

PICKARD DJINIS AND PISARRI LLP

ATTORNEYS AT LAW

1990 M STREET, N.W., SUITE 660

WASHINGTON, D.C. 20036

WWW.PICKDJIN.COM

TELEPHONE
(202) 223-4418

FACSIMILE
(202) 331-3813

August 14, 2018

Filed Electronically

Mr. Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549

Re: *Regulation Best Interest, File No. S7-07-18; and*

Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, File No. S7-08-18

Dear Mr. Fields:

Pickard Djinis and Pisarri LLP¹ is pleased to submit these comments in response to the above-referenced proposals regarding registered investment advisers and broker-dealers (collectively, the "IA/BD Proposals"). The first proposal (the "Reg. BI Proposal") would impose a new standard of conduct on broker-dealers when they provide investment advice to retail investors.² The second proposal (the "Form CRS Proposal") would require broker-dealers, investment advisers and dual registrants to deliver new relationship summaries ("Form CRS") to retail clients, which would entail changes to advisers' Form ADV and the delivery obligations relating thereto. This proposal would also address other regulatory disclosures and would forbid persons from calling themselves "advisers" or "advisors" without being subject to the Investment Advisers Act of 1940 ("Advisers Act") and related rules.³ These two releases, along with a third release on investment adviser standards of conduct, and possible further regulation,⁴ are

¹ Pickard Djinis and Pisarri LLP is a law firm specializing in securities regulation relating to investment advisers, broker-dealers and service providers thereto. Our investment adviser client base ranges from federally registered firms with billions of dollars of assets under management to state-regulated solo practitioners. This letter reflects the views of a number of our federally regulated adviser clients.

² *Regulation Best Interest*, Exchange Act Release No. 83062 (April 18, 2018), available at <https://www.sec.gov/rules/proposed/2018/34-83062.pdf>.

³ *Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles*, Advisers Act Release No. 4888 (April 18, 2018), available at <https://www.sec.gov/rules/proposed/2018/34-83063.pdf>.

⁴ *Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation*, Advisers Act Release No. 4889 (April 18, 2018),

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designed to address long-standing concerns about the blurring of the traditional line between investment advisers and broker-dealers who provide investment advice to retail investors, and the resulting investor confusion. We commend the Commission's efforts to address this thorny issue in a comprehensive manner.

Executive Summary

Regulation Best Interest

We generally endorse the proposal to strengthen the standard of conduct for broker-dealers and to require these financial professionals to provide advice that is in retail investors' best interests. However, we are concerned that this standard is not sufficiently clear. Although the Commission advises that broker-dealers will not be held to the same fiduciary standards that apply to investment advisers, proposed Regulation Best Interest ("Reg BI") and the Proposed IA Interpretation use the same terminology, which perpetuates, rather than eliminates, confusion. We are also concerned that it is not sufficiently clear when the "best interest" standard applies. Because the genesis of this regulatory endeavor is confusion about the parameters of the broker-dealer exception under the Advisers Act, we strongly urge the Commission to tackle that issue first. Then Reg BI can be applied to "solely incidental" investment advice, while anything more is subject to the full fiduciary standard of conduct under the Advisers Act.

Form CRS

While we acknowledge the need to disclose important relationship information to retail investors, we cannot support the Form CRS Proposal as it now stands. Investment advisers are already required to make full disclosure of the services they provide, the fees they charge, and the conflicts of interest they have and how they manage them. The Commission has spent years refining the Form ADV disclosure brochure to ensure that it is clear, concise and written in a way that clients can understand. The CRS Proposal does not identify deficiencies with Form ADV or offer any justification for adding another layer of disclosure on top of it. In addition to being concerned that the content of Form CRS could confuse investors who also receive a Form ADV brochure, we are concerned that the asynchrony between the respective delivery requirements for Form CRS and the ADV brochure will confuse clients and create substantial administrative burdens for advisers. As an alternative, we recommend that the Commission consider a minor addition to Part 2A of Form ADV that would direct retail advisory clients to the SEC's website for more information about the kinds of investment advice available from broker-dealers and the standards of conduct that apply thereto.

available at <https://www.sec.gov/rules/proposed/2018/ia-4889.pdf> ("Proposed IA Interpretation"). Pickard Djinis and Pisarri LLP previously submitted a comment letter on this proposal. Letter from Mari-Anne Pisarri, Pickard Djinis and Pisarri LLP to Brent J. Fields, Secretary, SEC re: Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation (August 7, 2018).

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On the broker-dealer side, we believe proposed Form CRS does not effectively convey the incidental nature of the investment advice rendered, uses confusing language and is not optimally structured for its intended audience. We generally endorse the suggested improvements to the Form offered by the Investment Adviser Association ("IAA").⁵

Restrictions on the Use of Certain Names and Titles and Disclosure of Regulatory Status

We support the proposed restrictions on broker-dealers' use of the terms "adviser" and "advisor," but share the concerns expressed by other commenters that this may not go far enough to eliminate investor confusion. We are agnostic on the proposed required disclosures of regulatory status, but identify some issues that should be addressed before such a requirement is finalized.

