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Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Standards of Conduct for Investment Advisers and Broker-Dealers

Dear Mr. Fields:

CFA Institute[1] appreciates the opportunity to provide comments to the Securities and Exchange Commission ("SEC" or the "Commission") on its request for information, as the Commission considers standards of conduct for investment advisers and broker-dealers (the "Request"). CFA Institute speaks on behalf of its members and advocates for investor protection and market integrity before standard setters, regulatory authorities, and legislative bodies worldwide. We focus on issues affecting the profession of financial analysis and investment management, education and competencies for investment professionals, and on issues of fairness, transparency and accountability of global financial markets.

Executive Summary

CFA Institute has long advocated for safeguarding investor interests through a uniform fiduciary duty for personalized investment advice, and supported the Department of Labor's fiduciary duty rule on the basis of this position. To this end, we believe the Commission should provide clarity and guidance in three specific areas to enhance investor protection at minimal cost to the industry.

First, it should use administrative guidance to clarify the definition of "investment adviser" under section 202(a)(11) of the Investment Advisers Act of 1940 (the "Advisers Act") to specifically include all who provide personalized investment advice, and imply such advice through the titles they use, so that they are subject to an Advisers Act fiduciary standard of care.

Second, the SEC should use its legal authority to clarify what constitutes "incidental" under section 202(a)(11)(C) to explain that providing personalized investment advice, or implying such advice through use of titles such as "financial advisor" does not qualify for the Incidental

[1] CFA Institute is a global, not-for-profit professional association of more than 155,000 investment analysts, advisers, portfolio managers, and other investment professionals in 165 countries, of more than 148,900 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 149 member societies in 73 countries and territories.

Exclusion. Based on the advice of outside legal counsel, we believe the SEC has the legal authority to issue guidance to this effect without having to engage in formal rulemaking.

Third, we recommend that the SEC in consultation with FINRA, require broker-dealers to provide prominent, clear, consistent, complete and ongoing disclosure that they are agents of the brokerage firms that employ them, and that they do not represent the interests of the retail customer/account holder.

Taking these steps would provide multiple benefits for investor protection, financial market transparency and financial literacy for retail investors as follows:

1. They would significantly discourage the inappropriate offering of, or implication for, personalized investment advice without registration under the Advisers Act.
2. They will restore a plain reading of the Advisers Act for the benefit of investors without the complexity of new regulations.
3. They would impose limited, if any, additional regulatory costs on broker-dealers who use the advisor title most frequently, and would not affect their business models.
4. It would aid discussions between the SEC and the Department of Labor ("Labor" or the "DOL") on a uniform fiduciary standard of care by adding clarity to the obligations of brokers and investment advisers.
5. Such clarification would lead to heightened retail investor understanding of who is providing personalized investment advice and whose interests they represent.

Background

In its Request, the SEC invited public comments on what standards of conduct should apply to investment advisers and broker-dealers "when they provide investment advice to retail investors." This is an issue the industry and the SEC have sought to understand and address for many years.[2]

Among the most important studies on this matter was the so-called Rand Report[3] from 2008. While investors were shown in that study to have an awareness about the different activities of broker-dealers relative to those of investment advisers,[4] there was significant confusion when attempting to distinguish between investment advisers and "financial advisors."[5]

[2] CFA Institute has commented on this issue a number of times in recent years. See e.g., https://www.cfainstitute.org/Comment%20Letters/20170613.pdf; https://www.cfainstitute.org/Comment%20Letters/20150720.pdf; https://www.cfainstitute.org/Comment%20Letters/20100830.pdf.
[3] Rand Institute for Civil Justice: "Investor and Industry Perspectives on Investment Advisers and Broker-Dealers" (2008). See https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.
[4] Id. at p. 110 (Table 6.14).
[5] Responses to "the questions on beliefs about financial service providers indicated that respondents view financial advisors or financial consultants as being more similar to investment advisers than to brokers. However, when asked

We believe that clarity, consistency and coordination of standards in this area are key elements to investor trust. Investor confusion about the roles and duties of different financial services providers using the word "adviser/advisor" in their titles has become problematic from both an investor protection and trust standpoint. This is so, particularly when it is understood that a so-called financial advisor is typically a registered-representative / broker who is an agent of a brokerage firm and who is not legally or practically, representing the interests of the customer.

