

# Fiduciary- Not Just Reg 9

FIRMA NATIONAL CONFERENCE  
IN-CONFERENCE WORKSHOP  
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# What is a Fiduciary?

## OCC's Reg 9 definition

- Fiduciary capacity means: trustee, executor, administrator, registrar of stock and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gifts to minor act, investment adviser – if the bank receives a fee for its investment advice, or any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. 92a.
- Investment discretion means, with respect to an account:
  - Sole or shared authority (whether or not that authority is exercised) to determine what securities or other assets to purchase, sell or retain on behalf of the account
  - Delegated authority - A bank that delegates its authority over investments and a bank that receives delegated authority over investments are both deemed to have investment discretion.

# What is a Fiduciary?

## SEC and other regulators description

- An adviser's relationship with its clients is fundamentally one of trust and confidence. This emanates from the fact that clients consent to having the adviser act on their behalf, making the clients vulnerable to the adviser. The law provides some measure of protection for clients in light of that vulnerability by imposing on advisers fiduciary duties owed to their clients.
- Under common law principles of agency, an investment adviser, as agent, owes fiduciary duties to its clients, as principal. Certain other aspects of an adviser's fiduciary duties are grounded in the law of trusts.
- A registered adviser's fiduciary duty also emanates from federal statutes, most notably Section 206 of the Investment Advisers Act of 1940 ("Advisers Act").

# What is a Fiduciary?

Advisers may have a fiduciary duty to their clients emanating from other sources as well, such as:

- Section 38(a) of the Investment Company Act of 1940 - An adviser can be held liable for breach of fiduciary duty involving personal misconduct in respect of any registered investment company for which it serves as adviser.
- ERISA – Persons who operate pensions, retirement, welfare and other types of benefit plans covered by the Employee Retirement Income Security Act of 1974 (“ERISA”) may be considered fiduciaries.
- Blue Sky Laws – In many cases, securities statutes and regulations adopted by various states prohibit conduct similar to that prohibited by Section 206 of the Advisers Act
- States – Due to the vacating of the DOL’s Fiduciary Rule, some states have, or are working on introducing fiduciary legislation/regulation for certain investment related advice and recommendation activities.

# Basic Trust Premises

- 12 CFR 9

*Liability in case of breach of trust*

Fiduciary Activities of National Banks (Title 12 of the Code of Federal Regulations, Part 9)

*Liability for breach of trust for selling trust property*

*Duty of Loyalty*

*Liability for breach of duty of loyalty*

*Liability for breach of trust by purchasing property*

- 12 USC 92a

Trust Powers (Title 12 of the United States Code, Section 92, paragraph 'a')

*Liability for breach of trust for failing to sell trust property*

*Balancing losses against gains*

*Leaving funds on deposit for an unreasonable time*

- 12 CFR 12

Recordkeeping and Confirmation Requirements for Securities Activities

*Duty for interest*

*Duty to keep trust property separate*

*Duty to keep and render accounts*

*Liability for breach of trust for failing to purchase property*

- Scott, Laws of Trust

Duties and Liabilities of Trustee

*Liability for Interest*

*Investments which a trustee cannot properly make*

*Liability of successor trustee*

*Duty to keep trust property separate*

*Duty to dispose of improper investments*

# Consequences of Breach

- Liability under securities and/or anti-fraud laws
- Monetary fines, cease and desist, penalties, limitations to growth
- Private civil actions
- Criminal action and sanctions
- Reputation risk and embarrassment

# Other items to consider

1. Banking Laws (UDAAP, Special Class Clients )
2. Beneficial Ownership
3. Affiliate Transactions
4. Conflicts of Interest / 12b-1 Fees, Share Classes, Fee Arrangements)
5. Proxy Voting
6. Corporate Actions
7. Class Actions Processing
8. Reg R Checkup
9. Fiduciary Access to Digital Assets
10. FDIC Deposit Recordkeeping Rule
11. Worth Knowing (GDPR , SEC Best Interest, FRB Supervisory, LIBOR, MiFid)
12. On the Horizon