Background

The regulatory regimes for broker-dealers and investment advisers developed at a time when the roles of these financial service providers were more distinct than they are today. As a general matter, the former sold securities, while the latter were "counselors," dispensing investment advice on a discretionary or nondiscretionary basis. As a result, the regulation of brokers under the Securities Exchange Act of 1934 ("Exchange Act") and self-regulatory organization ("SRO") requirements is transaction-focused and rules-based in accordance with just and equitable principles of trade, while the Advisers Act creates a principles-based, fiduciary regime derived from the common law of agency.

However, the distinction between advisers and brokers has never been absolute. Recognizing that the sale of securities often entails an element of advice, Congress carved a limited broker-dealer exception out of the definition of "investment adviser" in the Advisers Act. This exception (codified in Section 202(a)(11)(C)) covers any broker-dealer whose investment advice is "solely incidental" to its business as a broker or dealer and who receives no "special compensation" for that advice.

Over the years, the line between brokerage services and advisory services blurred, to the point where broker-dealer representatives began holding themselves out as "financial advisors." The introduction in the late 1990s of fee-only brokerage accounts -- which were thought to better align brokers' and customers' interests than commission accounts do -- further weakened the distinction between advisers and brokers. A protracted battle over the proper way to regulate broker-dealer investment advice ensued, with confused investors watching from the sidelines.

⁵ Letter from Karen L. Barr, President and CEO, Investment Adviser Association, to Brent J. Fields, Secretary, SEC re: *Reg BI Proposing Release, Form CRS Proposing Release, and Proposed Interpretation* (August 6, 2018) ("IAA Letter"), at 12-29, available at <https://www.sec.gov/comments/s7-07-18/s70718-4171283-172164.pdf>.

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Although the Commission has tried for years to resolve this debate,⁶ the confusion persists. We applaud the Commission's current initiative, and suggest that the first step to a successful conclusion should be to define "solely incidental" investment advice once and for all.

Solely Incidental Investment Advice

In 2005, the SEC adopted Rule 202(a)(11)-1, whose principal purpose was to allow broker-dealers to treat customers of asset-based or fixed-fee brokerage services as brokerage clients and not advisory clients so long as any investment advice rendered to such clients was "solely incidental" to the brokerage services provided to them and so long as the broker-dealer made certain disclosures regarding the nature of the client account.⁷ Discretionary advisory services, services provided for a separate fee or pursuant to a separate contract and certain financial planning services were not deemed to be solely incidental advice under the rule.

In 2007, the U.S. Court of Appeals for the D.C. Circuit vacated Rule 202(a)(11)-1 on the grounds that the SEC had exceeded its authority in excluding brokers offering fee-based brokerage accounts from the definition of investment adviser.⁸ In the wake of this ruling, the Commission proposed a new interpretive rule (also called 202(a)(11)-1) to salvage parts of the original rule that were swept away by the Court's action but not expressly invalidated.⁹ The proposed interpretive rule has neither been adopted nor withdrawn.

The Reg BI Proposal revisits this history, concentrating on the treatment of discretionary brokerage accounts, which the Commission has found to have a "quintessentially supervisory or managerial character . . . [that] warrants the protection of the Advisers Act and its attendant fiduciary duty" - at least where such discretion is exercised on more than a temporary or limited basis.¹⁰ The Commission asks for comment about whether a broker-dealer's exercise of

⁶ See generally Reg BI Proposal at Part I.A.

⁷ *Certain Broker-Dealers Deemed Not To Be Investment Advisers*, Advisers Act Release No. 2376 (April 12, 2005), available at <https://www.sec.gov/rules/final/34-51523.pdf> ("2005 Broker-Dealer Exception").

⁸ *Financial Planning Association v. SEC*, 482 F.3d 481 (D.C. Cir. 2007).

⁹ *Interpretive Rule Under the Advisers Act Affecting Broker-Dealers*, Advisers Act Release No. 2652, (September 24, 2007), available at <https://www.sec.gov/rules/proposed/2007/ia-2652.pdf> ("2007 Proposed Broker-Dealer Exception").