In an attempt to provide greater investor protection in this context, the DOL's fiduciary rule for providing investment advice was introduced, but only as it relates to assets in retirement accounts. While we have supported that effort as a step toward ensuring unconflicted advice for retirement investors, and that the regulatory jurisdictions of the agencies are not the same, we strongly support a coordinated approach, such that the Commission and Labor can implement "parallel" investor protection regulations that cover the full range of investor assets.

In preparation of this letter, we have consulted outside counsel to determine the viability of certain of the actions we suggest herein regarding the use of titles and agency disclosures by industry participants. We are informed that these are consistent with the regulatory authority vested with the SEC.

Discussion

An integral part of the CFA examination program and the CFA charter is the study, application and adherence to our Code of Ethics and Standards of Professional Conduct (the "Code and Standards").[6] Within the Code and Standards is a requirement that "members and candidates must act for the benefit of their clients and place their clients' interests before their employer's or their own interests."[7]

On this basis, CFA Institute has long advocated for safeguarding investor interests through a uniform fiduciary duty for personalized investment advice. This is consistent with the mandate within our Code and Standards and provided the basis for our support of the Department of Labor's fiduciary duty rule. We believe there is a current opportunity to make progress on this goal and on addressing longstanding investor confusion about those who provide investment services. Specifically, investors deserve to know and understand who is across the financial services table from them. Is it someone providing them with personalized investment advice under a fiduciary duty or someone who represents a financial firm and is selling them financial products?

We agree with the Request's recognition that significant "developments in the marketplace since the Commission last solicited information from the public in 2013 include financial innovations,

about job titles and service provided, responses indicate that financial advisors are more likely to provide brokerage services only than to provide advisory services only."

[6] The CFA Institute Code of Ethics and Standards of Professional Conduct (effective 1 July 2014) https://www.cfapubs.org/doi/pdf/10.2469/ccb.v2014.n6.1.

[7] Id. at p. 2, Standard III.A.

changes to investment adviser and broker-dealer business models, and regulatory developments," including the DOL rule. While some innovations, such as lower-cost products and trading services, have benefitted investors, others have resulted in investor confusion and mis-selling of expensive products, obviously to the detriment of Mr. and Mrs. 401(k).

Existing disclosures alone have been largely ineffective in alerting investors to the different standards that apply when receiving advice vs. sales. In part, this is a consequence of lines becoming increasingly blurred by brokers who refer to themselves as "financial advisors," or offer personal financial or investing advice, but who are not registered investment advisers. This has led to widespread investor confusion (as evidenced in the Rand Report, discussed below) and created an uneven playing field for professionals who are registered advisers and those who provide the same personal advice and claim exemption from registration. The result is two distinctly different legal duties and standards for the same investment advice.

We believe the SEC has an opportunity to take several straightforward steps that will significantly enhance investor protections and substantially increase the understanding of current practices. It can clarify the type of advice that only registered investment advisers ("RIAs") can offer, what titles connote personal advice, and how registered reps or brokers work for their firm and do not represent the customer.

As discussed more fully below, these steps would help to bridge the deep confusion and the regulatory gaps between registered investment advisers who work on behalf of their customers and regulated brokers/salespersons who represent the business interests of their firms. We believe these actions can be accommodated through administrative guidance or direct rulemaking that clarifies existing requirements. These will not entail changes to business models, or result in significant regulatory or compliance costs, while the benefits to addressing investor confusion and improving financial literacy will be significant.

What stands out in each of the actions recommended below is that retail investors will better understand the motivations of their investment service providers. Making clarifications for the investor/customer community is an important, cost-effective upgrade in an environment where certain activities of advisers and sales people have been allowed to blend together.

While we still very much support a more comprehensive regulatory change by the Commission, in consultation with DOL, to create a uniform fiduciary standard for personalized investment advice, we believe important improvements to oversight and practice are possible and straightforward by simply clarifying the current state of play in investment advice. Without complex regulatory changes, the SEC can create an important level of transparency around current practice. We are highly supportive of the Commission addressing this issue, as a meaningful step in advancing the investor protection element of the SEC's mission.

