

“No thinking man can believe that an economy built upon a business foundation ... can permanently endure without some loyalty to that (fiduciary) principle.”

Justice Harlan Fiske Stone
Harvard Law Review, 1934

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Statement of Knut Rostad on the Need for the DOL Retirement Security Rule

“This morning the Whitehouse announced the Department of Labor Retirement Security Rule. [The Retirement Security Rule - Strengthening Protections for Americans Saving for Retirement | CEA | The White House](#)

The Rule is essential to fill the gap in federal regulation -- ‘*The Grand Canyon*’ gap – in investor protection left by the SEC’s Regulation BI. Four points stand out:

- 1. Reg BI was designed to accommodate broker-dealers’ conflict-infested businesses. Fiduciary advocacy groups warned of Reg BI’s weaknesses.**

Consumer Federation of America and PIABA warned investors the day before Reg BI was released that SEC falsely claims “Reg BI Better for Investors” and explained “Why Reg BI will do more harm than good (and) is being misrepresented by the SEC.” *The Institute for the Fiduciary Standard argued that Reg BI failed to define “best interest”, so that BDs can “interpret the rule to fit their needs.”*

- 2. The first Reg BI enforcement case in June 2022 was wrongly championed as Reg BI enforcing a best interest standard. This case could have been brought under the prior suitability standard, according to Ropes & Gray and other securities attorneys.**

[SEC Files First Enforcement Action Alleging Violations of Best Interest Rule’s Care and Compliance Standards | Insights | Ropes & Gray LLP \(ropesgray.com\)](#)

3. The North American Securities Administrators Association, NASAA, has monitored Reg BI in the states. NASAA identified how often BDs recommended “Costly, complex and risky” (CCR) products. The bottom line: Reg BI has failed to raise the BD sales “suitability” standard.

North American Securities Administrators Association (NASAA) research from November 2021 [NASAA NASAA Report Finds that Many Broker-Dealer Firms Still Place Their Financial Interests Ahead of Their Customers Despite Implementation of Regulation Best Interest](#) -and September 2023 [Reg-BI-Phase-II-B-Report-Formatted-8.29.23.pdf \(nasaa.org\)](#) on BD compliance with Reg BI is revealing.

In November 2021, NASAA reports that 76% of BDs (FINRA Retail 2021) and only 14% of RIAs (IA only 2018) recommended at least one CCR product. Also, NASAA reports 66% of BDs and 5% of RIAs recommended VAs. (Appendix B)

In September 2023, NASAA reports, “Firms are still relying heavily on suitability policies Efforts to address the standard of care concepts established by Reg BI remain perfunctory.” (Page 3)

4. The highest court in Massachusetts affirmed last month that Reg BI is no substitute for the fiduciary standard.

The court ruled for the state fiduciary rule and against Robinhood in part because Reg BI “Constitutes a regulatory floor that does not foreclose state regulation to more clearly protect investors”. (page 46) [2023-sjc-13381.pdf \(justia.com\)](#)

In summary:

- Fiduciary advocates foresaw in June 2019 when it was released the holes in investor protection in the SEC’s Reg BI.
- The first SEC Reg BI enforcement case enforced the suitability standard.
- NASAA affirms BDs still “rely heavily of suitability policies.”
- The Massachusetts highest court affirmed Reg BI is only a regulatory floor.

There’s no question additional protections in the DOL Retirement Security Rule are needed to fill ‘The Grand Canyon’ gap in federal regulation. So when the industry screams in vehement opposition to any DOL rulemaking, their voice will be muted.”