

December 13, 2018

VIA ELECTRONIC UPLOAD at www.sec.gov

Mr. Brent Fields
Securities and Exchange Commission
100 F Street, NW
Washington, DC 20549

RE: Comment on File Number S7-08-18

Dear Mr. Fields:

In response to the request by the Securities and Exchange Commission (“**Commission**”) for comments on three releases impacting investment advisers and broker-dealers (collectively, the “**Releases**”),¹ I previously wrote to express my view that rather than harmonizing the duties they owe, the Commission would be better served by focusing on *disharmonization* (“**Disharmonization Letter**”).² Although the deadline for submitting comments has passed, I respectfully request that the Commission consider the views expressed in this additional letter.

Retirement Plan Sponsors Need Clear, Simple, and Accessible Disclosures

In the Relationship Summary Release, the Commission asks if brokers and advisers should be required to deliver Form CRS to workplace retirement plans.³ As far as I am aware, only one commenter—Lexie S. Pankratz of Trailhead Consulting, LLC—directly answered the question, stating that individuals representing retirement plans should receive the disclosure proposed in Form CRS.⁴ The few other comments addressing the matter suggest that anyone with responsibility over a retirement plan has the specialized knowledge of a financial professional.⁵

¹ Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, 83 Fed. Reg. 21203 (May 9, 2018); Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles, 83 Fed. Reg. 21416 (May 9, 2018) (“**Relationship Summary Release**”); Regulation Best Interest, 83 Fed. Reg. 21574 (May 9, 2018).

² Letter from Ken Fisher, Executive Chairman, Fisher Investments (Jul. 31, 2018).

³ 83 Fed. Reg. 21416, 21422 (May 9, 2018).

⁴ Letter from Lexie S. Pankratz, Owner, Trailhead Consulting, LLC (Aug. 7, 2018).

⁵ Comments submitted by T. Rowe Price and Fidelity Investments state that communications with retirement plans and their sponsors should not be considered retail, implying that they have no need for the disclosures in proposed Form CRS, and comments submitted by Transamerica and The SPARK Institute ask the Commission to clarify that representatives of retirement plans

Their implied assertion is not true, and Ms. Pankratz should not have to stand alone on this important matter. Accordingly, I write again to emphasize that, like retail investors, retirement plan decision makers need clear, simple, and accessible disclosures.

According to data released by the Department of Labor, there are approximately 700,000 private retirement plans with more than 1 participant.⁶ Only a small proportion of employers sponsoring these plans have the resources to hire full-time financial professionals to manage their plans. The vast majority do not. For example, the Department of Labor reports only 13 percent of private retirement plans have 100 or more participants.⁷ Looking at similar data published by The SPARK Institute, of all plans with 100 or more participants, 82 percent have fewer than 500 participants and 91 percent have fewer than 1,000 participants.⁸ The fact that a few large plans may not need the additional disclosures proposed in Form CRS should not lead to the erroneous conclusion that the same is true for retirement plans in general.

Individuals making decisions for retirement plans are by and large not financial professionals, nor are they lawyers. They do not have the training or specialized knowledge that many within the financial services industry take for granted. They are business owners, managers, bookkeepers, or human resources employees. They are busy, hard working people running an organization. They have a job, and it encompasses far more than a retirement plan. A retirement plan and the nuances of the financial services industry are not—and should not ever—be their primary focus. It would be absurd to assume they fully understand the distinct roles and legal duties of a broker-dealer and investment adviser.

The many and varied responsibilities of retirement plan sponsors demand that any disclosure be clear, simple, and accessible. Even with existing retirement plan fee disclosure requirements, a survey by The Pew Charitable Trusts shows that fee disclosures are often still hard to find and

will not receive Form CRS, also implying that they have no need for the disclosures. Letter by Bob Grohowski, Senior Legal Counsel, and Jon Siegel, Senior Legal Counsel, T. Rowe Price (Aug. 10, 2018); Letter by Ram Subramaniam, Head of Brokerage and Investment Solutions, Fidelity Investments and David Forman, Chief Legal Officer, Fidelity Brokerage Services, LLC (Aug. 7, 2018); Letter by Dave Paulsen, Executive Vice President, Transamerica (Aug. 7, 2018); Letter by Tim Rouse, Executive Director, The SPARK Institute, Inc. (Aug. 7, 2018).