¹⁰ Reg BI Proposal at 202. Temporary or limited discretion might include discretion (i) as to the price or time at which to execute a customer order for the purchase or sale of a definite amount or quantity of a specific security; (ii) on an isolated or infrequent basis, to buy or sell a security or type of security when a customer is unavailable for a limited period of time; (iii) as to cash management, such as to exchange a position in a money market fund for another money market fund or cash equivalent; (iv) to buy or sell securities to satisfy margin requirements; (v) to sell specific bonds and buy similar bonds in order to permit a customer to take a tax loss; (vi) to buy a bond with a specified credit rating and maturity; and (vii) to buy or sell a security or type of security limited by specific parameters established by the customer. *Id.* at note 356; see also Proposed 2007 Broker-Dealer Exception at note 13.

investment discretion should qualify for the broker-dealer exception under the Advisers Act, but does not address the full range of "quintessentially supervisory or managerial" activities that could also cross the "solely incidental" border.¹¹

In view of the fact that the impetus for the IA/BD Proposals is investor confusion arising from a lack of clarity regarding which financial services are governed under the Advisers Act and which are governed under the broker-dealer regime, we believe the wisest course would be to promulgate a new rule defining what "solely incidental" advice means for purposes of Advisers Act Section 202(a)(11)(C).

To start, we agree that rendering discretionary advice involves the type of ongoing managerial conduct that should be governed under the fiduciary Advisers Act regime. While we acknowledge that the temporary or limited exercise of discretion might be appropriately regulated under a transaction-focused regime, this exception should not be allowed to swallow the whole rule. We believe the Commission's prior suggestion as to what constitutes temporary or limited discretion is a good starting point for eliciting further public comment.

In addition to excluding discretionary advice, we submit that "solely incidental" advice should also exclude the kind of nondiscretionary, continuous and regular supervisory or management services that would cause a client's account to be included in an investment adviser's regulatory assets under management.¹² We also believe, in accordance with the Commission's long-standing interpretation, that solely incidental advice should not include portfolio manager selection and asset allocation services that broker-dealers typically provide in connection with wrap fee programs.¹³

Finally, we submit that a broker-dealer who holds itself out as providing financial planning services should not be able to call those services solely incidental investment advice. The Commission endorsed this view when it adopted Rule 202(a)(11)-1 in 2005, saying:

We do not believe that financial planning, as it is understood today, necessarily follows as a consequence of rendering brokerage services. Instead, it is a relatively new service that many brokers provide in a manner essentially independent of their brokerage services.¹⁴

¹¹ Reg. BI Proposal at 206 *et seq.*

¹² See Form ADV Instructions for Part 1A, Item 5.b. In calculating their regulatory assets under management, registered investment advisers are instructed to include both assets as to which they exercise investment discretion, and non-discretionary assets as to which they have ongoing responsibility to select or make recommendations, based on the needs of the client, as to specific securities or other investments the account may buy or sell, coupled with a responsibility to arrange or effect the purchase or sale if the client accepts such recommendations.

¹³ See 2005 Broker-Dealer Exception at text accompanying note 184.

¹⁴ *Id.* at 56.

However, because elements of financial planning are integral to the satisfaction of the broker's suitability obligations, the Commission took a nuanced approach and determined

to rely primarily on how a broker-dealer holds itself out to the public and its customers in distinguishing the advice provided in connection with financial planning from other types of investment advice, such as transaction-specific advice, which may be solely incidental to brokerage.¹⁵

As such, the rule excluded from the broker-dealer exception any broker dealer that:

Provides advice as part of a financial plan or in connection with providing financial planning services and:

- (i) Holds itself out generally to the public as a financial planner or as providing financial planning services;
- (ii) Delivers a financial plan to the customer; or
- (iii) Represents to the customer that the advice is provided as part of a financial plan or in connection with financial planning services.¹⁶

Attached to this comment letter as Appendix A is a suggested discussion draft of a new version of Rule 202(a)(11)-1. We believe this approach respects the important ancillary advisory services investors receive from broker-dealers,¹⁷ while safeguarding the fiduciary needs of investors who receive ongoing investment supervisory or management services.

Proposed Regulation Best Interest

Designed to "enhance the quality of recommendations provided" and "align broker-dealers' obligations more closely with retail customers' reasonable expectations,"¹⁸ proposed Reg BI establishes a standard of conduct that would apply whenever a broker-dealer (including an associated person thereof) recommends a securities transaction or investment strategy involving securities to a retail customer. The new standard would oblige the broker-dealer to act in the retail customer's "best interest" at the time the recommendation is made, without placing the broker-dealer's financial or other interest ahead of the retail customer's interest. This standard,

¹⁵ *Id.* at text accompanying note 157 (footnote omitted).

¹⁶ Rule 202(a)(11)-1(b)(2).

¹⁷ The Commission has described these services as including transaction-specific buy/sell recommendations; asset allocation advice with recommendations about asset classes, specific sectors or specific securities; and generalized research, advice and education. Reg BI Proposal at note 1.

¹⁸ *Id.* at 45.

which would be codified as Exchange Act Rule 15f-1, is comprised of a disclosure component, a care component and a conflict of interest component.

In crafting this proposal, the Commission rejected the recommendation of a uniform fiduciary standard for both broker-dealers and investment advisers made in the post-Dodd Frank 913 Study.¹⁹ Instead, the Commission proposes a standard that reportedly is higher than the current suitability standard under the Exchange Act, but lower than the fiduciary standard that applies to investment advisers. This compromise is designed to protect retail investors while preserving investor choice.

