

The SEC's "Best Interest" Proposal – A Step Forward or a Set Back? FiduciaryNews, ft. Tad Devlin and Edward "Ted" McNamara

Tad A. Devlin, partner with Kaufman Dolowich & Voluck in San Francisco, and Edward "Ted" McNamara, attorney in the KD Fort Lauderdale office, were quoted in an article written by Christopher Carosa for *FiduciaryNews* published on September 5, 2018.

After years of letting the Department of Labor do all the heavy lifting, the Securities and Exchange Commission finally swung into action a month after the 5th Circuit vacated the DOL's Fiduciary Rule. On April 18, 2018, the SEC "voted to propose a package of rulemakings and interpretations designed to enhance the quality and transparency of investors' relationships with investment advisers and broker-dealers while preserving access to a variety of types of advice relationships and investment products." They call it "Regulation Best Interest" and it's been the talk of the town since this spring.

Kara Stein, the lone dissenting commission in the 4-1 vote, referred to the 1,000+ page proposal as a "squandered opportunity" that might be more appropriately called "Regulation Status Quo."

Is Stein correct? We asked financial professionals across the nation for their thoughts on the SEC's effort. As you might imagine, it's clear Regulation Best Interest has some good points and some not-so-good points.

By waiting to see how various segments of the industry responded to the DOL's Rule – and ultimately what did it in from a legal perspective – the SEC has been able to formulate a proposal that can take into consideration the desires of both proponents and opponents of the Fiduciary Rule. "The DOL continues to seek a heightened standard for ERISA plan sponsors and others rendering investment advice," says Ted McNamara, an attorney at Kaufman Dolowich & Voluck in Fort Lauderdale, Florida, says,. The SEC's 'Best Interest' proposal incorporates some aspects of the fiduciary rule, but not others. It can be viewed as somewhat of a compromise. The SEC seeks to implement a clear rule that affords more protections to participants and investors while allowing brokers and plan sponsors to comply without overwhelming burden. For instance, under the SEC proposed rule, a broker-dealer is required to act in the best interest of its client and protect clients from investments that increase fees. However, it does not altogether prohibit commissions or other transaction-based fees protected by the Best Interest Contract Exemption."

In attempting to feature "the best of both worlds," the SEC risks omitting requirements deemed critical by one or both sides of the issue. "The SEC's proposal signals a desire to protect consumers through transparency but not to the extent it stymies business, commerce and transactions," says Tad A. Devlin, a partner at Kaufman Dolowich & Voluck in San Francisco, California. "The SEC proposal does not include several disclosure requirements and restrictions on fee arrangements as mandated by the proposed Fiduciary Rule. Proponents of the Fiduciary Rule will argue that eliminating these requirements in the interest of transacting business is a step backwards."