	Section 913 of Dodd-Frank	DOL Conflict of Interest Rule	Roskam-Roe
What types of communications are considered investment advice?	Section 913 is intended to apply a uniform fiduciary standard to "personalized investment advice about securities," regardless of whether that advice is provided by an investment adviser or a broker-dealer. Under the securities laws, the types of services provided determine whether a financial professional is rendering "investment advice." Particularized and actionable recommendations are considered "investment advice" under the securities laws, whereas generalized information and education are not. There is no requirement under the securities laws that the advice be on-going to be considered fiduciary investment advice, nor does the fiduciary duty hinge on whether the investor relies on the advice. Furthermore, in its Request For Information (RFI) on Duties of Brokers, Dealers, and Investment Advisers, the SEC assumed that “personalized investment advice about securities” would include “recommendation[s],” as interpreted under existing broker-dealer regulation. FINRA has stated in guidance that whether a particular communication is considered a "recommendation" is based on the facts and circumstances, including the content, context, and manner of presentation of the communication and whether the communication could reasonably be viewed as a suggestion that the customer take action or refrain from taking a particular course of action regarding a security or investment strategy.	The DOL proposal covers "investment advice" to retirement accounts. It is not limited to advice about securities. Similar to the securities laws, however, only those recommendations that are particularized and actionable are considered "investment advice." Specifically, under the proposal, the advice must be individualized to, or specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to assets of the retirement plan or account. The rule proposal eliminates requirements in current rules that the advice be on-going or the primary basis for the investment decision to trigger the fiduciary obligation, bringing it into closer alignment with the securities law definition. In its proposal, the DOL stated that FINRA guidance on whether a particular communication could be viewed as a recommendation provides useful standards and guideposts for distinguishing investment education from investment advice under ERISA. Accordingly, the DOL solicited comment on whether it should adopt some or all of the standards developed by FINRA in defining communications that rise to the level of a recommendation for purposes of distinguishing between investment education and investment advice under ERISA. Generalized information and education are explicitly carved out from the definition of investment advice.	The Roskam and Roe bills also cover "investment advice" to retirement accounts. However, unlike the securities law definition or the DOL proposal, these bills require a mutual agreement, arrangement, or understanding 1) that the recommendation is individualized to the advice recipient *and* 2) that the advice recipient intends to materially rely on the recommendation in making investment or management decisions with respect to assets of the retirement plan or account. These bills allow firms and advisers to disclaim that a mutual agreement, arrangement, or understanding exists (and therefore disclaim any fiduciary duty) merely by disclosing that: "This information is not individualized to you, and there is no intent for you to materially rely on this information in making investment or management decisions." These bills also allow firms and advisers to disclaim that any fiduciary duty exists merely by disclosing that they are providing the information in a marketing or sales capacity. By preserving existing loopholes in the definition of "investment advice" to retirement accounts, these bills allow firms and advisers to continue to evade their fiduciary duties. As a result, these bills are in direct conflict with the goal of Section 913 to harmonize fiduciary standards and codify the problem DOL is trying to solve.
What standard of conduct applies to such advice?	Section 913 states that the standard of conduct for all brokers, dealers, and investment advisers, "when providing personalized investment advice about securities to retail customers shall be to act in the best interest of the customer **without regard to the financial or other interest** of the broker, dealer, or investment adviser providing the advice." In accordance with such rules, conflicts of interest do not have to be eliminated entirely. Rather, Section 913 requires that material conflicts of interest shall be disclosed and may be consented to by the customer.	The DOL proposal effectively mirrors Section 913's duty of loyalty, stating that investment advice is in the best interest of the retirement investor when the adviser and firm providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, **"without regard to the financial or other interests** of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party." For those firms and advisers that receive conflicted or variable compensation, the best interest contract exemption replaces the "sole interest" standard under ERISA with a best interest standard based on the Section 913 model.	If a best interest standard ever applies (and it's not likely it would in most circumstances based on firms' and advisers' ability to evade their best inerest obligation), the Roskam and Roe bills are inconsistent both with each other and with the Section 913 standard regarding what constitutes a best interest recommendation. The Roskam bill states that a recommendation is a "best interest recommendation" if it is provided with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise and "**where the person places the interests of the plan or advice recipient above its own**." On its face, this formulation is inconsistent with Section 913's "without regard to" language and appears to continue to allow firms and advisers to engage in self-dealing transactions. The Roe bill states that a recommendation is a "best interest recommendation" simply if no more than reasonable compensation is paid. Thus, **there is no duty to provide prudent or loyal advice under this formulation.** As a result, firms could freely engage in self-dealing transactions that no similarly situated prudent expert would consider appropriate. It also ignores and is inconsistent with Section 913's "without regard to" language and doesn't seem to meet even a basic suitability standard, let alone a best interest standard.

