

To: Securities and Exchange Commission

Re: Regulation Best Interest

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(Mr. Solberg was formerly the Founder and Global Head of Investment Products Risk for a large, international, US-based Bank and was responsible for overseeing all businesses (including fiduciary businesses) that created and/or sold investment products or wealth management services to non-institutional investors. The Bank's businesses included securities and markets product manufacturing, a global private bank, multiple broker-dealers and a global consumer bank.)

General Comments:

The SEC's efforts to find an appropriate balance in developing Regulation Best Interest should be applauded. The effort to focus the rule on "whether changes should be made to the standard of conduct that applies to broker-dealers when making recommendations" is a logical approach. However, although the approach is logical, I am concerned that there has been too much effort made to weave the Best Interest Regulation into the complex fabric of existing regulations. Being sensitive to that fabric is rational and sound, however, it should not come at the expense of the relevant regulations, taken a whole, leaving the retail investor with misunderstandings about the different duty of care options available and to what standards the investment professional is, or is not, adhering.

The goal of every regulator, firm, and investment professional should be to ensure that retail investors are: 1) treated fairly and 2) have the opportunity to clearly understand a) the nature of the relationship they have with an investment firm and its assigned professional and 2) the specifics of all meaningful facts about each transaction they enter into.

[Note: Material Facts vs. Meaningful Facts. Material Facts are too restrictive a standard. Facts relevant in the context of a particular client's knowledge and sophistication and important for making a decision about a class of products or an individual product should be disclosed.]

The ultimate outcome of revised regulation should be that lines are no longer *blurred* (pg. 22) and the retail investor should be *free from doubt* (pg. 87) and that *retail confusion* (pg. 37) is eliminated. The retail investor should know exactly what they are getting and not getting. I am concerned that the current proposal for Regulation Best Interest will not put that retail investor in that position.

In that light I recommend, **in addition to other disclosures required under Regulation Best Interest**, that every investment firm (investment advisor or broker-dealer) and investment professional disclose the following in the **Relationship Summary Proposal**:

1) Whether a “Product Relationship” or a “Portfolio Relationship” is being established. These categories are important to ensure the client understands the relationship is will have in place.

A Portfolio Relationship will typically be established by an investment advisor and it should carry with it ongoing monitoring and communication responsibilities. A Product Relationship in which the investment professional is making a recommendation should: a) adhere to Regulation Best Interest and b) consider the

portfolio of the client in making the recommendation, but the relationship should not be described as a Portfolio Relationship unless ongoing monitoring and communication responsibility is accepted by the investment professional.

2) Whether a Fiduciary/Investment Advisor Relationship a Best Interest/Broker Dealer Relationship, or Suitability Relationship/Broker Dealer Relationship exists.

3) A comparative, plain-language description of each of the type of Relationships available both in the marketplace and available at the particular firm.

[Note: Generally I agree with the concept that regulators should guide and oversee firms and individuals based on principles rather than specific requirements. However, given the longstanding issues related to the sale of investment products to individuals, the failure of earlier principle-based regulation, and the need for rapid resolution of the issues that Regulation Best Interest is trying to address and the SEC should adopt recommended language for describing the types of relationships available in the marketplace and the key responsibilities that each type of relationship carries and does not carry. Should a firm wish to enhance or change that language they could make that judgment which would be subject to potential SEC review]

4) Whether A Portfolio Fee, a Product Purchase Fee and/or an Ongoing Fee is being charged. The Retail Investor should know exactly what that fee is prior to making the investment purchase (see below).

5) The meaningful (not material) conflicts that the firm in general has and how those conflicts are mitigated, if applicable.

When a transaction is recommended the retail investor should be provided (along with other required information the following:

- 1) Fees. All fees for any transaction should be disclosed before the transaction and there should not be sole reliance on up-front or one-time disclosure.
 - a. The client should be explicitly told in writing, or in discussion followed in writing, of:
 - i. The fees paid to the broker
 - ii. The percentage that those fees represent total invested.
 - iii. The net asset available for investment after the fees
 - iv. Any going forward fees that the broker will earn on an annual basis and/or at the end of the investment
 - v. The nature of any other income or earnings that the firm will, expects to or may make from the transaction or the assets or the underlying structure
- 2) The specific person or persons taking responsibility for the judgment about best interest should be identified in the firm records. If more than one professional is involved in interfacing with a client on a trade the professional taking responsibility for the judgment about best interest should be explicitly identified to the client.
- 3) Before each recommended transaction the client should be told by the broker-dealer the rationale for the recommendation. An explanation of that rationale should be retained in the firm's records.
- 4) The specific person or persons taking responsibility for the judgment about best interest should be identified in the firm records. If more than one professional is involved in interfacing with a client on a trade the professional taking

responsibility for the judgment about best interest should be explicitly identified to the client.