# What da 'ya know?

## COLUMN I

- A Fiduciary Access to Digital Assets
- B Reg W
- C Standards for Risk Management
- D Beneficial Ownership
- E UDAP
- F Senior Exploitation
- G Scott Laws of Trust



## COLUMN II

- \_\_\_ Holdings so significant as to impact asset value
- \_\_\_ Do no harm
- \_\_\_ Use SAR to report activity
- \_\_\_ Trustees Powers of Appointment not sufficient
- \_\_\_ Unfair or deceptive acts or practices
- \_\_\_ Establish P&Ps to 'spot' and mitigate risks
- \_\_\_ FRB Transactions with affiliates or subsidiaries

# UDAP – Unfair, Deceptive Acts or Practices

FTC 15 USC 45(a)(1) Illegal in or affecting commerce; DFA 2010 added ‘abusive’

**What:** FTC enforces for non-banks. Banking regulators enforce UDAP for agencies under their supervision; the CFPB (“Consumer Financial Protection Board”) enforces “Abusive” acts under (UDAAP). Primarily centered around credit/lending practices to natural persons, including the misrepresentation of the nature and extent of the liability.

**Why:** Bank’s ability to structuring of products increased in complexity while marketing of products increased in sophistication created concerns regarding the misrepresentation of the nature and extent of the liability.

Significant focus on disclosures, particularly costs and terms, including debt collection.

Credit extended for consumer purposes to certain trusts is considered to be credit extended to a natural person rather than credit extended to an organization.

# UDAP - Unfair, Deceptive Acts or Practices

## Considerations

- Loans in/from Trusts
  - Promissory notes
  - Interest rate, term, penalties for default
  - Sales of real estate financed by the Trust
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- Reg Z/TILA/RESPA/TRID disclosures statement(s)
  - Periodic statement of payments made and balance remaining
  - Privacy - 3<sup>rd</sup> parties charging payments directly to the trust

# Special Class Clients

Protection of certain individuals considered particularly vulnerable to certain practices

## **What:** Senior Investor Protection Rules

- FinCEN (Feb 2011) BSA 31CFR 103 (1020) – FIs advised to include the term "elder financial exploitation" in the narrative portion of all relevant SAR
- Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults (2013)
- FINRA 2165 requires firms to make reasonable attempt to collect trusted contact information from all of their clients.
- FINRA 4512 provides firms with a safe harbor for temporarily holding suspect *disbursements* (not sales of securities)
- State Laws / definition of “*older adult*”

**Why:** Provides relief to institutions from violation of privacy provisions of GLBA laws when financial institution reports suspected financial abuse of older adults to appropriate local, state, or federal agencies without complying with notice and opt-out requirements. Guidance issued by FRB, OCC, FDIC, FTC, CFPB, CFTC, SEC, NCUA, FINCEN, GLBA

## **Considerations**

- Bank employees, salespersons or others preying on trust clients

# Special Class Clients

**What:** Servicemembers Civil Relief Act (2003, amended 2004; amended 2008)

**Why:** Provides relief and protections to servicemembers, spouse, dependents and others subject to the obligation of the servicemember from adverse actions on loans while member is on active duty.

## Considerations

- Loans from Trusts or Employee Benefit accounts

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- Add procedures to identify members of special classes.
- Consider enhancing coding on systems to manage activities of members of special classes
- Examine sales practices for ways that could inadvertently harm the special class clients
- Provide proper training to applicable employees
- Remember responsibilities for preventing, identifying, and responding to suspected infractions

# Beneficial Ownership

SEC 1934 Act Sections 13(d), 13(g), and 13(f) and Schedules/Forms 13D/G/F More than 5% discretionary/voting holdings of equities and convertible debt assets in client portfolios and Institutional Investment manager reporting.

**What:** Disclosure - by “persons” acquiring large positions in a particular company using schedule 13(d); by “qualified institutional investor”, “passive investor” or an “exempt investor” not currently require to report using schedule 13(d) to report using 13 (g) ; by Institutional investment managers that use the United States mail (or other means or instrumentality of interstate commerce) in the course of their business and that exercise investment discretion over \$100 MM or more in Section 13(f) securities must file using schedule 13F.