Distinguishing Providers of Personalized Advice From Salespersons

1. Personalized Advice: Clarification of Section 202(a)(11)

We believe that clarifying the definition of "investment adviser" contained within the Advisers Act is an important first step the SEC could take toward ensuring that those *acting* as advisers must in fact *register* as such under section 203.[8] In particular, while implied in section 202(a)(11)[9] of the Advisers Act, clarifying that the definition of "investment adviser" includes all who provide personalized investment advice will ensure that those who provide such advice are subject to a fiduciary duty as registered investment advisers. This step will have the added benefit of addressing title confusion which has clouded the applicable standard of care for providing advice to investors.

CFA Institute believes standards of care should apply uniformly to all who provide personalized investment advice to retail investors, regardless of the title used by the provider. We believe that everyone who provides personalized investment advice should be bound by a fiduciary, best-interest standard of care for their clients.

Use of certain titles by investment service providers implies, at least from the perspective of investors, the provision of personalized advice. In many cases, however, the advice providers are not RIAs and thus operate under lower standards of care. Because of this, and given the level of investor confusion, we believe that titles suggesting personalized investment advice, such as "financial adviser," regardless of how they are used or spelled, should be reserved in the world of investment services solely for those who are RIAs under the Advisers Act.

Recommendation—SEC Administrative Guidance

We believe the SEC has clear authority to issue administrative guidance on the definition of "investment adviser" in section 202(a)(11) so as to clarify that providing personalized investment advice brings one squarely within the definition. We also believe it has the authority to further expound on what specifically will constitute "personalized" advice. We encourage the SEC to pursue this action.

We believe the end result of issuing such guidance will be to not only inform financial service providers of the activities that constitute personalized investment advice, but will also require registration by those who provide such advice, regardless of their titles. This will help move the needle for ensuring that only those abiding by a higher standard of care will be permitted to provide such advice to retail investors.

[8] 15 U.S. Code § 80b-3(a).
[9] 15 U.S. Code § 80b-2(a)(11).

2. Incidental Exemption: Clarification of Section 202(a)(11)(C)

Lockstep with providing clarification on the definition of investment adviser, we believe the SEC should clarify the application of Section 202(a)(11)(C)[10] for provision of advice in terms of broker-dealer activities and titles. This section of the Advisers Act provides that the definition of investment adviser does not include "any broker or dealer whose performance of such [advisory] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor."[11] (referred to herein as the "Incidental Exclusion").

In fact, this section is perhaps the most significant in terms of needed SEC clarification because reliance upon the Incidental Exclusion to provide personalized advice without registration is most widespread. Currently, Rule 203A-3(a)(3)(ii)[12] defines "impersonal investment advice" as advice by means of written material or oral statements that do "not purport to meet the objectives or needs of specific individuals or accounts." By contrast, we believe brokers are providing personalized investment advice that is intended to influence the investment decisions and actions of specific individuals or accounts. Also, as noted above, financial service providers — in reliance on this exclusion — now use titles to describe themselves that are beyond a reasonable reading of "incidental" and instead imply personalized advice. This includes use of the title, "financial advisor." Due to the use of this title, in particular, the distinction between the standards of care that investment advisers offer and the standards of care others provide while using forms of "adviser/or" in their titles, has become increasingly blurred in the minds of retail investors.

The Commission did address the relationship between titling and the Incidental Exclusion in connection with its adoption of regulation interpreting the Incidental Exclusion in 2005 (the "2005 Rule").[13] In the adopting release accompanying the 2005 Rule, the Commission noted that it had not included in the 2005 Rule "any other limitations on how a broker-dealer may hold itself out or titles it may employ without complying with the Advisers Act," despite many comments from the public on the matter. The Commission stated at the time that the titles, "financial advisor" and "financial consultant," were "generic terms that describe what various persons in the financial services industry do." It also noted its expectation that restrictions on certain titles would lead to "the development of new ones with similar connotations."

