August 6, 2018

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Release No. 34-83063; IA-4888; File No. S7-08-18; Restrictions on the use of Certain Names or Titles

Dear Mr. Fields,

The Investments and Wealth Institute f/k/a Investment Management Consultants Association (The "Institute")[1] is pleased to submit comments to the Securities and Exchange Commission ("SEC" or "Commission") on its April 18th rules package. While The Institute applauds the SEC for its efforts to raise the market conduct standard for investment advice and to increase transparency around business models and conflicts, we have concerns with the second part of proposed Form CRS restricting the use of 'advisor' or 'adviser' by standalone broker-dealers and their associated persons in firm names, job titles, and communications with retail investors[2] for the reasons set forth below.

Although the proposed restrictions[3] on using "advisor" or "adviser" is a laudable effort by the Commission aimed at reducing investor confusion, it would not accomplish this purpose. Secondly, the Title Restrictions conflict with First Amendment rights protecting truthful

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[1] The Institute was established in 1985 to deliver premier investment consulting and wealth management education and credentials, including the CIMA®, CPWA®, and RMA(SM) certifications. Its 12,000 members and certificants manage approximately $3 trillion in assets for individual and institutional clients. Additional information on the Certified Private Wealth Advisor® and Retirement Management Advisor® and other registered marks offered to investment professionals by the Institute is available at http://investmentsandwealth.org/home.

[2] *See* Section III.B.1. of *Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles,* SEC Rel. No. 34-83063; IA-4888 (Apr. 18, 2018).

[3] Proposed new section §240.15l-2 Use of the Term "Adviser" or "Advisor," hereafter referred to as "Title Restrictions."

commercial speech by financial services personnel.[4] In fact, the Title Restrictions, as proposed, have a potential to impact the long-term growth of two of the Institute's registered marks, Certified Private Wealth Advisor® ("CPWA") and Retirement Management Advisor(SM) ("RMA") and other designations offered by the securities industry.

Banning the use of these terms is not an isolated problem for one or two service providers. Approximately 17 of the professional designations listed on the Financial Industry Regulatory Authority's (FINRA) website[5] contain the word "advisor" or "adviser." Separately, an additional 87 standalone brokerage firms with 'advisor' or 'adviser' in their names would be impacted, according to the Commission's economic analysis; additional firms are affected when website descriptions are included.[6] The Release also estimates that approximately 70,101 registered representatives, or 15.5 percent of the total registered with FINRA, would be "potentially subject to this proposed prohibition…."[7]

It is true that the vast majority of our members will not be affected since the proposal excepts associated persons of registered investment advisers (RIAs) or dually registered broker-dealers who work with retail investors. However, we remain concerned about the impact on our members holding these designations who are affiliated with standalone brokers, as well as the potential impact on long-term growth.

The standard that the SEC must meet under this proposal is high. In *Ibanez v. Florida Dep't. of Business and Professional Regulation et al,* the U.S. Supreme Court overturned a state agency decision barring a financial planner from listing next to her name in the yellow pages of a Florida telephone book, on her business cards and stationery, the CFP® marks alongside her state-sanctioned CPA registration. The Court held that the state's decision to censure Ibanez was "incompatible with First Amendment restraints on official action."[8] The Court went on to say that a state may ban such speech only "if it is false, deceptive, or misleading," adding that if it is not, the state can only restrict such expressions upon a showing that "the restriction directly and materially advances a substantial state interest *in a manner no more extensive than necessary* [emphasis added] to serve that interest." The burden of the state is not "slight,"

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[4] *See Ibanez v. Florida Department of Business and Professional Regulation, et al*, 512 U.S. 136 (1994).

[5] *See* "Professional Designations," FINRA, available at https://www.finra.org/investors/professional-designations.

[6] Form CRS Release, footnote 679, at 315; *also* footnotes 684 and 685, at 321-322.

[7] *Id*. footnote 684, at 322.

[8] *Id.* at 142-149.

according to the Court, and the state must demonstrate that "the harms it recites are real and that its restrictions will in fact alleviate them to a material degree."[9]

This same standard should apply to federal agencies contemplating similar restrictions on legitimate commercial speech. Prohibiting the use of certain words in registered trademarks is an infringement on commercial speech, just as banning use of an entire trademark was incompatible with First Amendment restraints in *Ibanez.* The Commission has ample remedies available to discourage abusive and misleading practices, both in its rules package and its statutory authority to police fraud and deceptive market practices. Brokerage firms have used "advisor" or "adviser" branding for decades without the SEC, FINRA or state regulators taking enforcement action merely by using those words in job titles. Nor does the economic analysis in the Release provide convincing evidence that, borrowing from the *Ibanez* court, "the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." Any perceived benefits to consumers by eliminating title confusion are addressed by the Commission elsewhere in its rulemaking package.