These are laudable goals, and we generally endorse the Commission's efforts to strengthen the broker-dealer standard of conduct. However, the practical effect of the proposed best-interest standard is hard to divine. The Commission notes that some of the enhancements Reg BI would make to existing Exchange Act requirements "reflect obligations that already exist under the FINRA suitability rule or have been articulated in related FINRA interpretations and case law."²⁰ In such cases, it does not appear that the new standard would confer any new net protections on investors. Furthermore, while the new standard for broker-dealers would be "separate and distinct from the fiduciary duty that has developed under the Advisers Act,"²¹ Reg BI uses much of the same terminology that is found in the Proposed IA Interpretation.

For example, Reg BI's requirement that a broker "act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker . . . ahead of the interest of the retail customer"²² sounds a lot like the adviser's duty "at all times, [to] serve the best interest of its clients and not subordinate its clients' interest to its own."²³ The broker's obligation to disclose to the retail investor "the material facts relating to the scope and terms of the relationship with the retail customer, including all material conflicts of interest that are associated with the recommendation"²⁴ sounds like the adviser's duty to "make full and fair disclosure to its clients of all material facts relating to the advisory relationship," including "full and fair disclosure of all material conflicts of interest that could affect the advisory relationship."²⁵ And the broker's obligation to adopt "written policies and procedures reasonably

¹⁹ *Id.* at 62 *et seq.* *Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

²⁰ Reg BI Proposal at note 7.

²¹ *Id.* at 43.

²² Proposed Rule 15f-1(a)(1).

²³ Proposed IA Interpretation at 7.

²⁴ Proposed Rule 15f-1(a)(2)(i).

²⁵ Proposed IA Interpretation at 15-16.

designed to identify and at a minimum, disclose or eliminate, all material conflicts of interest associated with" a recommendation²⁶ seems to mirror the adviser's obligation to "seek to avoid conflicts of interest with its clients, and, at a minimum, make full and fair disclosure to its clients of all material conflicts of interest that could affect the advisory relationship," coupled with the adviser's duty to adopt written compliance procedures designed to address those conflicts.²⁷ In other places, the Commission acknowledges that Reg BI resembles aspects of fiduciary duty that have been imposed on broker-dealers in the past.²⁸

We appreciate the difficulty of devising a workable standard of conduct for brokers-dealer when they provide investment advice to retail investors. We respectfully suggest, however, that instead of trying to distinguish the nature of the obligations imposed on broker-dealers from the nature of the fiduciary obligations imposed on investment advisers, the Commission should acknowledge that the obligations are the same in substance, but different in scope. An adviser's fiduciary duty extends over the course of the relationship (as that may be defined by contract),²⁹ while the broker's obligation is episodic, arising only in connection with specific recommendations. However, on this point, we share the concerns expressed in the IAA Letter³⁰ to the effect that the scope of a broker-dealer's obligations under Reg BI must be sufficiently broad to avoid any gaps in investor protection.

Although the Commission opines that the determination of whether a recommendation has been made to a retail investor should be made in a manner consistent with existing broker-dealer regulation,³¹ we urge the Commission to define "recommendation" under Reg BI to include all forms of advice that qualify as "solely incidental" for purposes of Section 202(a)(11)(C) of the Advisers Act.³² Anything beyond incidental advice (including supervisory or management services, such as ongoing portfolio monitoring) should be subject to the fiduciary standard of conduct under the Advisers Act.

²⁶ Proposed Rule 15c-1(a)(2)(iii).

²⁷ Proposed IA Interpretation at 17 (footnote omitted); Advisers Act Rule 206(4)-7.

²⁸ Reg BI Proposal at note 173 (proposed obligation to disclose material conflicts of interest would resemble duty to disclose imposed on broker-dealers found to be acting in a fiduciary capacity); and note 222 (proposed duty to exercise reasonable diligence, care, skill and prudence designed to be similar to standard of conduct imposed on broker-dealers found to be acting in a fiduciary capacity).

²⁹ Proposed IA Interpretation at 14-15.

³⁰ IAA Letter, *supra* note 5 at 8-10.

³¹ Reg BI Proposal at 73-74.

³² We acknowledge that an exception may be appropriate for general investor education, or limited investment analysis tools such as a retirement savings calculator.

Additional Comments on Reg BI

- We recommend that the proposed care obligation be streamlined by combining Rule 15c-1(a)(2)(ii)(A) and (B) into a new paragraph (A), and that the current paragraph (C) be redesignated as (B). The new paragraph (A) would read as follows:

Understand the potential risks and rewards associated with the recommendation, and have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on the potential risks and rewards associated with the recommendation and the retail customer's investment profile.

