THOMAS V. METROPOLITAN LIFE INSURANCE CO.: SEMANTICS, FIDUCIARY DUTY, AND AN OUTDATED DISTINCTION

INTRODUCTION

In times of market volatility, financial crises, and increasingly uncertain economic prospects, it is vital that individuals and families make the right personal investment decisions. As the costs of basic needs such as education and healthcare have increased, many financial responsibilities have shifted from government and employers to individuals.[1] Consequently, individual investors must now manage a dizzying array of complex investment and insurance options.[2] Although a large body of regulation prevents the world of retail finance from approaching anything like a Hobbesian state of nature,[3] investing is not for the faint of heart. Terminology can be arcane and confusing.[4] Brokers and advisers who appear to offer the same services may have vastly different fee and compensation structures, and may be held to vastly different standards of care.[5] These distinctions are neither obvious nor meaningful to the average retail investor seeking to insure his or her family against disaster, invest for retirement, or prepare for the costs of a child's higher education.[6]

1. *See* METLIFE, THE METLIFE STUDY OF THE AMERICAN DREAM: AGAINST THE BACKDROP OF THE FINANCIAL BURDEN SHIFT 1 (2007), *available at*, http://www.hirmemphis.com/PDF/2007%20Data/MetLifeAmericanDreamStudyFinal012507.pdf; *see also* Onnig H. Dombalagian, *Investment Recommendations and the Essence of Duty*, 60 AM. U. L. REV. 1265, 1275 (2011). Two of the most significant trends are the replacement of defined benefit plans with defined contribution plans and declines in quality and subsidization of employer-sponsored health insurance. These trends may not be entirely unwelcome to MetLife and its brethren.

2. *See* METLIFE, *supra* note 1, at 1; *see also* Dombalagian, *supra* note 1, at 1276.

3. Chapter 13, titled "Of the Natural Condition of Mankind, As Concerning Their Felicity, and Misery," describes the "nasty, brutish, and short" lives of men living without government or law. *See* THOMAS HOBBES, LEVIATHAN 82, 84 (J. C. A. Gaskin ed., Oxford Univ. Press 1998) (1651).

4. *See, e.g.*, *Glossary of Investment Terms*, RAYMOND JAMES FINANCIAL, http://www.raymondjames.com/gloss.htm (last visited Oct. 12, 2011) ("Keeping up with the increasing number of investment products and services . . . can be confusing."); News Release, ING Direct, ING DIRECT USA's ShareBuilder Launches New "Touch The Ball" TV Campaign That Turns Online Investing Perception Upside Down (Feb. 17, 2011), *available at* http://multivu.prnewswire.com/mnr/sharebuilder/48620/ ("When it comes to investing, technical jargon, confusing trading tools and a blizzard of data can leave many investors feeling overwhelmed.").

5. *See, e.g.*, ANGELA A. HUNG ET AL., U.S. SEC. & EXCHANGE COMMISSION, INVESTOR AND INDUSTRY PERSPECTIVES ON INVESTMENT ADVISERS AND BROKER-DEALERS 89–90, 109 (2008), http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf; STAFF OF U.S. SEC. & EXCHANGE COMMISSION, U.S. SEC. & EXCHANGE COMMISSION, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS, at i, 95, 98–100 (2011) [hereinafter SEC STUDY], http://www.sec.gov/news/studies/2011/913studyfinal.pdf.

6. *See* Gary A. Varnavides, *The Flawed State of Broker-Dealer Regulation and the Case for an Authentic Federal Fiduciary Standard for Broker-Dealers*, 16 FORDHAM J. CORP. & FIN. L. 203,

Much of the regulation of financial services arose in the 1930s and 1940s, when investment services were more bifurcated: brokers[7] executed securities transactions for customers in return for a commission, while investment advisers dispensed advice and managed customer accounts in return for a fee that was typically a percentage of assets under management.[8] As a result, brokers are regulated by the Securities Exchange Act of 1934 (Exchange Act)[9], while investment advisers are regulated by the Investment Advisers Act of 1940 (IAA)[10]. Further complicating matters, some broker activities are regulated by both acts, while others are exempted from the IAA.

In *Thomas v. Metropolitan Life Insurance Co.*,[11] the Tenth Circuit held that the broker exemption of the IAA applied to the activities of a Metropolitan Life (MetLife) representative.[12] Although the court's analysis was couched as an exercise in statutory interpretation, its plain language analysis of the statute was flawed and created an overly-broad exemption that will result in the improper exclusion of broker activities from the requirements of the IAA.

Part I of this Comment provides background information on MetLife, the insurance industry and its products, and the regulatory structures governing brokers and investment advisers. Part II summarizes the facts, holdings, and procedural history of *Thomas*. Part III analyzes the decision in *Thomas* and focuses on the court's analysis of the IAA's broker exemption, concluding that the court's interpretation of the phrase "solely incidental" was flawed, unduly broadening the broker exemption and leading to less investor protection. This Comment concludes that the court should have adopted a narrower interpretation of the exemption, proposes such an interpretation, and finally notes that in light of recent developments in the regulatory framework, the negative effects of the *Thomas* decision may be short-lived.

216 (2011) (citing HUNG ET AL., *supra* note 5) ("[M]ost investors do not understand general distinctions between broker-dealers and investment advisers . . . .").

7. For simplicity and concision, this Comment uses the term "broker" rather than "broker-dealer" throughout. In addition, the term may refer to an individual licensed broker or the brokerage firm for which he or she works.

8. *See* Thomas v. Metro. Life Ins. Co., No. CIV-07-0121-F, 2009 WL 2778663, at *7 (W.D. Okla. Aug. 31, 2009) (citing Fin. Planning Ass'n v. SEC, 482 F.3d 481, 485 (D.C. Cir. 2007)), *aff'd*, 631 F.3d 1153 (10th Cir. 2011). The crucial distinction with respect to compensation is that the broker-dealer is compensated per transaction, while the investment adviser is compensated via a fee schedule.

9. *See generally* Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–nn (2006).

10. *See generally* Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to -21(2006).

11. 631 F.3d 1153 (10th Cir. 2011).

12. *Id.* at 1166–68.

