Matter of AXA Advisors, LLC, Admin. Proc. File No. 3-14708 (Jan. 20, 2012), In the Matter of Theodore W. Urban, Admin. Proc. File No. 3-13655 (Jan. 26, 2012), *and see* In the Matter of Charles L. Rizzo and Gina M. Hornbogen, Admin. Proc. File No. 3-14641 (July 20, 2012).

[37] *See:* (i) *SEC v. Kwame M. Kilpatrick*, et al., Case No. 12-cv-12109 (E.D. Mich., May 9, 2012); (ii) *SEC v. RKC Capital Management, LLC*, et. al., Case No. 2:12-cv-00408-BCW (D. Utah, Apr. 30, 2012); (iii) *In the Matter of Quantek Asset Management, LLC*, et. al., Admin. Proc. File No. 3-14893 (May 29, 2012); *and* (iv) *In the Matter of New England Investment and Retirement Group, Inc*. and Nicholas John Giacoumakis, Admin. Proc. File No. 3-15137 (Dec. 18, 2012).

adapt their current policies to meet these requirements when moving into the investment advisory world.[38]

Advertising and Marketing

Both Brokers and Advisers need to comply with rules around advertising and marketing. Advisers face strict rules governing the use of performance advertising and Brokers are subject to a number of specific requirements, including that the information provided to customers be "fair and balanced."[39] Recently, regulators have indicated that Advisers must carefully review their social media presence, especially with respect to testimonials.[40] On January 4, 2012, OCIE released a National Examination Risk Alert (the "Risk Alert") warning that, depending upon the circumstances, third-party postings to Adviser social media sites may be considered prohibited testimonials.[41] The Risk Alert suggests that Advisers consider adopting policies and procedures concerning these third-party postings, including safeguards to prevent any violations of applicable securities laws. Brokers moving into the Adviser sphere will therefore need to take a close look at their policies and procedures to ensure compliance with these specific requirements.

Pay-to-Play Rules

Rule 206(4)-5 under the Advisers Act is known as the "pay-to-play" rule and restricts political contributions by Advisers. The rule was modeled on Municipal Securities Rulemaking Board Rule G-37, which has been applicable to Brokers who are members of the MSRB for many years. This is another area of regulation which will likely converge further in the coming months, as FINRA is expected to devise its own pay-to-play scheme that would apply to all Brokers and parallel the language of Rule G-37 and Rule 206(4)-5.[42]

Dispute Resolution

Advisers and Brokers face separate dispute resolution regimes. Customers wishing to pursue claims against Brokers are generally subject to mandatory FINRA arbitration proceedings, as set forth in their initial account agreements.[43] The Advisers Act, on the other hand, provides federal courts with jurisdiction to hear claims alleging violations of the Advisers Act.[44] Nonetheless, many Advisers have included forum selection and arbitration clauses in their investment management agreements. While court decisions generally uphold arbitration provisions in investment management agreements, the future of such provisions continues to be debated.[45] In addition, although both Adviser clients and Broker customers have private rights of action under Exchange Act Section 10(b) and applicable state law, the Advisers Act provides fewer alternative private rights of action for dissatisfied clients than do the Securities Act and the Exchange Act.

CONCLUSION

A harmonized fiduciary standard for Advisers and Brokers would further simplify the compliance structure of dually registered entities. Although the March 2013 Release indicates that we may be moving towards such a harmonized standard, such entities may already leverage the significant overlap in the current regulatory regimes and utilize much of their existing compliance controls, procedures, and knowledge base to satisfy the additional regulatory obligations of dual registrants. ■

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[38] *See, e.g.*, FINRA RULE 5310 (2012) for the Broker analogue to the Adviser's duty to seek best execution.

[39] 17 C.F.R. § 275.206(4)-1; FINRA RULES 2210 and 2212 through 2216 (2013). While Rule 206(4)-1 under the Advisers Act does not contain an outright prohibition regarding the use of performance data in Adviser advertisements, performance advertising is subject to the rule's general prohibition against advertisements that are "false or misleading," as well as the SEC staff interpretations in connection with the rule.

[40] Brynn Peltz, Ellen Creede, & Nick Look, *What to Expect When You're Inspected by the SEC*, PREA Quarterly (Winter 2013).

[41] SEC, *National Examination Risk Alert, Investment Adviser Use of Social Media*, Vol. II, Issue 1 (Jan. 4, 2012).

[42] Portions of Rule 206(4)-5 will not be effective until the SEC finalizes its definition of the term "municipal advisor." FINRA, in turn, is to propose the new rule within nine months of such effective date. The final municipal advisor rule is expected to be proposed in 2013.

[43] FINRA RULE 12200 (2008). However, there has been some recent discussion of banning such mandatory arbitration clauses in account agreements. For further discussion, s*ee* Caitlin Nish, *Democrats Urge SEC to Ban Mandatory Arbitration Clauses*, WALL ST. J., Apr. 30, 2013.

[44] 15 U.S.C. § 80b-14 (2010).

[45] *See, e.g., Bakas v. Ameriprise Fin. Servs., Inc.*, 651 F. Supp. 2d 997 (D. Minn. 2009); *see also* Editorial, *Aguilar spot-on about mandatory arbitration*, INVESTMENTNEWS, Apr. 21, 2013. Section 921(b) of the Dodd-Frank Act amended Section 205 of the Advisers Act to provide the SEC with rulemaking authority to prohibit or impose conditions upon the use of mandatory pre-dispute arbitration clauses in investment management accounts.