**Why:** provides individual investors with greater transparency through information disclosure, acting as an early warning, signaling large aggregations of equity securities which might represent a shift in corporate control which may lead to a shift in investor confidence in the security or the US securities markets, which may lead to shifts in security prices or markets.

# Beneficial Ownership

## Considerations:

- Coding of securities/clients/rights on systems
    - “qualified” securities
    - beneficial owners
  - Self-custody vs Outside custody of assets
  - Remember trade error corrections!
  - Implement effective self assessments/QA prior to submitting
  - Edgar all the way!
- 
- Review reporting requirements and implement proper procedures
  - Reconcile affiliations to potential conflicts in your operating environment
  - Monitor SEC site for precedents associated with filing inadequacies

# SEC Affiliate Transactions

## Section 17 (Investment Company Act of 1940)

Investment Company Act of 1940 Section 17 A - affiliations with non-proprietary open ended mutual funds through ownership (discretion/voting) of 5% or greater voting shares.

**What:** implemented to curb abuses and deficiencies in the operation of registered investment companies and imposes requirements regarding the custody of assets, investment activities, and transactions with affiliates of certain registered investment companies. Section 17 of the Act contains prohibitions and limitations on transactions with affiliated mutual funds.

**Why:** Implemented to protect public investors from the abuse of insider “self dealings”. It is designed to prevent the insiders from using a mutual fund to benefit themselves to the detriment of the fund and its shareholders. Discretionary trust accounts are often invested in mutual funds and these fiduciary investments (in aggregate) may limit investment opportunities and revenue opportunities for the fiduciary institution.

# SEC Affiliate Transactions - cont.

## Section 17 (Investment Company Act of 1940)

### Considerations:

- Entity level program
- Documented procedures
- Required training
- Identify covered units and sources
- Establish frequency of assessment
- Leverage technology
- Timely escalation, communications and actions
- How best to correct affiliated transactions
- Root cause analysis and program adjustments to ensure ongoing compliance

# FRB Affiliate Transactions

## Reg W / Sec 23A / Sec 23B of the Federal Reserve Act

Transactions with or among affiliates or subsidiaries

**What: A)** Limits “covered transactions” between a Bank and any company that controls, is advised, or is controlled by the member bank or has interlocking directors, trustee, or general partners. “Covered Transactions” include : extensions of credit to an affiliate; ***purchases of or investment in securities***; purchases of an asset; acceptance of securities issued by an affiliate as collateral for a loan to any person; guarantees on behalf of an affiliate (including issuance of a letter of credit) **B)** prohibits transactions unless terms and conditions are substantially the same or at least as favorable as those for nonaffiliated transactions [*market terms*]

**Why:** In the interest of the Safety and Soundness of the bank, attempts to limit the risk to the Bank from transactions between and among affiliates and, limit banks ability to transfer the safety net subsidy; heightened focus on transparency; inadvertently trigger capital event or legal lending limit issues for the Bank

# FRB Affiliate Transactions

## Reg W / Sec 23A / Sec 23B of the Federal Reserve Act

### Considerations:

- Services provided to/by a Trust Department unit that are separate legal entities
- Pricing of services or products
- 3<sup>rd</sup> Party Vendor /Outsourced Oversight
- Statements in advertisements or contracts listing the Bank as an affiliate
- “as agent” securities transactions
- “riskless principal” securities transactions

### Establish procedures to identify and mitigate breach of undivided loyalties

- Identify the point of contact responsible for identifying affiliated entities
- Maintain a list of prohibited investments
- Maintain a list of prospective services/products provided by affiliates
- Maintain a list of prohibited investments
- Conduct investment due-diligence beyond the first layer
- Perform arms-length Third Party Vendor assessment
- Include in procedures to flag and resolve any prohibited transactions that occur

# Conflicts of Interest

## Fees & Compensation Arrangements

Compensation arrangements between affiliates or subsidiaries or others

**What:** Generally permitted with adequate disclosures and, where it is unlikely that firm would be in a position to take advantage of the client.