I. BACKGROUND

A. MetLife and Insurance Products

MetLife exemplifies the late twentieth-century ideal of a "financial supermarket,"[13] a horizontally-integrated[14] behemoth offering a full range of financial services and products.[15] Like most such entities, MetLife relies on a holding company structure. Subsidiaries include Metropolitan Life Insurance Company, Inc., which underwrites various types of insurance, and MetLife Securities, Inc., a registered broker and adviser that sells both investment products and advisory services.[16]

MetLife employs financial services representatives (FSRs) to sell its products and services to the general public.[17] FSR compensation is commission-based and representatives are incentivized to push proprietary MetLife products.[18] These products include not only traditional insurance policies, but also securities, mutual funds, variable universal life insurance policies (VULPs), and annuities.[19] In addition, MetLife Securities also employs financial planners who offer fee-based planning and advisory services.[20]

A VULP allows policy-holders to buy insurance and invest the cash value of the policy in securities.[21] Return on these investments is not immediately subject to taxation, providing customers with tax-deferred

13. A financial supermarket is "[a] company offering a wide range of financial services (e.g. stock, insurance and real-estate brokerage)." *Financial Supermarket*, INVESTOPEDIA, http://www.investopedia.com/terms/f/financialsupermarket.asp (last visited on Oct. 20, 2011).

14. Horizontal integration refers to the process by which "a company expands its business into different products that are similar to current lines." *Horizontal Integration*, INVESTOPEDIA, http://www.investopedia.com/terms/h/horizontalintegration.asp (last visited on Oct. 20, 2011).

15. *See* Joseph A. Smith, Jr., *Retail Delivery of Financial Services After the Gramm-Leach Bliley-Act: How Will Public Policy Shape the "Financial Services Supermarket"?*, 4 N.C. BANKING INST. 39, 40 (2000) (defining "financial services supermarket" in the context of Gramm-Leach Bliley); *Contact MetLife*, METLIFE, http://www.metlife.com/about/corporate-profile/contact/metlife/index.html (last visited Oct. 20, 2011) (demonstrating corporate structure).

16. *See MetLife Securities*, METLIFE, http://www.metlife.com/about/corporate-profile/contact/metlife-securities/index.html (last visited Oct. 20, 2011). MetLife is also an umbrella for a number of other subsidiaries not directly relevant to this case, including MetLife Bank, N.A. and a number of specialized insurance-related companies.

17. *Thomas*, 631 F.3d at 1157; *New Financial Services Representatives*, METLIFE, http://www.metlife.com/careers/sales-jobs/new-financial-representatives/index.html (last visited Oct. 20, 2011).

18. The incentives include both carrots and sticks: FSRs are compensated for selling proprietary products as well as subject to termination for not meeting quotas of such products. *Thomas*, 631 F.3d at 1157, 1167.

19. *See, e.g.*, *Insurance*, METLIFE, http://www.metlife.com/individual/insurance/index.html (last visited Oct. 20, 2011); *Investment Products*, METLIFE, http://www.metlife.com/individual/investment-products/index.html (last visited Oct. 20, 2011).

20. *See Financial Planning*, METLIFE, http://www.metlife.com/individual/planning/financial/index.html#overview (last visited Oct. 20, 2011).

21. *See* Hugh D. Berkson, *Variable Universal Life Policies: Can They Be Sold Without Misleading the Customer?*, 1686 PRAC. L. INST. 421, 424 (2008); Bruce W. Fraser, *VUL: Pros and Cons*, FINANCIAL ADVISOR MAGAZINE (June 2008), http://financialadvisormagazine.com/component/content/article/1-features/1909-vul-pros-and-cons.html.

growth. Policy-holders, however, also assume substantial investment risk, are subject to limited investment choices, and incur expenses that may not be obvious.[22] The marketing of VULPs has been criticized for featuring unrealistic rates of return and burying fees and costs in fine print.[23] An average investor may have difficulty understanding the differences between, and the relative strengths and weaknesses of, various life insurance options, including VULPs.[24] Significantly, because the purchaser bears investment risk with a VULP, the product is regulated as a security, and can only be sold by a registered broker.[25]

B. Regulation of the Securities Industry

In response to the loss of public faith in capital markets that arose from the stock market crash of 1929 and the ensuing Great Depression, Congress enacted a series of federal securities laws.[26] The Securities Act of 1933 regulated the primary distribution of shares; the Exchange Act, enacted in 1934, created the Securities and Exchange Commission (SEC or Commission) and regulated the secondary markets, including the activities of brokers; and the IAA, enacted in 1940, established rules for the regulation of investment advisers.[27]

Brokers are required to be members of a self-regulatory organization.[28] The Financial Industry Regulatory Authority (FINRA) performs this task.[29] FINRA and its predecessors developed rules that require investments recommended by a broker to be "suitable" for a customer.[30] Under this standard, a broker must have reasonable grounds for believing a recommendation is suitable for a customer based on that customer's financial situation.[31] Notably, this standard does not require a broker to disclose any conflicts of interest.[32]

In contrast, the IAA does not delegate regulation to SROs; instead, regulatory oversight remains with the SEC.[33] Investment advisers (who

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22. *See* Fraser, *supra* note 21.

23. *See* Berkson, *supra* note 21, at 423. The hypothetical sale of a VULP by a fast-talking insurance agent in the introduction of Berkson's article illustrates both the optimistic bias of a typical sales pitch and the possible negative consequences of a market downturn to a policy-holder.

24. *See, e.g.*, Daniel R. Fischel & Robert S. Stillman, *The Law and Economics of Vanishing Premium Life Insurance*, 22 DEL. J. CORP. L. 1, 3 (1997) ("Even financially sophisticated consumers may lack a detailed understanding of the different types of insurance products.").

25. Berkson, *supra* note 21, at 425–26 .

26. *See* Arthur B. Laby, *Reforming the Regulation of Broker-Dealers and Investment Advisers*, 65 BUS. LAW. 395, 402 (2010).

27. *Id.*

28. This requirement was put in place in 1983. *See* SECO Programs, Exchange Act Release No. 20409, 29 SEC Docket 275 (Nov. 22, 1983).

29. Varnavides, *supra* note 6, at 205.

30. *See id.* at 206.

31. *Id.* The broker must take into account customer's financial status, tax status, and objectives when analyzing suitability.

32. *See id.* at 206–07. For examples of such conflicts, see *infra* text accompanying note 128.