⁶ See Employee Benefits Security Administration, Private Pension Plan Bulletin Historical Tables and Graphs 1975-2015, Table E1 (February 2018), *available at* <https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf> (reporting 693,925 total plans, excluding plans with only 1 participant).

⁷ See *id.* at Tables E1 and E3 (reporting 693,925 total plans, excluding plans with only 1 participant, and 88,266 plans with 100 or more participants).

⁸ See 2016 Marketplace Update, The SPARK Institute, Inc. 8 (2016), *available at* (<http://www.sparkinstitute.org/marketplace-update.php>) (reporting 104,400 plans with 100 or more participants, with 85,500 of those having fewer than 500 participants and 94,900 having fewer than 1000 participants).

confusing for sponsors.⁹ A total of 34 percent of small to midsize business leaders reported being “not at all familiar” with the fees paid by their retirement plans. Only 19 percent reported being “very familiar” with their plan fees. As I explained in more detail in my Disharmonization Letter, disclosure with jargon or disclosure that obscures key concepts will serve no purpose, other than perhaps aiding brokers in their ongoing scam to make investors think brokers have duties equivalent to investment advisers. Form CRS, if adopted, must be a crisp document, enabling retirement plan investors to quickly digest the most critical concepts.

When investors do not understand who they are working with or what they are getting from financial services providers, they pay for it. They end up with investment products or services that do not meet their needs. I noted in my Disharmonization Letter that, of course, the salesperson’s needs are met. If they weren’t, they wouldn’t be selling. The same is true for products and services provided to retirement plans. If the decision makers do not understand, the participants pay for it. And the salesperson profits.

Useful, Purposeful Disclosure Must Supersede Uniformity

A handful of commenters call attention to the proposed definitions of “retail investor” in the Relationship Summary Release and “retail customer” in proposed Regulation Best Interest.¹⁰ They recommend harmonizing the definitions and excluding any “institutional investor” under FINRA Rule 2210. I understand and sympathize with their desire for uniformity. It makes implementation and compliance monitoring easier. Administrative convenience, however, must not overshadow the foundation on which U.S. securities laws are based—useful disclosure empowering informed investment decisions.

Linking the Form CRS delivery requirement to FINRA Rule 2210 in the manner suggested by the other commenters would result in Form CRS being delivered to retirement plans with fewer than 100 participants. Plans with 100 or more participants would not receive it. Based on my many years of providing investment advisory services, it is abundantly clear that many individuals overseeing retirement plans with 100 or more participants would benefit from a better understanding of the concepts in proposed Form CRS. A company having 100 participants in its retirement plan often does not have the resources to manage a retirement plan in the same way the very largest retirement plans would. All workplace retirement plans should

⁹ Many Small-Business Leaders Express Limited Knowledge of Retirement Plan Fees, John Scott and Sarah Spell (May 7, 2018), available at <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/05/07/many-small-business-leaders-express-limited-knowledge-of-retirement-plan-fees>.

¹⁰ Letter from Kenneth E. Bentsen, Jr., President and CEO, Securities Industry and Financial Markets Association (Aug. 7, 2018); Letter from Anne Tennant, Managing Director and General Counsel, Morgan Stanley Smith Barney LLC (Aug. 7, 2018); Letter from R. Scott Henderson, Bank of America (Aug. 7, 2018); Letter from Robert J. Moore, Chief Executive Officer, Cetera Financial Group, Inc. (Aug. 7, 2018); Letter from David Kowach, Head of Wells Fargo Advisors, Wells Fargo & Company (Aug. 7, 2018).

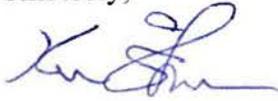
receive Form CRS. If there must be a threshold to exempt the largest plans, it ought to be much higher than 100 participants.

In my view, educating clients is a critical part of my responsibilities as an investment adviser. My firm goes to great lengths to teach our clients as much as possible. A client that understands our role and what we're doing is a better client.

I trust that a sincere desire to promote meaningful disclosure guides the Commission and its staff, but I write again today to urge the Commission to not allow calls for uniformity and administrative ease to supersede disclosure. Useful disclosure must be paramount, for retail investors and retirement plans alike.

Thank you for taking the time to consider my comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ken Fisher", written in a cursive style.

Ken Fisher