

# ABA Regulatory and Legislative Update

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# Positive Policy Environment

- Who's Driving
- Legislative Matters
  - Retirement Reform
  - Cannabis Developments
- Who Owes What Duty?
- Beneficial Ownership
- FDIC Deposit Insurance Recordkeeping
- A Word on Supervision



# Who's Driving?

- Prudential Regulators
  - Federal Reserve
    - Not a full Board
    - Staff adjusting
  - OCC
    - Clear agenda
    - Staff empowered
  - FDIC
    - Work to be done



# Who's Driving?

- Market Regulators
  - SEC
    - Commission – mixed views
    - Ship hard to turn
  - CFTC
    - New leadership pending




# Who's Driving?

- What Candidates are Saying on the Stump
  - Break up the big banks/nonbanks
  - Create postal bank, with basic banking services
  - Prohibit bank overdraft fees
  - Oppose regulatory relief; favor tough penalties



# Legislative Matters – Retirement Reform

- Pension legislation under way with new leadership of House Ways & Means and Senate Finance Committees
  - H.R. 1994, Setting Every Community Up For Retirement Enhancement Act of 2019 (SECURE Act),
  - S. 2526, Retirement Enhancement and Savings Act of 2019 (RESA)
- Provisions common to both bills
  - Enhance portability
  - Permit continued IRA contributions after age 70 ½
  - Encourage small employer plans
  - Lifetime income investment options



# Legislative Matters – Retirement Reform

- What's Needed for Retirement Reform
  - Leadership (e.g., Richie Neal (D-MA))
  - Bipartisanship (presidential candidates may test)
  - Compromise/resolution among priorities
  - The White House OK; bonus for involvement



# Legislative Matters – Cannabis Developments

- Growing industry on state level:
  - Legal for recreational adult use: 10 states & DC
  - Legal for medical purposes: 33 states
- SAFE Act (H.R. 2215): limits liability of banks that provide services to *legitimate* cannabis-businesses.
- FI/Client Issues: cannabis-business investments, related real estate, trust disbursements for medical purposes, employee benefit plans for cannabis businesses.





# Who Owes What Duty?

- SEC Regulation Best Interest
  - Proposed Rule: May 9, 2018
  - Applies to brokers giving advice to retail customers
  - Broker must act in best interest of customer at time of recommendation, without placing own financial or other interest ahead of customer's
  - Obligations: disclosure, care, conflict of interest



# Who Owes What Duty?

- Regulation Best Interest: Obligations
  - Disclosure: material facts/conflicts of interest
  - Care: reasonable basis for recommendation in light of risks, customer's investment profile
  - Conflicts of interest: policies designed to identify, disclose, and ***mitigate, or eliminate***, material conflicts from financial incentives



# Who Owes What Duty?

- Regulation Best Interest: Disclosure
  - Proposed Form CRS for Retail Investors
  - Standardized (4 page max) disclosure would highlight key differences in types of services offered, legal standards of conduct that apply to each, fees a customer might pay, and certain conflicts of interest that may exist.
  - Must be direct and clear about registration status in communications. Certain BDs cannot use terms “adviser” or “advisor” if not also an RIA.
  - Retail investor/customer: all individuals, as well as trusts for household purposes.



# Who Owes What Duty?

- Regulation Best Interest: Issues
  - What is “best interest”?
  - How far does a broker need to go to “mitigate” a material conflict of interest?
  - Will higher standard result in loss of access to advice received through brokers?
- FINRA indicates suitability rule may need to change



# Who Owes What Duty?

- DOL Outlook
  - Coordinating with SEC on best interest standard, *then* –
  - Do nothing?
  - Propose a “new & improved” Fiduciary Rule?
  - Issue one or more exemptions?
  - Revise and update restored advisory opinions?