33. Varnavides, *supra* note 6, at 209–10.

are compensated for providing advice about buying or selling securities) are held by the IAA to a fiduciary standard, which requires that an agent observe the duties of loyalty and care in its dealings with a principal.[34] This is a much higher standard than mere suitability; the duty of loyalty, in particular, requires an adviser to "subordinate [his] interests to those of the principal."[35] Both Congress and courts have recognized that undisclosed conflicts of interest are antithetical to this duty.[36]

While brokers providing investment advice fall under the general statutory definition of investment adviser, they are exempted from regulation under the IAA if the advice they give is "solely incidental to" their broker activities and they receive "no special compensation" for the advice.[37] The exempt brokers are thus held to the lower suitability standard established by FINRA under the Exchange Act, not the fiduciary standard under the IAA.

Many commentators have noted that the traditional differences between brokers and investment advisers have diminished, with both providing nearly identical services to retail customers.[38] The SEC, not unaware of these concerns, in 2008 commissioned the RAND Institute to review the current state of the investment business, including the regulatory framework, broker and advisor business practices, and investors' understanding of the business.[39] The ensuing report indicated, among other things, that retail investors made little distinction between brokers and advisers.[40]

Also recognizing the overlapping roles of these entities were the drafters of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank).[41] Section 913 of Dodd–Frank gave the SEC authority to make rules establishing a uniform fiduciary standard for bro-

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34. *See* Thomas Lee Hazen, *Stock Broker Fiduciary Duties and the Impact of the Dodd–Frank Act*, 15 N.C. BANKING INST. 47, 50–51, 64–67 (2011).

35. *See* Dombalagian, *supra* note 1, at 1285 (quoting RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006)). As a simple example of the difference in practice, consider a broker who sells two investment products, S1 and S2, that have similar risk and return characteristics. S2 is more expensive than S1, and the broker receives a higher commission or other financial incentive for selling S2. Under the suitability standard, as long as S2 is considered suitable for a customer, the broker may advise that customer to purchase S2. Under the fiduciary standard, the broker may not advise the customer to purchase S2, because the customer's interests are best served by purchasing S1.

36. *See* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191–92 (1963) ("The Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline a[n] investment adviser—consciously or unconsciously—to render advice which was not disinterested." (quoting LOUIS LOSS, SECURITIES REGULATION 1412 (2d ed. 1961))).

37. *See* 15 U.S.C. § 80b-2(a)(11) (2006).

38. *See, e.g.*, Varnavides, *supra* note 6, at 215 (referencing a speech by SEC commissioner Elisse B. Walter).

39. *See id.* at 216.

40. *See* HUNG ET AL., *supra* note 5, at 112–13.

41. *See* Hazen, *supra* note 34, at 48.

kers and advisers.[42] Dodd–Frank also mandated that the SEC produce a study of the regulation of advisers and brokers; the ensuing report recommended "a fiduciary standard no less stringent than currently applied to investment advisers" under the IAA.[43] At the time of this writing, however, the SEC had not engaged in any rulemaking based on this recommendation.

II. *THOMAS V. METROPOLITAN LIFE INSURANCE CO.*

A. Facts and Procedural Posture

In 2001, Robert and Amanda Thomas met with Jeffrey Laxton, a MetLife FSR, to discuss their finances.[44] Laxton, following company procedures for new clients, conducted a suitability analysis, advised the Thomases on asset allocation for their retirement fund (which was not managed by MetLife), and recommended several proprietary MetLife investment products.[45] At that time, the Thomases did not purchase any products or pay a fee for investment advice.[46]

In 2003, the Thomases met with Laxton following the birth of their child.[47] Laxton, again following company procedures, reviewed the Thomases' then-current financial situation and his 2001 analysis. Based on this review, he recommended a proprietary MetLife VULP to serve as a savings vehicle for the child's college education.[48] The Thomases followed Laxton's advice, both by purchasing the VULP and by allocating assets as he recommended. MetLife reserved 2.25% of the VULP's $91.00 monthly premium for the compensation of FSRs such as Laxton.[49]

In 2007, Mr. Thomas brought an individual and putative class-action complaint against MetLife in federal district court alleging various claims under state law, the Exchange Act, and the IAA.[50] The trial court dismissed the state law and securities claims and granted summary judgment for MetLife on the IAA claim.[51] The Thomases appealed on two grounds: (1) that the district court's refusal to allow them to amend their second amended complaint to add named plaintiffs with standing to

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42. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act § 913, Pub. L. No. 111-203, 124 Stat. 1824–27 (2010) (codified at 15 U.S.C. § 78o).

43. *See* SEC STUDY, *supra* note 5, at v–vi. Two commissioners effectively dissented from the study. *See infra* text accompanying notes 147–48.

44. Thomas v. Metro. Life Ins. Co., 631 F.3d 1153, 1157 (10th Cir. 2011).

45. *See id.*

46. *See id.*

47. *Id.*

48. Thomas v. Metro. Life Ins. Co., No. CIV-07-0121-F, 2009 WL 2778663, at *2 (W.D. Okla. Aug. 31, 2009), *aff'd*, 631 F.3d 1153 (10th Cir. 2011).

49. *See Thomas*, 631 F.3d at 1157.

50. *Id.* at 1156, 1158.

51. *Id.* at 1157–58.

bring securities claims was an abuse of discretion; and (2) that the district court's grant of summary judgment on the IAA claim was in error.[52]

B. Holding

1. Abuse of Discretion

The Tenth Circuit first considered the Thomases' appeal of the district court's ruling on the motion for leave to amend.[53] Although neither party had raised the issue of standing, the court considered it sua sponte and held that the Thomases lacked standing to appeal the ruling.[54]

At trial, the Thomases sought to add plaintiffs who had purchased securities from MetLife (and thus had standing for a federal securities claim) to their second amended complaint, a request that the district court denied.[55] Relying upon precedent, the Tenth Circuit reasoned that, because the Thomases lacked standing to bring securities claims themselves, they were not aggrieved by the district court's refusal to allow them to add third parties (who did have such standing) to their complaint.[56] In addition, the court held that the fact that the suit was a putative class action was irrelevant because no class had been certified, and the Thomases were the only appellants before the court on appeal.[57]

2. Summary Judgment

The bulk of the Tenth Circuit's opinion was spent reviewing the summary judgment order on the IAA claims.[58] The court began by noting that, for an appeal of summary judgment, (1) the standard of review was de novo, (2) the evidence would be viewed in the light most favorable to the Thomases, and (3) the judgment was appropriate when there was no genuine dispute of material fact and the appellee was entitled to judgment as a matter of law.[59] The matter of law at issue, according to the court, was the IAA's definition of "investment adviser."[60]