Selected Specific Comments

Pg. 73. SEC: “Do commenters agree with our proposed approach of a tailored standard for broker-dealers as opposed to a uniform standard of conduct for both broker-dealers and investment advisors” COMMENT: *If investment professionals are functioning in a similar manner, then they should be held to the same standards. If they are functioning differently then the retail client should understand the differences.*

Pg. 78. SEC: “... one-time, episodic or more frequent advice”. COMMENT: *If a research opinion is lowered, a target price or some other factors are used as the basis to make a recommendation, then the broker should have a best interest responsibility for informing the client when such factors changes.*

Pg. 79. SEC: Accordingly, the best interest obligations would not, for example: (1) extend beyond a particular recommendation or generally require a broker-dealer to have a continuous duty to a retail customer or impose a duty to monitor the performance of the account.” COMMENT: *If an investment professional is receiving an ongoing fee, then an ongoing duty of care should exist.*

Pg. 82. SEC: “By proposing Regulation Best Interest, we are not intending to change the analysis regarding whether an investor is a brokerage customer or an advisory client, as we believe his issue is outside the scope of this rulemaking”. COMMENT: *I do not believe the analysis has to be changed but I do believe the analysis has to be made clear to retail investors and not be buried within the firm’s records or within reams of disclosure.*

Pg. 83. SEC: The Commission proposes to define “retail customer” as: a person, or the legal representative of a such person, who: (1) receives a recommendation of any securities transaction or investment strategy involving securities from a broker, dealer or a natural person who is an associated person of a broker or dealer, and (2) uses the recommendation primarily for personal, family or household purposes. *COMMENT: This definition would seem to capture family offices in which third party investment professionals are making investment decisions. I would suggest for any accounts for which the retail client provides a power of attorney for allowing the investment professional to make investment decision should be exempt from Regulation Best Interest. The retail investor should explicitly identify the investment professional and document his or her credentials. Thus a family office managed by a team of professionals would not be considered a retail investor.*

Pg. 91. SEC: “Should the Commission broaden or limit the scope of individuals to whom Regulation Best Interest applies. For example: should it apply to small business entities such as a sole proprietorship? Why or why not? *COMMENT: Investment accounts held in the name of a sole proprietorship should be captured under Regulation Best Interest, as those accounts will benefit the individual. An exception should be made if those accounts are used to hedge activities of the business (e.g. commodity hedges)*

Pg. 92 SEC: “Regulation Best Interest would apply to both discretionary and non-discretionary recommendations made by a broker-dealer. *Comment: I am not sure what is meant by discretionary recommendations. Anyone with discretionary control of an investment account should be held to a fiduciary standard.*

Pg. 93. SEC: Should the Commission define the term “recommendation”? If so, should we define “recommendation” as described above?” *COMMENT: 1) Any solicitation of a transaction should be treated as a recommendation. All trades should be marked very clearly if they are solicited/recommended or not. A recommendation may occur even if a trade is not initially solicited. 2) Whether a recommendation has taken place is not subject to a bright definition. A bright line is needed for the retail client to understand the services they are getting (and not getting) and are paying for. They deserve a bright line and if it is a gray area it is up to the firm and investment professional to provide clarity as to what side of the line the transaction is on.*

Pg. 93 SEC: Do commenters agree that proposed Regulation Best Interest should apply to recommendations of “any security transaction or investment strategy involving securities” *COMMENT: The rule should include what is stated but be broadened to include “any investment instrument” in order to be consistent and comprehensive. Retail investors should not have to try to decipher if the recommendation they are getting falls under the Best Interest Regulation.*

Pg. 94. SEC: Should the rule include an obligation to perform ongoing or periodic evaluation of whether an account type initially recommended remains appropriate? If so, how frequently and what factors should that evaluation take into consideration? *COMMENT: The investment professional should have a responsibility to factor into his or her judgment about an account type or what should be recommended any information that is obtained about a client on an ongoing basis. However, at least once a year an investment professional should be required to perform a review of the client and the account unless the*

account is inactive (as defined) in which case the review should be performed before any new transactions are allowed.

Ongoing duty of care is a very difficult standard to apply. Ultimately the use of technology should allow for constant monitoring and the triggering of communications to clients that are relevant to broker and the retail clients assessment of a portfolio on an ongoing basis. This should be a goal of the industry and the SEC should begin to work on establishing standards for such a monitoring and communication system.

Hopefully the above comments will be of value to the SEC in its ongoing deliberations on Regulation Best Interest. Please let me know if I can be of further assistance.

JES