The 2005 Rule, however, was vacated two years later by the U.S. Court of Appeals for the D.C. Circuit in *Financial Planning Association v. Securities and Exchange Commission,*[14] and no new rule has been adopted in its place. Moreover, the 2005 Rule was promulgated nearly three years before release of the Rand Report, which sought responses to a survey on investor beliefs about different financial services professionals. That survey showed significant investor confusion

[10] 15 U.S. Code § 80b-2(a)(11)(C).
[11] Id.
[12] 17 CFR 275.203A-3(a)(3).
[13] Certain Broker-Dealers Deemed Not to Be Investment Advisers, 70 Fed. Reg. 20,424, 20,439 (Apr. 19, 2005).
[14] 482 F.3d 481 (D.C. Cir. Mar. 30, 2007).

when the titles are similar. In the table below, taken from Table 6.14 of the Rand Report, investors showed a clear understanding of what brokers do — execute stock or mutual fund transactions for clients — and how they get paid — through commissions. They also understood the differences between brokers and investment advisers, with the latter providing advice about securities, recommending specific investments, and getting paid fees based on clients' assets held.

However, investors did not readily distinguish between investment advisers and financial advisors. Investors perceived similarities between these two categories of service providers, which were most evident when it came to providing advice about securities as a part of their regular businesses and recommending specific investments.

Participants' Beliefs About Financial Service Professionals

What types of financial service professionals: (check all that apply)	Investment Advisers (%)	Brokers (%)	Financial Advisors or Consultants (%)
Provide advice about securities as part of their regular business	85	61	76
Execute stock or mutual fund transactions on the client's behalf	27	84	22
Recommend specific investments	93	46	67
Provide retirement planning	39	12	81
Typically receive commissions on purchases or trades that the client makes	5	96	43
Are typically paid based on the amount of assets that the client holds	51	57	45

Source: "Investor and Industry Perspectives on Investment Advisers and Broker-Dealers," Rand Institute for Civil Justice

Given that investors understood how investment advisers are different from brokers, but were less able to distinguish the differences between investment advisers and financial advisors, even though financial advisors and brokers are typically the same, meaning the only perceivable cause for this confusion must be the titles used. We urge the SEC to take action to end this confusion.

We recognize the need for brokers to provide advice on incidental matters that naturally arise in a brokerage arrangement. At the same time, it is commonplace for broker-dealers with commission-based models to provide and/or imply advice in reliance on the Incidental Exclusion that far exceeds both the spirit and reasonable reading of the law. These practices not only violate the Advisers Act on its face, but violate the principles of providing investor protection. It is clear that brokers who imply the provision of advice by calling themselves financial advisors in what is a sales relationship are misleading investors about the nature of their relationships.

Recommendation—SEC Administrative Guidance

It is our view, based on the advice of outside legal counsel that CFA Institute sought on this matter, that the SEC has the legal authority to clarify what constitutes "incidental" under the Incidental Exclusion through administrative guidance. Although the Commission indicated a concern with having the applicability of the exclusion turn on a party's title in the adopting release for the 2005 Rule, that Rule has since been vacated and no new regulations or formal guidance on this subject have been issued in the intervening period. Furthermore, the principal rationale offered in the 2005 Rule for not regulating the use of the title "financial advisor" — that the title was a generic term in the industry — has been called into question by the findings of the Rand Report, which (as discussed above) demonstrated that the similarity in titles between "financial advisor" and "investment adviser" generated significant confusion among investors. We therefore urge the SEC to take this opportunity to issue guidance to clarify that providing personalized investment advice, or implying such advice by calling oneself a "financial advisor," is *not* incidental to the work of a broker, and accordingly does not qualify for the Incidental Exclusion.[15]

We believe that by setting limits on these titles, the SEC would take a significant step toward discouraging the inappropriate offering of, or implication for, advice that is not incidental, but is instead personalized investment advice that would trigger registration under the Advisers Act and application of a fiduciary standard of care. We believe this would restore a plain reading of this section of the Advisers Act and produce changes that will impose a consistent and robust fiduciary standard that will benefit investors without the need for a new, parallel body of law.[16]

Moreover, such action by the Commission would have limited cost for the broker-dealer industry as it would not require wholesale changes to industry business models. Furthermore, by closing a loophole that has weakened investor protection through lowered standards, the Commission could aid its discussions with the DOL on a uniform fiduciary standard by adding clarity to the obligations of brokers and investment advisers. And finally, such clarification would lead to heightened investor understanding of the standards of care they can expect from those providing them with personalized advice.