Although we acknowledge that the Commission's proposed language is intended to incorporate existing broker-dealer suitability requirements,³³ we believe that a duty to understand the risks and rewards associated with a recommendation and have a reasonable basis to believe it is in the best interest of the retail customer in question is the most straightforward way to articulate those requirements. Believing that a recommendation is in the best interest of "at least some retail customers" adds nothing of substance to the rule.

- We support the Commission's use of the phrase "without placing the financial or other interest . . . ahead of the interest of the retail customer" in lieu of the Dodd-Frank phrase "without regard to the financial or other interest."³⁴ We believe the "without regard to" standard would be too hard to implement in practice.

- We recommend two changes to the definition of retail customer. First, because the actual use of investment advice is not within the broker's control, we suggest that *retail customer* should be defined as:

a person, or the legal representative of such person, whom the broker, dealer, or a natural person who is an associated person of a broker or dealer reasonably believes will use the recommendation primarily for personal, family, or household purposes.

Second, we urge the Commission to clarify that the phrase "legal representative of such person" applies only to an individual representative acting primarily for personal, family or household purposes. "Legal representative" should not include a registered investment adviser, bank or other financial service professional who may communicate with the broker-dealer on the investor's behalf.³⁵

³³ Reg BI Proposal at note 229 and accompanying text.

³⁴ *Id.* at 47-50.

³⁵ See Letter from Paul Schott Stevens, President and CEO, Investment Company Institute to Brent J. Fields, Secretary, SEC (August 7, 2018) ("ICI Letter") at 24-25; IAA Letter at note 50.

- We endorse the views expressed in the ICI Letter regarding the definition and treatment of "material conflicts of interest."³⁶

Form CRS

The Commission proposes to impose parallel disclosure requirements on firms regulated under the Advisers Act and Exchange Act. In this regard, the Commission plans to require investment advisers, broker-dealers and dual registrants to deliver a customer or client relationship summary on Form CRS to each retail investor at the outset of the relationship and periodically thereafter.

Form CRS would have a tightly prescribed content, starting with a boilerplate introduction and followed by sections describing (i) the IA's, BD's or dual registrant's services; (ii) the standard of conduct applicable to those services; (iii) the fees and costs for those services; (iv) comparisons of brokerage and investment advisory services (for stand-alone firms); (v) conflicts of interest; (vi) where to find additional information, including disciplinary information about the service provider; and (vii) a list of questions the retail customer should ask the service provider.

We have serious concerns about Form CRS as proposed.

On the adviser side, we strongly object to adding a new Form ADV, Part 3 to the robust disclosures advisers already provide to their clients. We believe the new form could confuse clients and divert their attention away from the more meaningful disclosures advisers make in their Form ADV brochures and brochure supplements. We are also concerned that the inconsistent delivery requirements for Form CRS/ADV 3 (as dictated by proposed Advisers Act Rule 204-5) and the ADV brochure (as dictated by Rule 204-3) would confuse clients and impose substantial administrative burdens on advisers.

We recognize the need for broker-dealers (stand-alones and dual-registrants) to provide enhanced disclosure to retail investors with regard to the incidental investment advice they provide, and we endorse a relatively short, plain-English document for this purpose. However, we do not believe proposed Form CRS would accomplish its goal for the reasons discussed below.

Investment Adviser Disclosures

As it stands today, investment advisers are required to make a full range of disclosures to their clients. These cover the nature of the services offered, the fees charged, the other types of costs clients will incur in connection with their investments, and other important information about the advisory services in question. As fiduciaries, investment advisers also are obliged to fully and fairly disclose their relevant business affiliations, material conflicts of interest and disciplinary histories. This disclosure is supplemented by mandatory disclosure of biographical information about certain of their advisory personnel, and their privacy policies.

³⁶ ICI Letter at 18-23.

The Commission has taken great pains over the years to ensure that investment adviser disclosures are delivered in a way that clients are likely to read and understand. To this end, in 2010 the Commission transformed a check-the-box advisory disclosure form into a user-friendly brochure with 18 disclosure items.³⁷ In so doing, the Commission instructed that

[I]t is critical that advisers communicate clearly to their clients and prospective clients in the brochure. Thus, instructions to Part 2 provide that, in drafting the brochure, advisers, among other things, should use short sentences; definite, concrete, everyday words; and the active voice. In addition, the brochure should discuss only conflicts the adviser has or is reasonably likely to have, and practices in which it engages . . . or is reasonably likely to engage.³⁸

An adviser who provides substantially different services to different clients can produce customized brochures that omit information that does not apply to the services provided or fees charged to clients receiving those brochures.³⁹ This permits advisers to tailor their brochures to the intended audience, including the unsophisticated retail investor.