The court's first task was one of statutory interpretation. It noted that the IAA "[g]enerally . . . imposes fiduciary duties on 'investment advisers,'"[61] defined as persons who "advis[e] others . . . as to . . . invest-

52. *Id.* at 1156–57.
53. *See id.* at 1158–60.
54. *See id.* ("[W]e have an independent duty to examine our own jurisdiction." (quoting Amazon, Inc. v. Dirt Camp, Inc., 273 F.3d 1271, 1274 (10th Cir. 2001)) (internal quotation marks omitted)).
55. *See id.* at 1158–59.
56. *See id.* at 1159 (citing Howard v. Mail–Well Envelope Co., 150 F.3d 1227, 1230 (10th Cir. 1998)) ("[P]arties generally do not have standing to appeal . . . to protect the rights of third parties.").
57. *See id.*
58. *See id.* at 1160–68.
59. *See id.* at 1160.
60. *See id.*
61. *Id.* (citing 15 U.S.C. § 80b-6 (2006)).

ing in, purchasing, or selling securities"[62] for compensation. But, the court continued, the IAA explicitly exempted from this definition brokers or dealers whose performance of advisory services was "solely incidental to" the conduct of their business and who did not receive "special compensation" for those services.[63]

a. "Solely Incidental to"

The Tenth Circuit agreed with the district court's interpretation of the phrase "solely incidental to" as simply indicating a relationship between investment advice and sale of a security rather than the importance of that advice relative to the sale.[64]

After first noting that the IAA did not define the phrase, the court turned to the dictionary.[65] Based on its reading of multiple definitions in *Black's Law Dictionary* and *Webster's Dictionary*, the court declared that a secondary object was "incidental" to a primary object when (1) the secondary object occurred only in relation to the primary object; and (2) the secondary object was of lesser size or importance than the primary object.[66] Although the definition was conjunctive, the court rejected the second prong, noting that an inquiry into relative size would create an uncertain test and be an exercise in "line-drawing."[67] Further, the adjective "solely" could not meaningfully modify the word "incidental" if the definition of the latter included such a relative-size component.[68] Thus, the phrase "solely incidental to" meant "only . . . in connection with."[69]

The Tenth Circuit then turned to various SEC releases[70] related to the IAA.[71] It began by noting that it would defer to a rule or regulation interpreting the IAA, but none had been supplied, leaving only the per-

62. *Id.* (second alteration in original) (quoting 15 U.S.C. § 80b-2(a)(11) (2006)) (internal quotation mark omitted).

63. *Id.* (quoting § 80b-2(a)(11)(C)).

64. *See id.* at 1161 (quoting Thomas v. Metro. Life Ins. Co., No. CIV-07-0121-F, 2009 WL 2778663, at *6–7 (W.D. Okla. Aug. 31, 2009), *aff'd*, 631 F.3d 1153 (10th Cir. 2011)) (internal quotation marks omitted).

65. *See id.* at 1162. In fact, the court consulted several dictionaries, including two different editions of *Black's Law Dictionary*. *See id.* at 1162 n.2.

66. *See id.* at 1162 & n.2 (quoting BLACK'S LAW DICTIONARY 830 (9th ed. 2009); BLACK'S LAW DICTIONARY 942–43 (3d ed. 1933); WEBSTER'S NEW INTERNATIONAL DICTIONARY 1257 (2d ed. 1956); WEBSTER'S UNABRIDGED DICTIONARY 966 (2d ed. 2001)).

67. *See id.* at 1162.

68. *See id.* The trial court's reasoning on this issue was slightly different; the court apparently assumed that the definition of "incidental" could be *either* "attendant to" (MetLife's argument) or "a minor . . . or . . . insignificant part of" (Thomases' argument) and concluded that "[t]he modifier 'solely' does not fit well with" the latter definition. *See Thomas*, 2009 WL 2778663, at *4.

69. *Thomas*, 631 F.3d at 1162.

70. As part of its rulemaking process, the SEC typically produces three types of informational releases: concept releases, rule proposals, and rule adoption. *See The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/whatwedo.shtml (last visited Oct. 16, 2011) [hereinafter *The Investor's Advocate*].

71. *See Thomas*, 631 F.3d at 1162–63.

suasive positions of the SEC's releases on the subject.[72] The court highlighted three such releases.[73] First, a 1946 release stated that brokers typically provided "a certain amount of advice to" customers, and that amount was not sufficient to regulate them under the IAA.[74] Second, releases from 2005 and 2007 indicated that advice was "solely incidental to" a broker's business when the former was "in connection with and reasonably related to" the latter.[75] The court concluded that the SEC's position in these releases was that "solely incidental to" was a question of mere connection, not relative importance.[76]

The Tenth Circuit then turned to the legislative history of the IAA.[77] The court noted that Congress passed the IAA to regulate a class of professionals that purported to provide, for a fee, unbiased investment advice as a "distinct product."[78] Because brokers were already regulated under the Exchange Act, they were not the target of the legislative proposals that eventually became the IAA (notwithstanding any advice they might provide as part of their business).[79] The court concluded that this historical distinction between brokers and advisers supported its interpretation that the key inquiry was whether a broker was acting in an advisory capacity connected to the traditional broker activity of buying or selling securities, not the relative importance of the activities.[80]

b. "Special Compensation"

The court analyzed the second prong of the exemption, "special compensation," using a similar framework: plain-language, SEC releases, and legislative history.[81] The Thomases had maintained that the phrase referred to any economic benefit received by a broker from a transaction that involved investment advice.[82] The Tenth Circuit, however, concluded that such an interpretation would be inconsistent with the statutory language because it would obviate the need for the word "special," which, in turn, would render the entire prong superfluous.[83]

Like "solely incidental to," "special compensation" was not defined in the IAA.[84] Rather than consulting a dictionary, the court instead looked at the statutory context.[85] First, the court determined that "com-

72. *Id.*
73. *See id.* at 1163.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 1163–64.
79. *See id.*
80. *See id.* at 1164.
81. *See id.* at 1164–65.
82. *Id.* at 1166.
83. *Id.*
84. *Id.* at 1162, 1164.
85. See *id.* at 1164.

pensation" must refer to an economic benefit received because of advisory services.[86] Second, the court highlighted that the word "special" necessarily modified "compensation" in a way that distinguished it from both the general "compensation" referred to in the statutory definition of "Investment Adviser" and the normal transaction-based compensation (i.e., commission) given to brokers for buying and selling securities.[87] Thus, based on the statutory language, "special compensation" was (1) compensation other than a commission or commission analog; that was (2) specifically received for investment advice.[88]

