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HOW TO NAVIGATE THE EVOLVING STANDARDS OF CARE FOR RETAIL INVESTMENT ADVICE

Retail investment advice standards are converging. Financial institutions will want to develop a holistic and flexible framework for complying with the ever-changing rules from federal and state securities, retirement, insurance, and banking regulators.

By Lindsay B. Jackson, Daniel R. Kleinman, and Natalie R. Wengroff *

The standards of care that apply to investment professionals¹ who work with retail investors have been evolving dramatically for the last 14 years.² During this time, we have seen various U.S. federal and state securities, retirement, and insurance regulators take steps to define, strengthen, and enforce more consumer protective standards for providing investment advice. Most recently, the Department of Labor (“DOL”)

finalized its fourth iteration of its “fiduciary rule” in 14 — a rule that is already being challenged in federal court. While the regulators undoubtedly act with good intentions, they have left a patchwork of standards (with different vocabularies) that continue to evolve as they appear to be converging towards what can be construed as the lowest common denominator — an increasingly restrictive, principles-based, fiduciary standard of care backed by threats (real or perceived) of aggressive, and potentially inconsistent, enforcement, and litigation. This article is intended to aid financial institutions and their legal and compliance teams in understanding the general landscape and developing an approach to operationalizing these standards in an ever-changing regulatory environment.

A BRIEF (RECENT) HISTORY OF RETAIL INVESTMENT ADVICE CONDUCT STANDARDS

2005 – *Deseret Letter*³ – The DOL issues an advisory opinion stating that recommendations to rollover assets

¹ Investment professionals include registered representatives of broker-dealers and investment advisers, bankers, and insurance company agents.

² Others may pick a different date, but we base our timeline on two significant events that happened in 2010, following the 2008 financial crisis: (1) the DOL’s first proposal to redefine “investment advice” for purposes of the fiduciary duties and prohibited transaction rules that apply to employee benefit plans, IRAs, and other qualified accounts and (2) the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which, among other things, authorized the U.S. Securities and Exchange Commission (“SEC”) to adopt a uniform fiduciary standard of care for investment advisers and broker-dealers and conduct the so-called 913 Study entitled “Study on Investment Advisers and Broker-Dealers.”

³ Advisory Opinion 2005-23A (Dec. 7, 2005); available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2005-23a>.

* LINDSAY B. JACKSON and DANIEL R. KLEINMAN are partners and NATALIE R. WENGROFF is an associate at Morgan, Lewis & Bockius LLP’s Washington, DC office. Their e-mail addresses are lindsay.jackson@morganlewis.com, daniel.kleinman@morganlewis.com, and natalie.wengroff@morganlewis.com. The authors would like to thank DANIEL WENTWORTH, Of Counsel in the same firm’s Boston office and CAITLIN S. ONOMASTICO, an associate in the same firm’s Pittsburgh office, for her assistance.

FORTHCOMING

• **THE USE OF AI IN THE SECURITIES INDUSTRY: REGULATORY CONSIDERATIONS FOR BROKER-DEALERS AND SEC-REGISTERED INVESTMENT ADVISERS**