

Collapsing Broker Protocol Shifts Broker Recruiting Landscape (December 2017)



By Robert Duffy & Stacey Nakasian | The legal risk for investment advisors and brokers looking to change firms recently escalated when UBS, Morgan Stanley and other large brokerage firms withdrew from the “Protocol for Broker Recruiting.”

The Protocol, which was established by three investment firms in 2006 and currently has 1600 members, shields brokers leaving firms and the firms they join from liability for soliciting broker’s clients. The Protocol allows a departing broker to take the following information regarding his clients: the client’s name, address, phone number, email and account titles. The broker can use the information to solicit his clients, but only after leaving his former firm, and neither he nor his new firm can make any other use of the information.

Those in the industry prior to the Protocol vividly recall the diligent enforcement of restrictive covenants by major brokerage firms, who expended enormous legal fees pursuing departing brokers and defending against claims when brokers moved from one wire house to another. The Protocol eliminated the need for much of that litigation and promoted compliance with SEC regulations regarding client privacy.

Fundamental changes since 2006, however, make the Protocol less beneficial to broker-dealers, in large part due to the emergence of Registered Investment Advisor firms (“RIA”) and their effective efforts to lure successful broker groups from major houses. Brokers are leaving the large brokerage firms in record numbers to join RIA firms and enjoy increased compensation.

The withdrawal from the Protocol by UBS, Morgan Stanley and other large firms must be viewed as the first step toward increased enforcement of non-solicitation and non-competition restrictive covenants which, these firms hope, will staunch the tide of departures. Brokers, particularly those with large books, will likely encounter more obstacles to reestablishing their portfolio should they decide to jump firms.

Brokers restricted by employment agreements who are contemplating a move should first understand how their particular restrictions will likely be construed and enforced under the governing law and what steps they should take to minimize the risk that they will not be able to move some or all of their book to their new shop. By the same token, firms enforcing restrictive covenants need to maximize the likelihood that restrictive covenants will be enforced on an expedited basis, to prevent erosion of their goodwill and client base. This begins with the drafting of the restrictions in light of the governing law.

Regardless of which side financial industry players find themselves, whether broker or firm, experienced legal counsel is a critical component to achieving a successful outcome. For more information, contact Bob Duffy or Stacey Nakasian at 401.455.0700.