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Is there an effective enforcement mechanism?	Broker-dealer customers may enforce their legal rights against their broker-dealers in FINRA arbitration. According to FINRA rules, broker-dealers are permitted to require their customers to sign pre-dispute mandatory arbitration clauses but are not permitted to restrict their customers from bringing class actions to enforce their rights.	The DOL proposal follows FINRA's rules. Under the proposal, firms and advisers would be permitted to require their customers to sign pre-dispute mandatory arbitration clauses to govern enforcement of the best interest contract; firms and advisers would not be permitted to restrict their customers from bringing class actions to enforce their rights under the best interest contract.	The Roskam and Roe bills do not include any private enforcement rights, which means that the private remedies that currently exist would govern the "best interest" standard in those bills. Under the Internal Revenue Code, there is currently no private right of action, meaning that IRA investors are incapable of enforcing the "best interest" standard in the Roskam bill and incapable of receiving a remedy if their adviser fails to adhere to that "best interest" standard. As a result, that standard is effectively toothless in the IRA context. In contrast to the Code, there is a private right of action under ERISA. However, as stated above, the Roe bill contains no duty to provide prudent or loyal advice, which means that 401(k) and other retirement plan participants would not be able to bring a claim against firms and advisers for providing self-dealing advice that is not in the best interests of the customer.
Can firms and advisers charge commissions and other forms of transaction-based (variable) compensation?	Section 913 states that the receipt of compensation based on commission or fees shall not, in and of itself, be considered a violation of the best interest standard. The "in and of itself" language implies that, while commissions and other forms of transaction-based compensation are not prohibited, certain compensation practices could be found to violate the fiduciary standard by virtue of creating particularly harmful conflicts of interest that are inconsistent with the best interests of the customer. This language works together with the requirement (above) that the advice be "without regard to" the firm or adviser's financial or other interest and the requirement (below) that the SEC prohibit or restrict certain sales practices, conflicts of interest, and compensation schemes that are contrary to the public interest to ensure that any variable compensation regime does not reward advisers for working against their clients' interest.	The DOL proposal allows firms and advisers to charge commisisons and other forms of transaction-based compensation subject to the best interest contract exemption.	The Roskam and Roe bills freely allow firms and advisers to charge variable compensation, with no meaningful protections for retirement investors from the harmful impact of the resulting conflicts. Under the Roskam and Roe bills, assuming firms and advisers are providing "investment advice" according to the bill's definition, advisers and firms must comply only with the requirements above, charge reasonable compensation, and provide general disclosures that they may receive varying amounts of fees or other compensation with respect to the transaction. They would only have to provide specific information about the amounts of compensation received if the retirement investor asks for it, in which case they could express that information in a formula. Many firms already provide cost formulas to investors that are incomprehensible and therefore serve no useful function.
Do firms have a duty to mitigate conflicts of interest?	Section 913 requires the SEC to examine and, where appropriate, prohibit or restrict certain sales practices, conflicts of interest, and compensation schemes that are contrary to the public interest and necessary for the protection of investors.	The DOL proposal requires firms that earn variable compensation and rely on the best interest contract exemption to adopt policies and procedures that are reasonably designed to minimize the harmful impact of conflicts of interest. This requires firms to take meaningful steps to eliminate practices that could encourage the firm's advisers to make recommendations that do not serve the best interests of the customer. For example, firms could no longer set quotas for the sale of certain products and base advisers' bonuses on their success in meeting those quotas. Similarly, firms could not pay advisers more to sell certain products without some neutral basis, such as the time or expertise necessary to evaluate the investment, to justify the added compensation.	Neither the Roskam nor Roe bill requires firms to take any steps to rein in harmful conflicts of interest. Thus, under these bills, firms could continue to encourage advisers to make recommendations that are not in retirement savers' best interest by requiring advisers to meet sales quotas for certain products, basing advisers' bonuses on their success in meeting those quotas, and even paying advisers exponentially more to sell certain products over others.