In addition to encouraging disclosure that is "succinct and readable,"⁴⁰ the Commission also devised a format for the brochure that enables investors to comparison shop for advisory services. To this end, Part 2A of Form ADV prescribes a uniform format; advisers must present information in the order of the items in the form, using headings prescribed by the form.⁴¹ In addition, each brochure must include a table of contents detailed enough to permit clients and prospective clients to locate topics easily.⁴² Investors' ability to compare services, fees, conflicts of interest and disciplinary histories across investment advisers is further enhanced by the brochures' availability in the Investment Adviser Public Disclosure database, which can be accessed through the SEC's investor.gov website.

³⁷ *Amendments to Form ADV*, Advisers Act Release No. 3060 (July 28, 2010) ("2010 Form ADV Release"), available at <https://www.sec.gov/rules/final/2010/ia-3060.pdf>. The adviser's disclosure brochure is designated as Part 2A of Form ADV.

³⁸ *Id.* at 8 (footnote omitted).

³⁹ Advisers Act Rule 204-3(e).

⁴⁰ 2010 Form ADV Release at 10.

⁴¹ *Id.* at 13 (footnote omitted).

⁴² *Id.* at 12. Material updates to the disclosure brochure are also designed to be user-friendly. Here, the Commission prescribed an annual summary containing "no more than necessary to inform clients of the substance of the changes to the adviser's policies, practices or conflicts of interest so that they can determine whether to review the brochure in its entirety or to contact the adviser with questions about the changes." *Id.*

The Form CRS Proposal does not identify any flaws in this established disclosure regime. Although the Proposal talks about a "layered approach to disclosure,"⁴³ it does not explain why the concise ADV brochure needs another layer of disclosure. While the benefits of adding a new Part 3 to Form ADV are hard to imagine, the risks are not. The first risk is that Form CRS will cause clients to become *less* informed than they are today. This could occur if clients use the four-page, mostly boilerplate, Form CRS as a substitute for the customized ADV brochures and brochure supplements. Over 40 percent (by word count) of Form CRS is devoted to the IA/BD comparison, suggested questions and references to other sources of information, leaving very little room for information of substance about the adviser or the services it offers.

Furthermore, some of the Form CRS boilerplate is likely to confuse clients. It is unlikely that retail investors would understand what a "fiduciary duty" is, or how that compares to a broker-dealer's duty to act in their "best interest." They might be perplexed about the statement that the adviser has an incentive to increase the assets in their account in order to increase the adviser's fees, since the whole point of engaging an investment adviser is to make their assets grow. They also might wonder why so much of the adviser's disclosure seems designed to direct them to a completely different type of financial professional, who can provide only incidental advice.⁴⁴

The proposed delivery requirements for Form CRS are problematic as well. Instead of incorporating this part of the ADV into Advisers Act Rule 204-3, which governs the delivery of the other parts of the form (*i.e.*, the brochures and brochure supplements), the Commission proposes to adopt a dedicated delivery rule for Part 3, identified as Rule 204-5. Although these rules would require an adviser to deliver the initial brochure, brochure supplement and Form CRS to a retail investor at or before the time the adviser enters into an investment advisory contract with that client, the rules diverge with regard to ongoing delivery requirements. An adviser whose brochure has materially changed since its last annual update must provide existing clients with either a new annual update or just a summary of material changes and an offer to supply the complete update upon request. Advisers whose brochures have not materially changed in the past year have no delivery requirements at all. Interim brochure amendments (*i.e.*, other-than-annual amendments) need not be provided to clients unless the amendments add or materially revise information about a disciplinary matter.⁴⁵

By contrast, even if a Form CRS does not change at all, proposed Rule 204-5 would require an adviser to give an existing client another copy of the form every time the client opens

⁴³ See, *e.g.*, Form CRS Proposal at 20.

⁴⁴ The Instructions to Form CRS are likely to confuse investment advisers as well. For example, Proposed Item 4.C.4. of the form speaks in terms of the kinds of investments that an adviser offers (*e.g.*, "you only offer mutual funds or other investments sponsored or managed by you or an affiliate" or "you only offer a small number of investments"). See *also* Form CRS Proposal at 72 ("investment advisers would be required to . . . provide examples of . . . investments that the firm offers to retail investors"). Investment advisers do not offer investments; they offer investment *advice*.

⁴⁵ In that case, the adviser must deliver a statement describing the material facts relating to the change or such a statement and the amended brochure itself.