The court then examined SEC releases related to the IAA's broker exemption.[89] A 1978 release referred to charges "specifically" and "clearly definable . . . for investment advice."[90] A 1989 action letter distinguished "a commission, mark-up, mark-down or similar fee for brokerage services" from "special compensation."[91] The court concluded that these positional statements from the SEC were consistent with its interpretation of the phrase.[92]

Finally, the court examined the IAA's legislative history.[93] Again, the court noted that Congress passed the IAA not in reaction to the behavior of brokers, who were regulated by the Exchange Act, but to a growing class of professional investment advisers who were not otherwise regulated.[94] As the legislation made its way through Congress, both the House and Senate had clearly distinguished brokers who "receive[d] only brokerage commissions" from those who received compensation specifically for advisory services.[95] Thus, the historical context supported the court's interpretation of "special compensation" as something more than a brokerage commission.[96]

c. Application

Having interpreted the statutory language, the court turned to the facts of the case.[97] That Laxton's primary business was as a broker of financial products, and that he had provided advice to the Thomases in order to sell them a financial product, was not disputed.[98] The advice was a secondary action in support of Laxton's primary action and objective:

86. *Id.*
87. *See id.* at 1164–65.
88. *Id.* at 1165.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *See id.* at 1166.
95. *Id.* at 1165.
96. *Id.* at 1166.
97. *Id.* at 1166–67.
98. *See id.*

selling the policy.[99] Thus, under the court's interpretation, Laxton's advice was "solely incidental to" his sale of securities; the relative amounts of advice and sales in the transaction were irrelevant.[100]

Laxton's compensation was tied to the sale of the policy; he received a "production credit" of $500 from MetLife after selling the policy and did not receive any compensation specifically tied to advice.[101] Further, his quotas were based on selling investment products, not advice.[102] This compensation did not meet either of the "special compensation" prongs established by the court: it was not received specifically in exchange for advice, and it was not distinct from a commission.[103] Thus, under the court's interpretation, Laxton's compensation was not "special compensation." Because Laxton's activities met both the "solely incidental" and "special compensation" prongs of the IAA's broker exemption, they were not regulated under the IAA.[104]

III. Analysis

Thomas was a case of first impression in the federal circuit courts and thus has the potential to be quite influential; the Tenth Circuit's interpretation has already been cited in cases in the Ninth and First Circuits.[105] The court chose to establish a narrow interpretation of "solely incidental" that led to a broad broker–dealer exemption from the IAA, but the foundations of this interpretation were tenuous, and the policy implications mixed. The holding, if widely followed in other circuits, could diminish protection of retail investors, at least until the SEC fulfills its Dodd–Frank mandate to harmonize the regulation of brokers and advisers.

A. A Close Call

At first glance, the *Thomas* decision seems relatively straightforward: a simple, almost textbook exercise in statutory interpretation. But upon closer examination, the court's interpretations were not as clear-cut as they appeared. Specifically, the court's plain language analysis of the phrase "solely incidental" was logically suspect.

99. *See id.*
100. *Id.* at 1167.
101. *Id.*
102. *See id.*
103. *See id.*
104. *See id.*
105. *See* Wiener v. Eaton Vance Distributors, Inc., No. 10-10515-DPW, 2011 WL 1233131, at *10 (D. Mass. Mar. 30, 2011) (holding that an investment fund's 12b-1 fees were not "special compensation" for investment advice under the broker-dealer exception of the IAA); Bronzich v. Persels & Associates, No. CV-10-0364-EFS, 2011 WL 2119372, at *6 (E.D. Wash. May 27, 2011) (applying the Tenth Circuit's plain language interpretation of "solely incidental" to a similar phrase in the Washington Debt Adjusting Act).

The strongest section of the Tenth Circuit's analysis was its interpretation of "special compensation." The Thomases argued that any compensation given to a broker as part of a transaction that involved advice was "special compensation."[106] In rejecting the Thomases' interpretation, the court focused on the fact that it would eliminate any distinction between "special compensation" and "compensation," rendering the former superfluous.[107] The court was, predictably, unwilling to attribute that intention to Congress.

The Tenth Circuit's conclusion that the phrase "solely incidental to" meant "in relation to," and thus had no comparative aspect, was less obvious. The court began by explicitly providing a conjunctive definition of an "incidental" object: one that occurs only in relation to a primary object *and* is comparatively smaller in size or importance.[108] The court then noted that the Thomases' interpretation of "incidental" focused on the comparative component "without regard" to the relational.[109] This was not strictly true: the Thomases claimed that Laxton's advice was not solely incidental to his brokerage activities because it was a "central component" of his sales of MetLife products.[110] Thus, the Thomases' interpretation implicitly encompassed both the relational and comparative aspects, and comported with the definition the court had just established.[111]

Immediately after remonstrating the Thomases for their lack of regard to one part of the definition of "solely incidental," the court committed the very same sin.[112] Noting that the word "solely" meant "exclusively or only" and, in the statutory exemption, "compl[e]ment[ed] the relational aspect of 'incidental,'" the court leapt to the conclusion that "solely" could not meaningfully modify the comparative aspect of the definition.[113] Because it was unwilling to adopt an interpretation that would render the word "solely" superfluous, the court declared that the plain-language definition it had just taken pains to establish was inapplicable and the district court's definition—which only included the relational component—was correct.[114]

106. *Thomas*, 631 F.3d at 1166. The Thomases' reasoning appeared to be that if a broker performed two activities, A and B, as part of a compensated transaction, then some part of the compensation must have been for each activity. It is not clear, however, why this would have to be the case.

107. *Id.*

108. *See id.* at 1162 ("[A]ll definitions establish that the word 'incidental' has two components. To be considered incidental, two . . . objects must be related . . . [and] . . . the incidental . . . object . . . must be secondary in size . . . .").

109. *See id.* at 1162.

110. *Id.* at 1161.

111. Presumably, A cannot be a "central component" of B absent some relation between A and B.

112. *See id.* at 1162.

113. *See* id.