**Why:** Provide sufficient transparency so that clients can independently make informed decisions:

- a) knowing that you are being paid by both the client and 3<sup>rd</sup> party (or parties)
- b) for the recommendation you may be making, and
- c) whether or not that arrangement has an impact on portfolio decisions.

# Conflicts of Interest

## Fees & Compensation Arrangements

### Considerations

- 12b-1 Fees
- Share Classes {SEC's 'SCDSI'}
- Soft Dollars / independence/ preferred clients
- Pricing Services & Methodologies
- Sales Incentives
- Disclosures vs practice

### Violation of duties:

- to disclose
- obtain best execution
- maintain policies & procedures to prevent and detect

# Proxy Voting

The challenges associated with ensuring financial institutions are voting proxies in the best interest of their clients.

**What:** Investment Advisers Act of 1940, Rule 206(4)-6 compliance; DOL Interpretive Bulletin 2016-01 compliance; Compliance with 17 CFR 240.14b-1 applicable to broker-dealers; OCC requirements.

**Why:** Some in the industry have admitted the proxy voting system remains noisy, imprecise, and disturbingly opaque. It is difficult for a beneficial owner (whose shares are not registered in their individual name) to find out if the vote was cast as instructed and properly counted.

# Proxy Voting

## Considerations:

- Record dates
  - Objecting vs non-objecting (post 1986)
  - Affirmatively Consenting vs Non-consenting (pre 1986)
  - Loaned Securities (cannot vote)
  - Voting authorities
  - Voting Policies – For or Against Management
  - Shareholder Proposals
  - Timing –list of NOBO holders; distribute materials; vote & tally; submit tally
  - Special Interest Groups / Shareholders
- 
- *OCC requirements*
  - *Investment Advisers Act of 1940 requirements*
  - *DOL expectations*
  - *Broker-Dealer requirements*
  - *Investment Company Act of 1940 requirements*

# Corporate Actions Processing

Corporate action processing involves significant risks, and should not be viewed only as a “back-office” issues. Corporate action processing have an impact on trading strategies in the front office and efficiency of capital markets more broadly.

**What:** The processing of corporate actions involves a range of market participants. Each of these market participants risk being affected by failures in corporate action processing because the process is complicated, very manual, and involves a chain of intermediaries, and therefore the risk of failures is very high.

**Why:** The direct risks to any individual firm can be very significant. Corporate action risks are not limited to the back office. Firms spend very large sums of money on failure prevention, causing actual losses to be somewhat lower. Processing failures can arise anywhere in the corporate action chain.

Typical Corporate Actions Events include:

- Dividend Payments
- Interest Payments
- Proxies
- Redemptions
- Rights Issuances
- Mergers
- Take Overs
- Conversions
- Splits

# Corporate Actions Processing

## Considerations:

- Mandatory; Mandatory with Options; and Voluntary
- Direct risk of processing failures
  - Ex –date v Payment date
  - Ex-date v Record date
  - Cost Basis confirmation & FMV
  - Tickler errors
  - Taxable v Non-taxable treatment
  - Tax Consequences of Mergers/ Events
  - Return of Capital determination
  - Return of Capital reclassification
  - Exercising Right Issues
  - Custodian rounding
  - Accurate Proxy Processing
- Cost of late payments
- Trading decisions

# Class Action Processing

Effective process to opt-in or opt-out of class actions in light of the fiduciary or custodial responsibilities to the client.

**What:** The goal of Class Action litigation is to achieve economies of time, effort, expense, and uniformity of judicial decisions without sacrificing procedural fairness. It enables the vindication of claims that otherwise could never be litigated, no matter how meritorious.

**Why:** Class actions are complex and expensive to litigate. The class action rules require a number of special procedures. Because many claims are aggregated in one suit, the relevant facts are more complex than in individual action. Eligibility covers historic ownership and the payouts typically take a bit of time after claim filing.