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an additional advisory account or makes changes to an existing account that "would materially change the nature and scope of the relationship with the retail investor," including a recommendation to move assets from one type of account to another in a transaction not in the normal, customary or already agreed course of dealing.⁴⁶ The Commission opines that this could include asset transfers due to IRA rollovers, deposits or the investment of monies based on infrequent events or unusual size such as an inheritance or receipt from a property sale, or a significant migration of funds from savings to an investment account.⁴⁷ In addition, *all* changes to Form CRS must be communicated to clients within 30 days after they are made. The Commission does not identify any justification for this deviation from the existing disclosure schedule. Requiring investment advisers to supply a new CRS on a transactional basis seems at odds with the principle that an adviser's fiduciary duty extends for the duration of its relationship with a client.⁴⁸

The disharmony between the existing ADV brochure delivery requirements and the proposed requirements under Rule 204-5 are likely to confuse clients and would impose unjustifiable administrative burdens on advisers, the majority of whom are small businesses.⁴⁹

For all of these reasons, we respectfully urge the Commission to eliminate the proposed Form CRS requirements for investment advisers. If the Commission wants to ensure that advisers' retail clients understand that they can obtain episodic investment advice from broker-dealers in connection with buying and selling securities, there is a better way to accomplish this.

In lieu of a Form CRS for investment advisers, we endorse the IAA's suggestion that the Commission should provide balanced and accurate comparative information about different types of financial professionals on its investor.gov website.⁵⁰ The cover page of any ADV brochure addressed to retail clients could direct those clients to the SEC's educational materials if the existing mandatory legend were amended to read as follows:

⁴⁶ Proposed Rule 204-5(b)(2)(ii).

⁴⁷ Form CRS Proposal at 140-141.

⁴⁸ Indeed, receiving a suggestion to "carefully consider" whether to keep doing business with one's investment adviser in the midst of a long-standing fiduciary relationship, could be jarring for a customer.

⁴⁹ In 2017, 56.8 percent of federally registered investment advisers reported that they had ten or fewer non-clerical employees. See *2017 Evolution Revolution: A Profile of the Investment Adviser Profession by IAA and NRS* at 6, available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/Evolution_Revolution_2017.pdf.

We ask the Commission to be mindful of the fact that Form ADV has been substantively amended three times in the past eight years, and that each amendment imposes new compliance costs on advisers.

⁵⁰ IAA Letter, *supra* note 5 at 17 *et seq.*

Information about [adviser's name] is also available on the SEC's website at www.adviserinfo.sec.gov. In addition, you can visit www.investor.gov for information about obtaining certain types of investment advice from other kinds of financial professionals.

Broker-Dealer Disclosure

Although we endorse the concept of a relationship summary disclosure requirement for stand-alone broker-dealers and dual registrants with regard to their brokerage services, we do not think Form CRS as proposed does what it is intended to do. In this regard, the form leaves the impression that providing investment advice for transaction-based fees is the core function of a broker-dealer. The form does not effectively convey the fact that a broker-dealer's primary function is to buy and sell securities, and that when it recommends specific transactions or investment strategies it does so solely in connection with that function.

Furthermore, we agree with the views expressed by other commenters to the effect that stand-alone brokers, like stand-alone advisers, should not be required to compare themselves to firms offering different services and operating under different business models.⁵¹ Nor should brokers be charged with calculating the annual cost of a "typical" brokerage account, especially when that cost could include highly variable fees for mutual funds and annuities.⁵² The best-faith effort by the most knowledgeable broker could still be wildly off the mark, thus doing more harm than good to the investor.

Additional Comments

○ We believe that a "retail investor," for Form CRS purposes, should be redefined to mean a natural person other than a qualified client as described in Advisers Act Rule 205-3(d)(1). While we do not object to including a trust or similar entity that represents such a natural person, we believe that trusts or similar entities with professional trustees or managing agents such as banks, broker-dealers, investment advisers and the like, should be excluded from the definition.

○ Because the Commission's whole regulatory initiative is designed to address investor confusion regarding the receipt of investment advice from broker-dealers, we do not see a need to require execution-only broker-dealers to deliver relationship summaries to their clients. Nor do we think broker-dealers should be obliged to deliver relationship summaries where the retail investor's brokerage account is managed by a registered investment adviser.

⁵¹ See, e.g., *id.* at 16.

⁵² ICI Letter, *supra* note 35 at 8-10.

- We endorse the IAA’s specific recommendations to redesign the relationship summaries for stand-alone brokers, dual registrants, and – if the Commission determines to mandate them – investment advisers, subject to the results of investor testing.⁵³
- We urge the Commission to update existing guidance on the use of electronic methods to deliver regulatory disclosures.⁵⁴ We endorse a “notice and access equals delivery” approach like the one the Commission has taken in other contexts.⁵⁵
- When the time comes to finalize Form CRS and the other components of the IA/BD Proposals, we respectfully urge the Commission to ensure that the adopting releases are succinct and readable, so that both investors and financial professionals can easily understand the new requirements.