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Is there a continuing duty of care after the advice is rendered?	Section 913 states explicitly that broker-dealers are not required to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities. Furthermore, in the RFI, the SEC assumed that the question of whether a broker-dealer or investment adviser might have a continuing duty, as well as the nature and scope of such duty, would depend on the contractual or other arrangement or understanding between the retail customer and the broker-dealer or investment adviser. This would be determined based on the totality of the circumstances of the relationship and course of dealing between the customer and the firm, including but not limited to contractual provisions, disclosure and marketing documents, and reasonable customer expectations arising from the firm's course of conduct.	Similar to Section 913, the DOL proposal does not mandate an on-going or long-term advisory relationship and instead leaves that decision to the parties. Under the proposal, the terms of the best interest contract between the adviser, his or her firm, and the retirement investor and the nature of the relationship will govern whether the nature of the relationship between the parties is on-going or not.	The Roskam and Roe bills allow firms and advisers to unilaterally limit the scope, timing, and responsibility to provide monitoring or advice services in the same way firms and advisers can disclaim that a mutual agreement, arrangement, or understanding exists. This appears to allow firms to disclaim an on-going duty of care even in instances where that would not be appropriate.
How does the standard apply to recommendations based on a limited range of investment products?	Section 913 states that the sale from a limited range of in-house investment products shall not, in and of itself, be considered a violation of the best interest standard. Just as with the language relating to the reciept of commissions, the "in and of itself" language implies that firms would not necessarily be in compliance with the best interest standard by virtue of charging variable compensation. Clarifying the circumstances in which such sales would violate a best interest standard has been identified as an important focus of any SEC rulemaking to implement Section 913. In addition, Section 913 states that the SEC may, as a condition of firms' offering such a limited menu of in-house proudcts, determine it necessary to require firms to provide notice to each retail customer and obtain the consent or acknowledgment of the customer.	Similar to Section 913, the DOL rule proposal allows firms to offer a limited number of in-house investment products. As a condition to doing so, however, it requires firms and advisers to take additional precautions to protect against the particularly acute conflicts of interest associated with this business model. These conditions include making a finding that the menu limitations do not prevent the adviser from providing advice that is in the best interest of the retirement investors, notifying the investor of any limitations regarding the available options and the unique needs of the investor, and ensuring that any payments received for the services provided do not exceed the fair market value of the services provided.	The Roe and Roskam bills allow firms and advisers to sell from a limited range of in-house investment products with no enhanced protections for savers, other than a standard disclaimer that the same or similar investments may be available at a different cost elsewhere.
What disclosures are required?	Section 913 requires the SEC to facilitate the provision of simple and clear pre-engagement disclosures to investors regarding the terms of their relationships with firms and their advisers, including any material conflicts of interest.	The DOL proposal requires firms to provide retirement savers with point-of-sale and on-going annual disclosures regarding the costs and conflicts associated with their advice.	The Roe and Roskam bills rely primarily on general and imprecise disclosures to address conflicted advice. Specifically, when a firm or adviser receives variable compensation, they would be required provide the retirement saver with notice that they *may* receive varying amounts of fees or other compensation and a "description" of fees or other types of compensation that are directly paid to the firm or adviser with respect to the transaction. However, the firm or adviser could choose to express the amount the investor paid in a variety of ways, including as a formula, estimate, or range. The firm or adviser would also be required to provide a "description" of the types and ranges of any indirect compensation paid to the firm or adviser, but here again, they could express the amount the investor paid in a variety of ways that may not be useful to the investor. *Only upon request of the advice recipient* would a firm or adviser have to provide the specific amounts of indirect compensation paid to the firm or adviser.