# Class Action Processing

## Considerations

- Ensuring receipt of notification
- Deciphering the legal responsibilities
- Reviewing eligibility
- Mining the custodian records
- Identification of decision maker
- Timely communication
- Notification v. filing
- Receipt and reconciling of settlement proceeds
- Timely processing of proceeds
- Abandoned funds
- Segregation of duties
- Manual process and oversight

# Regulation R-Checkup!

Bank/ Broker-Dealer ongoing compliance with an often overlooked regulation critical to fiduciary organizations

**What:** Sets forth a series of exceptions and exemptions to allow banks to continue to engage in their traditional securities services for customers as part of their trust, fiduciary, custodial, deposit sweep, and other activities, in the Gramm-Leach-Bliley Act (and subsequently in Regulation R).

**Why:** Title II of the Gramm-Leach-Bliley Act (GLBA) eliminated the former blanket exemptions for banks from regulation as securities brokers and dealers under the Securities Exchange Act of 1934. GLBA sought to modernize the regulation of financial services institutions based on principles of functional regulations, with the SEC as the primary regulator of securities activities. However, Congress included in GLBA a series of exemptions to allow banks to continue their traditional securities services activities for customers as part of their trust, fiduciary, custodial, deposit sweep, and other activities.

# Regulation R-Checkup!

## Considerations:

- Networking Arrangements
- Trust and Fiduciary Chiefly Compensated Calculation and reporting
- Commercial paper, CIFs, BAs, and Government securities
- Stock purchase plans
- Deposit Sweep accounts
- Transactions in Money Market Mutual Funds
- Affiliate transactions processing
- Private securities offerings
- Safekeeping and Custody activities
- Employee Benefit, IRAs and similar accounts
- Employee benefits plan administrators and recordkeepers
- Accommodation trades
- Foreign Securities transactions
- Securities Lending activities
- Municipal securities

# Fiduciary Access to Digital Assets

Digital Asset = any electronic record that you own, license or control which includes any online account that you have authority to access.

**What:** legal avenue to digital assets of deceased or incapacitated persons. Uniformed Fiduciary Access to Digital Assets Act (UFADAA) completed in 2014.

**Why:** The Uniform Law Commission in 2014 granted default access to fiduciaries; was argued to conflict with TOAs and federal computer fraud laws; invasion of decedent's privacy; infringe on privacy of the 3rd parties; potential mis-categorization of digital assets - internet domains; blogs; internet businesses; crypto currency accounts.

Revised in 2015 (RUFADAA or Revised Uniform Fiduciary Access to Digital Assets) recognizing 4 types of fiduciaries: executors or estate administrators; court appointed guardians or conservators; agents under POA; and trustees. Provides immunity to the custodians for acts done in good faith to comply with the RUFADAA.

# Fiduciary Access to Digital Assets

## Considerations:

- Living vs deceased or incapacitated
  - Ability to collect, custody, and count assets
  - Content vs Catalogue (list)
  - 3<sup>rd</sup> party agreements / terms or conditions of service
  - Private keys /inability to recover lost digital assets
  - Mis-categorization of digital assets (“funds”, “securities”, “neutral”)
  - Settlement practices – DVP or not
  - State enactments
- Request **explicit** authority from grantor/beneficiary, explicitly naming trustee as **Digital Executor**, with some direction on time period, i.e. now or after death.
  - Establish procedures for collecting and managing information needed to access digital accounts.
  - Remember that fiduciaries are subject to same fiduciary duties as with tangible physical assets.

# FDIC Deposit Recordkeeping Rule - 12FR370

In November 2016, the FDIC Rule 370 was finalized which creates new recordkeeping requirements for 38 of the largest banks in order to facilitate a timely payout to depositors if a bank fails. Eff 4/01/2017 ; compliance date 4/01/2020

**What:** Rule 370 shifts the focus of covered “Insured Depository Institutions” (IDIs) from providing available data on insured accounts to performing the determination of insured deposits on underlying bank data. Insured deposit institutions with 2 million or more deposit accounts must maintain complete and accurate records regarding the ownership and insurability of all domestic deposit accounts.