***Restrictions on the Use of Certain Names and Titles and
Disclosure of Regulatory Status***

In order to mitigate the risk of investor confusion, the Commission proposes to forbid broker-dealers and their personnel, in communications with retail investors, to refer to themselves, as “advisers” or “advisors” unless they are subject to the Advisers Act and related rules.⁵⁶ The Commission further proposes to require both broker-dealers and investment advisers to identify their registration status, and the personnel of such firms to disclose their affiliations in any written communications with retail investors.⁵⁷

We agree that use of the terms “advisor” or “adviser” may lead a retail investor to conclude that he or she is dealing with a registered investment adviser. However, other titles, such as “financial consultant” or “wealth manager,” could also leave the impression that the party using the title is offering an ongoing relationship of trust and confidence. The English language is broad

⁵³ IAA Letter at 24 *et seq.*

⁵⁴ See Form CRS Proposal at 146; *Use of Electronic Media for Delivery Purposes*, SEC Rel. No. 33-7233 (Oct. 6, 1995), available at <https://www.sec.gov/rules/interp/33-7233.txt>; *Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples Under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940*, SEC Rel. No. 33-7288 (May 9, 1996), available at <https://www.sec.gov/rules/interp/33-7288.txt>; *Use of Electronic Media*, SEC Rel. No. 33-7856 (Apr. 28, 2000), available at <https://www.sec.gov/rules/interp/34-42728.htm>.

⁵⁵ See, e.g., *Internet Availability of Proxy Materials*, SEC Rel. No. 34-55146 (Jan. 22, 2007), available at <https://www.sec.gov/rules/final/2007/34-55146.pdf>.

⁵⁶ Proposed Exchange Act Rule 15I-2; Form CRS Proposal at 171 *et seq.* Dual registrants would not be subject to these restrictions, nor would dual-hatted professionals who provide regulated investment advice to retail investors.

⁵⁷ Proposed Exchange Act Rule 15I-3 and proposed Advisers Act Rule 211h-1.

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and deep, and we are concerned that restricting the use of two misleading terms will just invite the use of others. We also believe that the context in which professional titles are communicated is important. Therefore, we endorse the views of expressed by the IAA and other commenters to the effect that, in addition to addressing misleading titles, the Commission should also address broker-dealer marketing practices that mislead or confuse retail investors.⁵⁸ We do not think that Reg BI or Form CRS as currently proposed is sufficient.

We are generally agnostic on the proposal to require registration status disclosure, although we find the format requirements to be too prescriptive. Furthermore, with regard to investment advisers, we suggest that before adopting a final rule, the Commission should determine whether the existing Form ADV brochure supplement adequately informs retail investors of the registration status of the advisory representatives they deal with, and if so, should modify the proposal accordingly. We also note that when it adopted the narrative Form ADV brochure, the Commission expressed concern that references to SEC registration could create a misimpression that registration “either carries some official imprimatur or indicates that the adviser has attained a particular level of skill or ability.”⁵⁹ For this reason, advisers who refer to themselves as registered investment advisers in their brochures must also “include a statement that registration does not imply a certain level of skill or training.”⁶⁰ Should the Commission determine to finalize proposed Rule 211h-1, we ask the Commission to confirm that a similar disclaimer need not accompany references to SEC registration mandated by the new rule.

* * * * *

We commend the Commission for tackling the difficult questions addressed in the IA/BD Proposals and we appreciate the opportunity to submit these comments. We would be happy to supply any additional information you may desire about the matters discussed above. Kindly contact the undersigned at 202.223.4418 for further assistance.

Respectfully submitted,


Mari-Anne Pisarri

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

⁵⁸ See IAA Letter at 32.

⁵⁹ 2010 Form ADV Release, *supra* note 37 at note 29.

⁶⁰ Form ADV, Part 2A, Item 1.C.

APPENDIX A

Suggested Interpretive Rule Under the Advisers Act Affecting Broker-Dealers

Rule 202(a)(11)-1 Certain broker-dealers.

(a) *Solely Incidental.* A broker or dealer registered with the Commission under section 15 of the Securities Exchange Act of 1934 [15 U.S.C. 78o] ("Exchange Act") will not be deemed to provide advice that is solely incidental to the conduct of its business as a broker or dealer within the meaning of section 202(a)(11)(C) of the Advisers Act if it

- (1) Exercises investment discretion, as that term is defined in paragraph (b) of this section, over any customer accounts;
- (2) Has ongoing responsibility to select or make recommendations, based on the needs of the client, as to specific securities or other investments the account may buy or sell and, if the client accepts such recommendations, is responsible for arranging or effecting the purchase or sale;
- (3) Provides portfolio manager selection and asset allocation services in connection with wrap fee programs; or
- (4) Provides advice as part of a financial plan or in connection with providing financial planning services and:
 - (i) Holds itself out generally to the public as a financial planner or as providing financial planning services;
 - (ii) Delivers a financial plan to a customer; or
 - (iii) Represents to the customer that the advice is provided as part of a financial plan or in connection with financial planning services.

(b) *Investment discretion.* For purposes of this section, the term *investment discretion* has the same meaning as given in section 3(a)(35) of the Exchange Act, except that it does not include investment discretion that a customer grants on a temporary or limited basis.