# Who Owes What Duty?

- States Taking Action
  - Nevada: broker-dealers/advisers now fiduciaries
  - Proposals in MD and NJ: make brokers fiduciaries
  - New York “Best Interest” Regulation
  - MA enforcement action on DOL Fiduciary Rule
  - Patchwork quilt of fiduciary triggers, status, and duties



# Who Owes What Duty?

- OCC potentially enters the fray
  - OCC: ANPR on Part 9 (Fiduciary Activities)
  - Amendment to broaden “fiduciary capacity”
  - Additional requirements for non-fiduciary custody
  - No date or other information on release

*Source: OCC Regulatory Agenda (Fall 2018)*



# Beneficial Ownership Reporting

- Bank Secrecy Act (BSA):
  - BSA regulation: “Customer Due Diligence (CDD) Requirements for Financial Institutions”
  - Improve financial transparency
  - Prevent criminals/terrorists from disguising illicit activities and launder ill-gotten gains





# Beneficial Ownership Reporting

- CDD Regulation: Establish/Maintain Written Policies and Procedures to –
  - Identify and verify identity of customers
  - **Identify and verify *beneficial owners* of companies opening accounts (our focus)**
  - Understand nature/purpose of customer relationships
  - Monitor to identify/report suspicious transactions



# Beneficial Ownership Reporting

- Beneficial Ownership Requirements:
  - Establish/maintain written procedures “reasonably designed” to identify and verify **beneficial owner(s)** of **legal entity customer**.
  - Include Procedures in BSA Anti-Money Laundering (AML) Compliance Program

*Source: 31 C.F.R. § 1010.230 (2019)*



# Beneficial Ownership Reporting

- “Beneficial Owner”:
  - *Ownership prong*: each individual who owns 25%+ equity of LEC; and
  - *Control prong*: a *single* individual with “significant responsibility” to control, manage, or direct an LEC (e.g., CEO, CFO, GP), or someone regularly performing similar functions
  - Total beneficial owners from 1-5 individuals per LEC



# Beneficial Ownership Reporting

- “Legal Entity Customer” (LEC):
  - *Includes*: corporations, LLC’s, partnerships, statutory trusts, foreign equivalents
  - *Excludes*: publicly-traded companies, banks, financial institutions, common law trusts, etc.



# Beneficial Ownership Reporting

- Required Tasks:
  - Identify beneficial owner (*name, date of birth, address, identifying #/SSN*) of each LEC at time account opened (LEC certification)
  - Verify identity of each beneficial owner through risk-based procedures:
    - Conditionally may rely on LEC-provided information
    - Documentary verification: photocopies OK



# Beneficial Ownership Reporting

- FinCEN FAQ (April 3, 2018)
  - For pooled investment vehicles, bank need only identify and verify an individual that controls vehicle (*e.g.* portfolio manager, GP) (#18)
  - Where beneficial owner is a trust with *multiple* trustees, only *one* trustee need be identified (#19)
  - If a trust owns 25% or more of an LEC, the beneficial owner under the ownership/equity prong is the trustee (even if an LEC, such as a bank), but covered financial institutions must still identify and verify a natural person as the beneficial owner of the LEC under the control prong (#20)



# Beneficial Ownership Reporting

- FinCEN Ruling (Sept. 7, 2018) Excludes from Beneficial Ownership Rule –
  - CD rollovers
  - Loan renewal, modification, or extension
  - Commercial LOC/credit card account renewal, modification, extension (not requiring underwriting review or approval)
  - Safe deposit box rental renewal



# Beneficial Ownership Reporting

- Bank Trust/Wealth Mgmt. Relief:
  - ERISA accounts excluded from rule
  - Bank-created accounts are *not* LEC accounts
  - Periodic review of trust or custody accounts do *not* trigger beneficial ownership rule
  - Safe deposit boxes: renewals *excluded*

*Source: 31 C.F.R. § 1020.100(a)(2)(iii); FinCEN FAQ 11 and 14 (April 3, 2018); FinCEN Ruling (Sept. 7, 2018)*





# FDIC Deposit Insurance Recordkeeping

- Banks with 2 million or more deposit accounts must “maintain” information on beneficial owners entitled to deposit insurance or meet alternative rules in order to more accurately calculate insured/uninsured deposits
- Deposit accounts for trusts, agents, financial institutions: deposit account owner to provide underlying depositor information to FDIC in event of bank failure/receivership
- Recent FDIC proposals provide welcome relief
- Effective: April 1, 2017. Compliance: April 1, 2020.



# A Word on Supervision

- Principals' expressions of transparency and open communication
- Role of Supervisory Guidance
  - Agencies' Joint Interagency Statement (Sept. 11, 2018)
  - Supervisory guidance has no force/effect of law
  - Numerical thresholds only illustrative; not req'd
  - Examiners won't criticize violations of guidance

*Source: Interagency Statement Clarifying the Role of Supervisory Guidance (Sept. 11, 2018)*



# Questions?

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