In addition to issuing guidance, we also encourage renewed regulatory examination sensitivity and, where appropriate, vigorous enforcement activity to bring financial service providers into compliance with this guidance. We encourage the SEC and/or FINRA to examine and test

[15] Specifically, the SEC could issue a policy statement or interpretative rule with approval by vote of SEC Commissioners, which would then need to be published in the *Federal Register*. Alternatively, SEC staff could act through i) issuance of staff interpretive guidance, ii) a frequently asked-questions document, or iii) a guidance update from the Division of Investment Management stating that a broker-dealer holding itself out as a financial advisor may not rely upon the Incidental Exclusion.

[16] The Investor Advisory Committee at the SEC expressed support for a titles-based approach and noted that doing so would negate the need for a new, parallel body of law under the Securities Exchange Act of 1934, and therefore allow the retention of existing legal precedent, staff interpretations, and no-action positions regarding the Advisers Act. See https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation.pdf.

whether brokers are relying properly on the Incidental Exclusion, and adhering to the rule's objectives.

3. Proper Disclosure of the Registered Representative Role

We recognize that disclosure alone is often insufficient in securing investor protections. However, coupled with the clarifications we seek above, we believe investors will greatly benefit from clear, prominent disclosure that defines for them the roles of brokers as their service providers.

As retail investors struggle to understand the correlated but different standards for their financial services providers, we believe a clear delineation of roles will go far to alert investors. Registered representatives of firms, commonly known as financial advisors or brokers, are agents of the firms that employ them. If brokers wish to hold themselves out as personal financial advisers/advisors, they should have to register as RIAs and abide by the obligations that arise with adviser registration.

Recommendation—SEC Disclosure Requirement

To improve investor understanding and clarify service provider roles, we urge the Commission to require prominent, clear, complete, consistent and ongoing disclosure to their clients that they are the agents of the brokerage firm that employs them, and that they do not legally represent the interests of the retail customer/account holder. This is a simple disclosure common to many other professional sales relationships.

Need for Consistent Approach

There are noticeable costs of having multiple standards of conduct apply to similarly situated customers. In particular, investors are susceptible to losses attributable to investments that, while suitable, may not have been recommended had the investment professionals put their clients' best interests first in mind. And market integrity, in general, suffers when investors lose faith in a system they thought put their interests first.

Compliance costs and risks for those who operate under two standards of care also increase. Higher-cost business models apply to investment advisers due to compliance costs and time allotted to consideration of investment recommendations for the benefit of clients. Broker/dealer models, by comparison, are lower cost because they benefit from lower care thresholds. To address these differences, the current DOL rule would require broker-dealers to create contractual agreements that impose best-interests, fiduciary duties of care for the retirement portion of their clients' portfolios, even while the same broker-dealers are held to a lower, suitability standard of care for clients' other assets.

Compliance for providers in these complicated circumstances must necessarily become more onerous as they try to maneuver through the regulatory field so as not to run afoul of different applicable legal standards. More concerning is that clients will only be further confused as to the standards of care that prevail when asking for advice: will the advice provider vacillate between two significantly different standards?

Inconsistent regulation for similar activities also leads to regulatory arbitrage, while differing professional standards for the same activities affront basic notions of fairness from our regulatory system. We support, therefore, a regulatory framework that establishes a level playing field where like activities are governed by the same or substantially similar regulation. We believe it is imperative that the SEC and DOL create a legally and economically consistent structure that has the effect of creating regulatory parity for investment advice, whether for retirement or non-retirement purposes, even when standards emanate from different regulatory agencies.

Conclusion

We believe the SEC has the authority and a timely opportunity to clarify the legal contours of investment advisers, personalized investment advice, the Incidental Exemption and titles used in the financial services industry by using administrative guidance. We strongly encourage such action. We believe these actions will go far to address the confusion surrounding the roles of broker-dealers, restore investor trust, and restore the intended use of the Incidental Exclusion under the Advisers Act.

Should you have any questions about our positions, please do not hesitate to contact James Allen, CFA [redacted], or Linda Rittenhouse at [redacted], [redacted].

Sincerely,

/s/ Kurt N. Schacht	/s/ James Allen	/s/ Linda L. Rittenhouse
Kurt N. Schacht, CFA Managing Director, CFA Institute Advocacy	James Allen, CFA Head, Capital Markets Policy CFA Institute Advocacy	Linda L. Rittenhouse Director, Capital Markets CFA Institute Advocacy