SEC Will Pursue Fiduciary Rule in 2013

Other priorities next year will include hiring more examiners to police advisors, JOBS Act rulemaking on Reg D, crowdfunding

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SEC headquarters in Washington. (Photo: AP)

The Securities and Exchange Commission plans to “move forward” next year with a uniform fiduciary standard rule for advisors and brokers when providing personalized investment advice as well as “continue to assess” ways to better harmonize advisor and BD rules when they are providing similar services, according to the agency’s just-released 2012 Financial Report.

The agency will forge ahead with a fiduciary rule in 2013 even with a new chairman at the helm, SEC Commissioner Elisse Walter, who will fill in for Mary Schapiro until a permanent chairman is named. While Walter, a Democrat, has sided with current SEC chairwoman Schapiro as well as the other Democratic Commissioner, Luis Aguilar, in “vigorously” advocating “that all investors should receive equal protection under the law from a uniform fiduciary standard,” she likely wouldn’t go along with putting brokers under the Investment Adviser Act fiduciary standard. However, Walter has been a strong proponent of harmonizing advisor and BD rules.

Schapiro told AdvisorOne in late September that the agency was indeed moving forward with a rule proposal internally, and that she was “ready to go” on releasing a request for information to allow the public to help inform a “more detailed” cost-benefit analysis on the agency’s fiduciary rule. She said at the time that “it would be nice to get this final request for information," however, such a comment request has yet to be issued by the agency.

David Tittsworth, executive director of the Investment Adviser Association in Washington, says the question now is whether soon-to-be Chairman Walter "has two other votes to support the request for public comment, " as the two Repulican Commissioners Troy Paredes and Daniel Gallagher "have expressed reservations about a fiduciary rulemaking in the absence of appropriate cost-benefit information and analysis." Thus, Tittsworth says, "Chairman Walter would have to address their cost-benefit concerns in order to move forward with a request for comments and, ultimately, a rulemaking on fiduciary standards."

Barbara Roper, director of investor protection for the Consumer Federation of America, agrees, noting that while it's "encouraging" that further efforts on a fiduciary rule are on the agency's agenda, "unless the Republican [commissioners] are prepared to drop their opposition," to a fiduciary rule "it's going to take a third Democratic vote to finalize a rule."

Indeed, there was disagreement among the SEC Commissioners this year on "which questions to even ask in a preliminary cost-analysis review to submit for public comment prior to agreeing on an actual proposal," adds Duane Thompson, senior policy analyst at fi360. "Complicating things even more is the likelihood of a 2-2 deadlock on many issues before the Commission, including the fiduciary study, at least until a nomination is submitted by the Obama Administration to fill the open Commission slot" after Schapiro resigns.

The same question exists with respect to other “harmonization” issues, Tittsworth adds. Section 913 of Dodd-Frank "authorized the SEC to conduct rulemakings on various aspects of disclosure as well as 'rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.'"

The report’s “Looking Forward” section also states that the SEC’s Division of Investment Management will hire additional examiners next year to oversee funds and advisors, if the money is available. These examiners, the report states, “would increase investor protection by supplementing and coordinating with other examination efforts. They would also bring skills and specialized experience to examinations of funds and investment advisers.” In addition, the examiners’ specialized skills are “expected to directly inform and support and improve policies and rulemakings that address industry practices observed during exams.”

The exam function, the Division says, “will be part of a larger Office of Risk and Examination Group (REG), which will also conduct rigorous quantitative and qualitative financial analysis of the investment management industry to assist the Commission and the Division in carrying out their missions.”

Along with other Dodd-Frank and Jumpstart Our Business Startups (JOBS) Act rulemakings, the report also states the agency will finalize rules that disqualify securities offerings involving certain “felons and other ‘bad actors’” from relying on the safe harbor from Securities Act registration provided by Rule 506 of Regulation D.

The SEC says that it will engage in rulemaking to implement the JOBS Act’s provisions, including modifying the prohibition against general solicitation and general advertising in Rule 506 of Regulation D and Rule 144A under the Securities Act, and implementing exemptions under the Securities Act for “crowdfunding” offerings and unregistered public offerings of up to $50 million.