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August 7, 2018

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

Dear Mr. Fields,

Subject: File Number S7-07-18: SEC Proposed Regulation Best Interest

We appreciate the opportunity to comment as the Commission considers its proposed “Regulation Best Interest” imposing a “best interest” standard of care on broker/dealers.

It is abundantly clear that the proposal’s intention is honorable in enhancing the public’s experience when dealing with broker/dealer reps. I believe, however, that there are fundamental faults with the approaches suggested.

Proposed Standard doesn’t pass the “Santa Claus Test”

In the film, *Miracle on 34th Street*, a Santa Claus at Macy’s department store famously refers a child’s parent to a competing vendor in order to obtain a child’s preferred toy. Santa Claus was clearly acting in the “best interest” of the customer. I call this the “Santa Claus test.”

I propose that, in order to truly be considered a “best interest” standard, such a rule would have to require a broker/dealer to pass the Santa Claus test. In other words, it would need to require (and be expected to result in) broker/dealers unselfishly recommending prospective customers to go elsewhere (and/or to buy somebody else’s proprietary products) when it is in the best interest of the customers to do so. So, for example, it would need to require them to objectively recommend superior securities outside those which they proprietarily sell.

There is an axiom that, “To a hammer, everything looks like a nail.” For example, if you are a variable annuity salesperson, you certainly want people to believe (and you may believe yourself) that everybody should not only buy variable annuities, but that they should buy variable annuities that you happen to sell. In order to pass the “Santa Claus test”, such a variable annuity salesperson would need to be willing/able to recommend that non-variable annuities be used – acquired from other sources.

I see no reason to believe that this rule as currently proposed would truly inspire broker/dealers to behave in a manner consistent with the “Santa Claus test.” Accordingly, I don’t believe that the proposed rule provides the sort of protection which the public needs to protect them from broker/dealers distributing sales pitches/recommendations masquerading as objective advice while trying to sell expensive inferior securities to naïve customers.

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FUNDAMENTAL MISCONCEPTION: That broker/dealer reps distribute “advice” and not “sales pitches”.

Throughout the proposed rule document, it is repeatedly either explicitly or implicitly asserted that broker/dealer reps distribute investing advice to prospective clients in conjunction with soliciting product sales.¹ First, if this were true advice (i.e., not “solely incidental” to making a sale (a.k.a., a “sales pitch”)), it would already be subject to a fiduciary standard through the Investment Advisers Act of 1940.² Accordingly, the proposed rule must only be attempting to regulate sales pitches. Second, I believe that the nature of the loyalties and conflicts associated with a being a product salesperson creates unameliorable conflicts.³ It is very difficult to imagine ANY securities salesperson consistently making sales pitches which in any meaningful way might be imagined to be truly in the “best interest” of the retail customer.

An advisor and a salesperson are not the same. If a salesperson chooses to try to distribute something resembling advice (a.k.a., a “recommendation”), they should be regulated as an advice giver (i.e., they should be subject to the fiduciary standard of the Investment Advisers Act of 1940). This could perhaps be made more clear either by asking Congress to repeal the broker/dealer exemption entirely or by enforcing the broker/dealer exemption dramatically more forcefully (i.e., prohibit broker/dealers from engaging in any activities or behaviors which might be in any way mistaken for objective advice and/or a relationship of trust).

If the salesperson does not distribute anything attempting to resemble advice, their sales pitches should be regulated to the same extent that sales persons of non-securities products are (i.e., merely avoiding outright fraud).

It would also be useful to establish a “bright line” discriminator between a salesperson (i.e., broker/dealer rep counting on the broker/dealer exemption) and a fiduciary (i.e., an RIA). Just as RIAs are precluded from using the title “RIA” after their names, the titles used could similarly be specified:

Broker/Dealer reps could be required to use the title “Non-Fiduciary Salesperson” with no other possibilities allowed. Any attempts to describe one’s self or one’s services in a manner that implies a relationship of trust would be prohibited.

¹ For example, from p. 21, “*There is broad acknowledgement of the benefits of, and support for, the continuing existence of the broker-dealer model as an option for retail customers seeking investment advice ...*”. Also from p. 21: “*Among other things, the Commission and our staff, commenters and others have recognized the benefits of the broker-dealer model for advice and the access to advice and the choice of products, services and payment options, that the brokerage model provides retail customers.*”

² The Investment Advisers Act of 1940 makes it clear that broker/dealers are already subject to the ultimate “best interest” standard (i.e., The fiduciary standard imposed by Section 206 of the Investment Advisers Act of 1940, as interpreted by *SEC vs. Capital Gains Research Bureau, Inc.*) unless the “advice” that they give is “solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor” (Section 202(a)(11)(C) of the Investment Advisers Act of 1940).

The “solely incidental” exception clearly applies only to “advice” which is actually a “sales pitch” (i.e., not really advice at all), intended only to convince a retail customer to execute some sale or transaction (i.e., not necessarily to enhance the customer’s well-being).

³ A broker/dealer rep has a clear duty of loyalty to their employer (i.e., which precludes them from passing the “Santa Claus Test”). They also have a clear duty of loyalty to themselves and to their families (e.g., which encourages them to seek the highest possible commissions).

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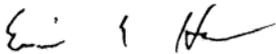
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RIA reps could be required to use the title “Fiduciary Adviser” with no other possibilities allowed.

The point here is that Broker/Dealer reps should be allowed to engage in product sales, but the public should be fully aware that they are dealing with salespeople, NOT advisers.

If you have any questions whatsoever about anything, feel free to contact us.

Sincerely,



Eric E. Haas, MBA, MS

Member

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