114. *Id.*

There are several possible responses to this argument. First, the word "solely" is not better suited to modify "occurring in relation to" than it is to modify "secondary to." The mere fact that the word modifies each aspect differently does not imply that it is better suited to modify one or the other: the salient point is that it can meaningfully modify both.[115] Furthermore, when "solely" limits "occurring in relation to," the result is absurd: the statute exempts a broker only if her advice was related to the sale of securities *and not related to anything else*. This makes little sense, as the advice given would presumably stem from, and be related to, any number of other things (e.g., macroeconomic conditions and the broker's analysis of the client's financial situation). Perversely, such a reading specifically exempts any broker whose advice is related only to his desire to sell a specific security, and is thus entirely self-serving.

Even if one accepts the court's assertion that "solely" can only meaningfully modify the relational aspect of the definition, this does not imply rejection of the comparative. The modifier is not superfluous if it can meaningfully modify at least one element of the definition; one might deconstruct the phrase "A is solely incidental to B" as "A is *only* related to B, and A is a small part of B." This maintains both elements of the definition and still allows the modifier to inform its meaning.

In sum, the Tenth Circuit's plain language analysis, established a two-part definition of "incidental," wrongly criticized the Thomases for disregarding one part, and then discarded the other part based on questionable parsing of the surrounding language. The Tenth Circuit also failed to mention how close a call the district court had considered the issue. In contrast to the Tenth Circuit's conjunctive, two-part definition of "incidental," the district court had considered the relational and comparative aspects of "incidental" as separate, mutually exclusive definitions; in deciding to adopt the relational aspect, it stated "[a]t the risk of parsing the statutory language too closely, . . . analysis of the language of the legislation cuts in favor of MetLife, but not compellingly so."[116] Any such doubt was lacking in the Tenth Circuit's holding.

Leaving aside the logical and linguistic gymnastics,[117] the court found somewhat better support for its position by examining SEC comments and legislative history. But even these persuasive sources were less than overwhelming in their support for the court's position. The court cited a 1946 SEC Release for its recognition that the fact that bro-

115. To say that A *only* occurs in relation to B provides no particular information about the relation itself, but merely serves a limiting function: "A occurs in relation to B, and not in relation to anything else." In contrast, when modifying "secondary to," it serves an emphasizing function: "A is secondary to B, and no greater."

116. Thomas v. Metro. Life Ins. Co., No. CIV-07-0121-F, 2009 WL 2778663, at *4 (W.D. Okla. Aug. 31, 2009), *aff'd*, 631 F.3d 1153 (10th Cir. 2011).

117. Perhaps "contortionism" would be more apt.

kers "commonly give a certain amount of advice" would not "bring them within the scope of the [IAA]."[118] But the phrase "a certain amount of advice" fits with the comparative component of "incidental" discussed above, with the phrase "a certain amount" indicating a small amount of advice relative to the broker's primary business.[119]

The Tenth Circuit asserted that the SEC has consistently interpreted the broker–dealer exception, but this conclusion is less than clear. The court cited a 2005 SEC Release that interpreted "solely incidental to" as "in connection with and reasonably related to"; however, the same document contained a provision stating that advice is *not* solely incidental if it is in connection with financial planning.[120] The 2005 interpretation was struck down in a 2007 case,[121] after which the SEC came back with yet another proposed interpretation, this time dropping the financial planning provision.[122] The purported interpretive consistency remains elusive.[123]

The combination of ambiguities in the plain language and inconsistencies in the SEC guidance might argue for a conservative approach that embodies all reasonable facets of the term's meaning, which would effectively err on the side of investor protection. But perhaps the key to the court's interpretation lies in this declaration, buried in the middle of the plain-language analysis: "Plaintiffs' proposed reading . . . [would create] a difficult problem of line-drawing—how much advice is too much, and how could we measure the importance of the advice?"[124] This is a valid point: embracing an interpretation that involved weighing the relative importance of the advice in a security sales transaction would have required the court to leave the issue to a more fact-intensive inquiry, and perhaps establish a set of guidelines or factors. In contrast, eliminating the need for such an inquiry created a cleaner and more predictable legal rule. It seems plausible that ultimately the court justified its analysis with a decision (conscious or not) to elevate the policy goal of certainty and predictability over a competing policy goal of investor protection.

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118. *Thomas*, 631 F.3d at 1163.

119. *See Certain*, MACMILLAN DICTIONARY, http://www.macmillandictionary.com/dictionary/american/certain_20 (defining "a certain" as "some, but not very much") (last visited January 29, 2012).

120. *Thomas*, 631 F.3d at 1163 (citing Certain Broker–Dealers Deemed Not To Be Investment Advisers, Investment Advisers Act Release No. 2340, 70 Fed.Reg. 2716, 2726 (proposed Jan. 14, 2005)). The release was a reproposal of a rule first proposed in 1999, Advisers Act Rule 202(a)(11)-1; that rule would have extended the broker exclusion to certain brokers even if they did receive special compensation for advice. *See* Laby, *supra* note 26, at 408–12.

121. Fin. Planning Ass'n v. SEC, 482 F.3d 481, 492 (D.C. Cir. 2007) (holding that the SEC's attempt to broaden the exclusion violated both the letter and intent of the IAA).

122. See Interpretive Rule Under the Advisers Act Affecting Broker–Dealers, Investment Advisors Act Release No. IA-2652, 72 Fed. Reg. 55126, 55127, 55129 (proposed Sep. 28, 2007).

123. *Compare Thomas*, 631 F.3d at 1163 ("Since . . . 1946, the SEC's position has been consistent . . . ."), *with* Varnavides, *supra* note 6, at 208 ("Over the last decade, the SEC has repeatedly, and unsuccessfully, tried to provide a clear interpretation of the . . . broker–dealer exception."). *See generally* Laby, *supra* note 26, at 408–11 (detailing "The Rise and Fall of Advisers Act Rule 202(A)(11)-1").

124. *Thomas*, 631 F.3d at 1162.