The Form CRS Release readily acknowledges the limitations of its economic analysis, stating that "[t]he economic tradeoffs involved in the choice of names and titles by firms and financial professionals are complex and affected by a wide range of factors."[10] For example, the Release notes that SEC staff was unable to estimate how many investors contracted for services that did not meet their preferences, or if they paid more than they would have preferred for those services.[11] In another section of the analysis, the proposing Release acknowledges that the SEC is unable to estimate the search costs incurred by retail investors. The Release states that

> We do not have access to data that would provide us with this type of information…. Similarly, we also are unable to provide estimates of changes in costs due to changes in the potential for mismatch as we do not currently have data on the percentage of the investor population that is mismatched, or the extent of harm that comes from mismatch. For example, we don't have an analysis of how well someone would have done in their portfolio (especially after costs) if they had been correctly matched."[12]

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[9] *Id* at 136.

[10] *Id.* at 300.

[11] *Id.* at 312.

[12] *Id.* at 319.

Title restrictions alone, according to the Release, may impact only half of retail investors' search for an advisor inasmuch as 40 to 50 percent of investors rely solely on referrals.[13] Further complicating efforts, as noted in the Release, the scope of the proposal is limited to securities professionals, and would not apply to other personnel in the financial services industry who use advisor or adviser in job titles, such as banks, trust and insurance companies, and commodities professionals.[14]

With respect to longer-term industry costs, the analysis likewise struggles to provide a clear picture of the loss of business for certain firms. Under the section titled "Impact on Efficiency, Competition, and Capital Formation," the Commission notes, for example, that it

> does not have access to the type of detailed customer information of individual broker-dealers that would allow us to estimate the percentage of customers that might be confused as a result of the name change or what fraction of these customers might eventually be recovered by a [standalone] broker-dealer.[15]

As a result, the assumptions in the economic analysis are forced to rely on hypotheticals. A word count illustrates the tentative conclusions within this particular seven-page section. As a consequence, the analysis resorts to broad conjectural theses to illustrate potential outcomes, rather than offering hard numbers. Some of the narrative, for example, frequently repeats the word "may," an auxiliary verb that, according to *Merriam-Webster,*[16] suggests a possibility or probability. "May" is repeated 20 times in this particular section. Similarly, the adjective "potential," which is defined in *Merriam*[17] as "existing in possibility," and along with "potentially," is used 18 times to modify other scenarios or conclusions.[18]

We make this point only to suggest that the Commission must make a compelling argument that its regulatory solution is consistent with *Ibanez*, one that "directly and materially advances a substantial [governmental] interest in a manner no more extensive than necessary to serve that interest." Given its inability to provide more concrete projections of costs or benefits affecting all interested parties, we do not believe the Titles Restrictions proposal meets this important First Amendment test.

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[13] *Id.* at 235-236.

[14] *Id.* at 311.

[15] *Id.* footnote 688, at 324.

[16] *Merriam-Webster*, available at https://www.merriam-webster.com/dictionary/may.

[17] *Id.*, available at https://www.merriam-webster.com/dictionary/potential.

[18] Form CRS, sec. IV.B.3., "Impact on Efficiency, Competition, and Capital Formation," at 329-337.

Other disclosures in the regulatory package provide enhanced protection for retail investors seeking to hire the appropriate financial intermediary that best meets their needs. Form CRS requires a summary description detailing the difference in business models between standalone broker-dealers, dual registrants, and RIAs. Another requirement separately requires disclosure of the firm's registration status with the Commission and its affiliated agent's relationship with the firm.

In addition, Regulation Best Interest ("Reg BI") imposes new disclosures on broker-dealers, requiring the disclosure of material facts in connection with the scope and terms of the customer relationship, and all material conflicts of interest associated with a broker's investment recommendation, offering a panoply of consumer protections that previously would have required extensive research by the individual investor. If the Commission does move forward with this approach, we believe that, at a minimum, it should allow the use of registered marks on business cards indicating educational attainment.

In summary, other aspects of the Commission's rules package should greatly assist retail investors in understanding critical differences in business models that offer retail investment advice.

Please contact the undersigned at [redacted] if you have any questions or comments.

Sincerely,

Sean R. Walters, CAE®
Executive Director and Chief Executive Officer
Investments & Wealth Institute®

cc: The Honorable Jay Clayton, Chairman
The Honorable Kara M. Stein, Commissioner
The Honorable Robert J. Jackson, Jr., Commissioner
The Honorable Hester M. Pierce, Commissioner
Dalia Blass, Director, Division of Investment Management
Brett Redfearn, Director, Division of Trading and Markets