**Why:** FDIC wants to deliver *prompt* payment and *prompt* access to insured funds in the event of an insured bank’s failure. Believed to maintain the confidence in the monetary systems. Allows FDIC to make more accurate determination of the cost of the failed institution for prompt liquidation. **Is the ‘Trust Cash’ deposit account detail sufficient to provide identifying information regarding the underlying beneficiary - promptly?**

# FDIC Deposit Recordkeeping Rule - 12FR370

## Considerations:

- “Prompt” = within 24 hours after FDIC’s appointment as receivers
- Requires FIs to accurately classify each account into FDIC’s account ownership taxonomy
  - Consistently assign a unique identifier to each depositor
  - Match each depositor to all the accounts in which they have an ownership or beneficiary interest.
- Reliefs:
  - Extended compliance runway with reduced certification and testing requirements
  - Implementation is still a major investment
  - Final rule introduces a bifurcated approach for data collection
  - 24 hour requirement for third parties’ transactional accounts
  - Maintenance of a “pending reason” code and formally request exception
  - Identifying the correcting missing or inaccurate data will be a substantial effort.

# General Data Protection Regulation (GDPR)

Compliance with data protection rules in the Europe

**What:** GDPR governs how businesses process and handle data. GDPR was effective May 25, 2018 and is designed to protect the personal information of individuals. GDPR alters how businesses and public sector organizations can handle the information of their customers. It also boosts the rights of the individual and gives them more control over their information.

**Why:** Previous law was based on the 1995 data protection directive. New legislation is designed to harmonize data privacy laws across Europe as well as give greater protection and rights to individuals.

**Impact:** Within the GDPR there are large changes for the public as well as business and bodies that handle personal information. While GDPR applies across the entirety of Europe, each individual country has the ability to make its own small changes.

# General Data Protection Regulation (GDPR)

## Considerations:

- Individuals, organizations, and companies are either “controllers” or “processors” of personal data.
- If you are subject to the Data Protection Act of 2018 (DPA) in the UK, you are likely also subject to the GDPR.
- Both personal data and sensitive personal data are covered by GDPR.
- Personal data, a complex category of information, broadly means a piece of information that can be used to identify a person. Can be name, address, IP address, etc.
- Sensitive personal data encompasses genetic data, information about religious and political views, sexual orientation, etc.
- What makes GDPR different is that pseudonymized personal data can fall under this law.

# SEC Best Interest Standard/ Broker Disclosures

proposed 2018

Establishes a standard of conduct for BDs and associated persons when dealing with security related transactions with retail customers.

**What:** This is a three-part package of rules which establishes, a best interest standard of conduct for broker-dealers, interprets the standard of conduct for investment advisers, and requires delivery of a new “Customer Relationship Summary” disclosure form to retail investors.

**Why:** With the vacating of the DOL Fiduciary Rule, SEC is required to come up with enhanced retail investor protection requirements. SEC intends this rule package to fill the gaps between investor expectations and legal requirements.

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# SEC Best Interest Standard/Broker Disclosures

## Considerations:

- State Initiatives:
  - Nevada Fiduciary Law
  - Maryland
  - Massachusetts
  - New Jersey
  - Others
- DOL engagement
- Special interest groups
- Congress initiatives

# FRB Supervisory Guidance – January 11, 2018

Status of January 4, 2018 FRB proposal setting forth core principles of effective senior management, the management of business lines, and independent risk management and controls for large financial institutions.

**What:** The proposal consolidates and clarifies the FRB's existing expectations regarding risk management and delineates the roles and responsibilities for individuals and functions related to risk management.

**Why:** The FRB is complementing the Board Expectation guidance by (1) aligning the attributes of senior management with those of an effective board of directors and (2) better distinguishing expectations for boards from those of senior management.

**Impact:** Board should set the firm's strategy and risk tolerance and senior management should be responsible for implementing the strategy and risk tolerance approved by the board.