B. Implications for Brokers: A Broad Exemption

By choosing to create a more predictable legal rule, the court created a broad exemption such that, absent any "special compensation" tied to investment advice, a broker would only be regulated under the IAA if the advice had no relation to the sale of securities.[125] The perverse result is that the IAA's fiduciary standard and requirements for disclosure of conflicts of interest would only be effective in cases where the broker would be almost certain not to have such conflicts.[126]

In practice, then, *Thomas* provides a near-roadmap for how a brokerage may incentivize its salespeople to push proprietary products without disclosing the incentive to customers. As illustrated by the Thomases' interactions with Laxton, so long as the product being sold is suitable and the incentive is tied to its sale, a broker may quietly put his or her own interests above those of the customer. To be sure, the salesperson is subject to other rules of conduct related to conflicts of interest, such as those related to excessive prices, churning, and undisclosed ownership of the security being sold, but the holding leaves considerable room for brokers to put their own interests above those of their customers.[127]

C. Implications for Investors: Less Protection

On the other side of the table, *Thomas* allows more room for brokers to put their own interests first and leave conflicts undisclosed, which results in less protection for investors. As noted above, most investors are not aware of the legal distinctions between brokers and advisers, and even more sophisticated investors are subject to disadvantages stemming from information asymmetry and cognitive biases.[128] To the extent that investor protection is a social good, the *Thomas* holding reduces its availability.

Despite the predictable complaints of paternalism, protection of retail investors is desirable for a number of policy reasons.[129] From an economic standpoint, hidden conflicts prevent investors from properly discounting for those conflicts, creating an inefficient market.[130] In addition,

125. Under the court's interpretation, it seems that any relationship at all between advice and security sales would satisfy the "solely incidental to" prong.

126. In such a case, the broker has no incentive, via special compensation or the potential commission from the sale of a security, to give conflicted advice.

127. See Hazen, *supra* note 34, at 61–63, for a discussion of regulations that brokers *are* subject to. The issue of undisclosed ownership of a security being sold (scalping) is in principle quite similar to that of an undisclosed compensation incentive, at least from the point of view of the investor.

128. *See* Dombalagian, *supra* note 1, at 1279–80.

129. *See id.* at 1272–83. The author lays out several policy justifications for regulating investment recommendations, including risk allocation, asymmetries in information and bargaining power, asymmetries in sophistication, and conflicts of interest.

130. *Id.* at 1282. The author argues for an explicit recognition of the value of this discount, advocating a scheme wherein financial services providers are subject to fiduciary duties unless they

many economists consider the assumption of substantial investment risk by an unsophisticated individual investor purchasing a product such as a VULP to be socially costly.[131] Finally, the idea that a firm presenting itself as a loyal, trusted adviser might give—without notice or disclosure—self-serving advice runs counter to expectations of fair play.[132]

Although wider consumer awareness of this practice arguably allows consumers to discount products accordingly or demand more extensive information from brokers, such awareness also decreases the level of trust in the marketplace.[133] As District Court Judge Friot noted in his decision in *Thomas*: "Where the product being sold is a sophisticated financial product . . . the need for unbiased advice—or at least for the disclosure of those things that might tend to skew the salesman's 'advice'—would seem to be every bit as great as in a conventional advisory relationship."[134]

D. A Proposal for a Narrower Interpretation of the Broker Exemption

In *Thomas*, the Tenth Circuit, like most courts, framed the conclusions of its statutory analysis as logical inevitabilities; once the terms were defined, the outcome was more or less predetermined.[135] Yet the court did make debatable interpretive choices. Although it arguably would have had some difficulty stretching the statutory meaning of "special compensation" to cover Laxton's commissions, the court could have defensibly adopted a narrower definition of "solely incidental to."[136] Such a definition might not have changed the ultimate outcome for the Thomases,[137] but it would have allowed the Tenth Circuit to maintain a higher level of investor protection.

Alternatively, the court might have adopted a test in which advice would be solely incidental to the sale of a security if it was not a substantial factor in the customer's decision to buy that specific product from that broker. Factors would include whether the advice was specifically

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offer customers a put option on the product (i.e. the ability to sell it back within a certain period); his assertion that this would convey significant and useful information "to even the least financially literate customer" seems debatable. *Id.* at 1327–35.

131. *See id.* at 1274–75 (noting a number of possible negative externalities stemming from widespread assumption of risk by investors).

132. MetLife is well-known for featuring a certain lovable (and presumptively loyal) pet as its spokes-canine and dirigible-eponym. The company's television advertising segments emphasize concepts such as protection and guidance. *See TV Advertising*, METLIFE, http://www.metlife.com/about/advertising/consumer/television/index.html (last visited on Feb. 11, 2012).

133. Again, whether average consumers can receive all of this information and engage in such rational discounting is an open question.

134. Thomas v. Metro. Life Ins. Co., No. CIV-07-0121-F, 2009 WL 2778663, at *9 (W.D. Okla. Aug. 31, 2009), *aff'd*, 631 F.3d 1153 (10th Cir. 2011).

135. *See, e.g.*, Thomas v. Metro. Life Ins. Co., 631 F.3d 1153, 1167 (10th Cir. 2011).

136. *See supra* Part III.A (discussing the "close call" of the court's interpretation of the phrase).

137. Perhaps the narrower definition would have led to a remand.

related to the security sold, whether the broker provided information on competing options, and whether the customer reasonably relied upon the broker to select the security. Advice merely related to a class of securities would not be a sufficient factor, nor would a mere suitability analysis.[138] Such a test—or one similar thereto—would still allow brokers to provide a "certain amount" of unremunerated advice[139] and remain exempt from the IAA, but once that advice crossed the line into steering a customer to a specific product, the exemption would be lost.[140]

Such a test would require a deeper inquiry into the nature of the broker–investor transaction in question and thus place a slightly higher burden on the courts. In addition, the narrowing of the broker exemption (at least compared to the Tenth Circuit's interpretation thereof) would create at least the theoretical possibility of more litigation. Finally, one can argue that reading such a test into the straightforward (at least on its face) language of the IAA is overstepping, and the clarification of the exemption should be left to the legislature.

Any increase in the broker's burden, however, seems relatively small when weighed against the need to afford investors greater protection from conflicts of interest. Furthermore, it is somewhat reductive to argue that interpretations that create the possibility of more litigation are inherently bad; litigation is simply a mechanism through which the legal rights defined by such interpretations are protected. Ultimately, the task of the courts is to interpret the language of the IAA in light of its overarching purpose—investor protection—and adopt any reasonable tests or factors that make sense. The proposed test affords investors protection from one of the most prevalent conflicts of interest, while maintaining a reasonable exemption for brokers who are not steering customers to particular securities for their own benefit. From a practical standpoint, it leverages the IAA's existing fiduciary standard to bridge the gap until a legislative or rules-based solution emerges.

E. Dodd–Frank: A New Hope

In fact, Congress may ultimately dictate the solution. Dodd–Frank, passed in 2010, recognized that the services offered by brokers and advisers have become nearly indistinguishable.[141] The legislation delegated to the SEC the authority to make rules establishing a uniform fiduciary

138. As an example, under this proposal, a broker would be exempt from the IAA when recommending life insurance, or even VULPs generally, but would not be exempt when recommending a specific MetLife VULP.

