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BROKER-DEALER AND INVESTMENT ADVISER ACCOUNT RECOMMENDATIONS

The SEC Staff recently released a bulletin titled “Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors.” In this article, the authors discuss the Staff Bulletin in detail, including observations on the ways in which the Bulletin appears to deviate from the SEC’s guidance under Reg BI and the IA Interpretation. They conclude with factors a firm should consider before making recommendations.

By Brian J. Baltz and John V. Ayanian *

Nearly 18 months into his tenure, Securities and Exchange Commission Chair Gary Gensler’s agenda with respect to the standards of conduct for broker-dealers and investment advisers seems to be coming into focus. At the start of his tenure, there were questions about whether Chair Gensler would revisit Regulation Best Interest (“Reg BI”) under the Securities Exchange Act of 1934¹ and the SEC’s 2019 interpretation of an investment adviser’s fiduciary duty (“IA Interpretation”) under Section 206(1) and (2) of the Investment Advisers Act of 1940.² Rather than

revisiting them, Chair Gensler has asked the SEC’s Divisions of Investment Management, Trading and Markets, Examinations, and Enforcement to help ensure that investment professionals live up to their obligations under Reg BI and the Advisers Act fiduciary duty.³

Perhaps the most significant action by the SEC Staff in response to Chair Gensler’s request to date was a March 2022 Staff bulletin titled “Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors” (“Staff Bulletin”).⁴ The Staff Bulletin is a series of questions

¹ Exchange Act Rule 15l-1; Regulation Best Interest, Securities Exchange Act Release No. 86031 (June 5, 2019), 84 Fed. Reg. 33318 (July 12, 2019) [hereinafter Reg BI Adopting Release].

² Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (June 5, 2019), 84 Fed. Reg. 33669 (July 12, 2019) [hereinafter IA Interpretation].

³ “Investor Protection in a Digital Age,” Remarks Before the 2022 NASAA Spring Meeting & Public Policy Symposium, Gary Gensler, Chair, Secs. & Exch. Comm’n (May 17, 2022).

⁴ SEC Staff Bulletin, Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors (Mar. 30, 2022), *available at*

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