# FRB Supervisory Guidance – January 11, 2018

## Considerations:

- Independent Risk Management should provide an objective, critical assessment of risks and evaluate whether a firm remains aligned with its stated risk tolerance.
- Establish a system of internal control to guide practices, provide appropriate checks and balances, and confirm quality of operations.
- Internal audit should provide independent assessments of the effectiveness of the risk management framework and the system of internal control.
- Until this proposal is finalized, the FRB will continue to rely primarily on the principles set forth in SR letter 12-17 and CA letter 12-14 to assess the effectiveness of the firm's board of directors. Additionally, the FRB will continue relying on existing risk management guidance to assess the effectiveness of a firm's management of business lines and independent risk management and controls.

# Replacing LIBOR

Significance of the change to another key benchmark and its impact on financial instruments

**What:** LIBOR is a short-term unsecured interest rate charged between banks for wholesale funding. LIBOR rates are calculated in five currencies and seven borrowing periods ranging from overnight to one year and are published each business day. Over \$350 trillion dollars' worth of financial derivative contracts, mortgages, bonds and retail and commercial loans have their interest rates tied to LIBOR.

**Why:** The concerns about the relevance of LIBOR and the liability associated with submitting estimated LIBOR rates, and more recently the LIBOR fixing scandals. The scandals revealed that some banks were falsely inflating or deflating their rates in order to profit from trades or to give the impression that they were more creditworthy than they actually were.

# Replacing LIBOR

## Considerations:

- Within the US, the Federal Reserve (Alternative Reference Rate Committee (ARRC)) is responsible for the transition
- Broad Treasury Financing Rate proposed by ARRC
- Financial Stability Oversight Council (FSOC) proposes Secured Overnight Funding Rate (SOFR)
- U. K. proposes Sterling Overnight Index Average (SONIA)
- Impact on existing contracts and governing documents

# MiFid and impact on research costs

European Markets in Financial Instruments Directive (MiFid II)

Introduces changes and has impact on managers access to research

**What:** MiFid II requires that managers separate payments for trading and research, rather than pay broker-dealers for investment research through trading commissions, or soft dollars

**Why:** To make research costs more transparent

**Impact:** SEC MiFid stance could bring implementation challenges for US managers

# Proposed Updates to GIPS

The CFA is proposing changes to the Global Investment Performance Standards (GIPS). These proposed changes are expected to take effect in 2020.

The changes are designed to expand the current GIPS reach into hedge funds, private equity and real estate. One of the primary reasons for updating the standard is because of the current dependencies on composites.

While GIPS is not mandatory for investment managers, it is a prerequisite in the screening process of investment consultants. The proposed changes would allow investment managers to report their pooled funds' performance separately instead of in a composite.

# SEC Roundtable on the Proxy Process

**What:** On September 13, 2018, SEC announced a review of all staff guidance to determine if prior positions should be modified, rescinded or supplemented in light of market or other developments.

**Actions:** SEC Investment Management staff withdrew two interpretive letters that give guidance to investment advisers seeking to comply with the proxy voting requirements of Rule 206(4)-6 under the Advisers Act.

The SEC is considering action to revise rules applicable to proxy voting activities.

On November 15 2018, the SEC Roundtable focused on three topics: (1) proxy voting mechanics and technology; (2) shareholder proposals; and (3) the role of proxy advisory firms.

# Headline News

- Hate Groups Collecting Millions from Donor-Advised Funds (February 21, 2019)
- SEC Launches Share Class Selection Disclosure Initiative to Encourage Self-Reporting and the Prompt Return of Funds to Investors (February 12, 2018)
- SEC's OCIE Issues Risk Alert on Transfer Agent Safeguarding of Funds and Securities (February 13, 2019)
- Retirement Plans need Cyber-Security Reporting (January 8, 2019)
- SEC Draft Fund-of-Funds Rule favors ETFs (January 8, 2019)
- False Claims Act statute of limitations destined for timely supreme court review (January 30, 2019)
- FINRA plans major changes to rules governing the expungement of customer complaint information (February 26, 2019)