139. This would fulfill at least one of the SEC's early expressions of the exemption's purpose. *See Thomas*, 631 F.3d at 1163.

140. Another way to look at this is that there would be two cases where brokers' advice would be regulated by the IAA because it is not "solely incidental to" a sale: when they provide advice that has no relation at all to a sale, and when they provide advice that is a substantial factor in a sale.

141. *Cf.* Varnavides, *supra* note 6, at 215 (quoting a speech by SEC commissioner Elisse B. Walter).

standard for brokers and advisers, but it also required the Commission to conduct a study on the business and regulation of brokers and advisers before implementing any rules in the area.[142]

On January 21, 2011, the SEC delivered to Congress the mandated study on advisers and brokers.[143] Among its recommendations were "a fiduciary standard no less stringent than currently applied to investment advisers" under the IAA, and "[a] uniform standard of conduct [that] will obligate both investment advisers and broker–dealers to eliminate or disclose conflicts of interest."[144] Although the recommendations themselves do not have legal force, the message is clear: advisers and brokers should be held to the same (fiduciary) standard when providing investment advice.[145]

How soon—or indeed whether—the SEC will embody these recommendations in new rules, or interpretations of existing rules, is another matter. On the same day the SEC Study was delivered to Congress, the two Republican SEC Commissioners released a statement distancing themselves from it, asserting that the study did not "adequately justify its recommendation [to change] the regulatory regime for broker–dealers and investment advisers."[146] In particular, they claimed the study did not "appropriately account for the potential overall cost" of recommendations and was merely a "starting point for further research and consideration."[147] At the same time, House Republicans have been pushing to designate FINRA as an SRO for investment advisers as well as brokers, and task it with the enforcement of a uniform fiduciary standard, a process that may further muddy the waters.[148] Finally, the SEC, which is respon-

142. *See* Hazen, *supra* note 34, at 48. As Hazen observes, Congress "punted" by granting the SEC authority to harmonize the standard and mandating that the Commission conduct a study, as opposed to writing a standard into Dodd–Frank itself. *Id.* at 53–54.

143. Interestingly, the SEC study was delivered less than two weeks before *Thomas* was decided.

144. SEC STUDY, *supra* note 5, at vi–vii.

145. The SEC Study explicitly rejected eliminating the IAA's broker-dealer exclusion (thus subjecting brokers to the full body of IAA requirements), reasoning that such an approach would be inflexible compared to "tak[ing] the best of each regulatory regime." *Id.* at 140–41, 143.

146. *See* Kathleen L. Casey & Troy A. Paredes, *Statement by SEC Commissioners: Statement Regarding Study on Investment Advisers and Broker–Dealers*, U.S. SEC. & EXCHANGE COMMISSION (Jan. 21, 2011, 6:11 PM), http://www.sec.gov/news/speech/2011/spch012211klctap.htm. The SEC is composed of five commissioners appointed to five-year terms by the President of the United States; no party may be represented by more than three commissioners. At the time the SEC Study was released, the Commission had two Democrats, two Republicans, and an Independent..

147. *Id.* Calling for additional economic analysis of a regulation is a common strategy to stall its implementation. *See, e.g.*, Mark Schoeff, Jr., *Senate Republicans Prod SEC Nominees on Dodd–Frank*, INVESTMENT NEWS (June 19, 2011), http://www.investmentnews.com/article/20110619/REG/306199978. See Robert S. Adler, Op-Ed, *Safety Regulators Don't Add Costs. They Decide Who Pays Them*, N.Y. TIMES (Oct. 17, 2011), http://www.nytimes.com/2011/10/17/opinion/safety-regulators-dont-add-costs-they-decide-who-pays-them.html, for a counterpoint to arguments railing against the economic costs of regulation. Adler also notes that cost-benefit analyses are already part of virtually all agency studies and recommendations. *Id.*

148. *See, e.g.*, Melanie Waddell, *Draft Bill Calling for SRO for Advisors Introduced in House*, ADVISORONE (Sept. 8, 2011), http://www.advisorone.com/2011/09/08/draft-bill-calling-for-sro-for-advisors-introduced. *See generally* Spencer Bachus, *Discussion Draft*, THE COMM. ON FIN. SERVS.,

sible for many regulatory activities, is perennially resource-constrained and must prioritize among a number of competing duties; there is no guarantee that a unified fiduciary standard for brokers and advisers will be a top priority in the near future.[149] Given the variety of options on the table, likely opposition from Republicans, and the internal constraints of the SEC, it is difficult to predict the direction and timeline for the proposed reforms.[150]

CONCLUSION

The Tenth Circuit's decision to dismiss the claim in *Thomas* established a clear and predictable legal rule exempting brokers from regulation under the IAA when they provide advice connected to the sale of a security. In doing so, the court favored predictability over the protection of investors, choosing to shield brokers when they provide customers with advice that is not in the latter's best interest. Although the court seemed at pains to provide an uncontroversial analysis based on traditional canons of statutory interpretation, its unnecessary reliance on a confused parsing of the language of the IAA's broker–dealer exemption undermined the clarity of that analysis.

With the SEC poised to make new rules unifying the regulation of brokers and advisers, the effects of *Thomas* may be relatively short-lived. However, it is unclear when these new rules will be proposed and enacted, and what shape they will take. In the meantime, an interpretation of the broker exemption that implements the proposed "substantial factor" test may provide less predictability, but will capture the full meaning of "solely incidental to." In doing so, it will afford courts more opportunity to address each case on its own merits, ensuring that investors do not fall victim to self-serving recommendations from those they trust with their very financial futures.

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http://financialservices.house.gov/UploadedFiles/BACHUS_017_xml.pdf (last visited Oct. 21, 2011) (a discussion draft of a house bill discussing the amendment of the Investment Advisers Act of 1940 to provide for the registration and oversight of national investment adviser association).

149. See generally *The Investor's Advocate*, *supra* note 70, for a discussion of the Commission's numerous responsibilities.

150. Commissioner Casey stepped down in August; her seat remained open until the confirmation of Republican Daniel M. Gallagher on Oct. 21, 2011. Mr. Gallagher has already telegraphed his concerns for regulatory costs. *See* Schoeff, *supra* note 147.

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