# Headline News – Cont.

- FINRA Issues 2019 Risk Monitoring and Examination Priorities Letter (January 22, 2019)
- Nevada Rolls Out Update to State Fiduciary Law (January 31, 2019)
- Maryland Introduces a Fiduciary Standard (February 8, 2019)
- Nevada Fiduciary Rule Riles Industry (March 5, 2019)
- ARA reminds Nevada about ERISA – Again (March 4, 2019) 2019
- California weighs Mandatory Reporting of Suspected Elder Financial Abuse (March 12, 2019)
- SEC Share Class Initiative Returning More than \$125 Million to Investors (March 11, 2019)

# Headline News – Cont.

- ICI to SEC: Broadridge’s own study shows processing fees unreasonable (January 30, 2019)
- Ripple effects to expect from MEP Reform (February 5, 2019)
- 401(k) Sponsors on lookout for “Indirect” fees (January 18, 2019)
- Cryptocurrency Exchange loses password, access to \$190 Million (February 4, 2019)
- SIFMA voices opposition to financial transactions tax bill (March 5, 2019)
- State securities regulators back Reg BI with improvement (March 5, 2019)
- XXX to return more than \$5 Million to Retail Investors and pay penalty relating to directed brokerage arrangements (March 5, 2019)
- FINRA launches new initiative for member firms to self-report 529 Savings Plan violations (February 11, 2019)

# Headline News – Cont.

- Vanguard staffer’s \$2 MM Fraud shows perils of Dormant account neglect (March 20, 2019)
- Banks have even less room for error with bad behavior (March 15, 2019)
- SEC asks industry how to best custody Crypto Assets (March 15, 2019)
- Senate Bill seeks to expand SEC ability to punish old violations (March 14, 2019)
- House Bill floats SEC Investor Testing requirements (March 14, 2019)
- SEC charges 79 firms for selling high-priced mutual fund share classes (March 11, 2019)
- Wall Street tax bill would hurt 401 (k)s; Lobbyist (March 8, 2019)
- Fidelity sued over “Secret” Fund Supermarket fees (February 22, 2019)
- Fidelity under investigation over Funds Network Fees (February 22, 2019)

# Headline News – Cont.

- ESG 401 (k) Service Planning to show up in RFPs (March 8, 2019)
- FINRA extends deadline for 529 Sales Breach Amnesty (March 7, 2019)
- Supreme Court asked to rule on Loss Causation (January 21, 2019)
- SEC, FINRA increase focus on best execution of client trades (January 28, 2019)
- New scrutiny on platform fees raises sub-TA cost questions (March 14, 2019)
- Fidelity “Infrastructure” fee spawns second 401(k) claim (March 20, 2019)
- CFP Board to Congress: SEC Regulation BI needs clarity, greater consumer protections (March 14, 2019)
- SEC launches new Cyber-Security Sweep (March 22, 2019)
- XXXXX to pay \$8 MM to settle charges of improper ADR handling (March 25, 2019)

# Headline News – Cont.

- Slammed by fines, distributors move to fewer share classes, simpler sales terms (March 25, 2019)
- Clayton says there is no timetable for Best Interest (“BI”)Rule (March 26, 2019)
- ‘There is more work to be done’: Reg BI faces criticism at Congressional Hearings (March 26, 2019)
- Quants; Is it time to tweak the code? (March 23, 2019)
- Whistleblowers awarded \$50 MM by SEC in XXXXXXXX case (March 26, 2019)
- SEC solicits comments from Custodians to Registered Investment Advisers (March 27, 2019)
- ABA calls for reducing regulatory burden for Collective Investment Fund Audit requirements (March 26, 2019)

# Key Takeaways

Risk Management is no longer siloed or fragmented

How does your approach fit within your regulator's standards and expectations.

- Is our framework clear?
- How would we identify a concern?
- Can it be prevented?
- How will we know when an event occurs?
- What do we do about it?

As a Fiduciary, look beyond the obvious - think - Reputation Risk.

# Questions