July 31, 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 Numbers S7-07-18, S7-08-18, and S7-09-18

Dear Mr. Fields:

This letter responds 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 appreciate this opportunity to share my perspective, gleaned from over 40 years in the industry, on two issues contained within the Releases. First, I share my views on how to improve the Commission's proposals relating to confusion about the differences between broker-dealers and investment advisers. Second, I give a more granular response to the Commission's request for comment on imposing new financial responsibilities on investment advisers.

While Well-Intentioned, True Harmonization Will Only Increase Investor Confusion—The Commission Would Be Better Served by Focusing on Disharmonization

Having worked in the industry longer than most, I remember a simpler world. Brokers, calling themselves stockbrokers or registered representatives, sold investment products for a commission. Investment advisers gave investment advice for a fee. People generally understood the differences. Over the last few decades, brokers have intentionally blurred these distinctions by calling themselves "advisors" and by offering more and more investment advice.[2] The result is investor confusion. As the Commission notes in the Releases, retail investors today do not understand who they are working with or what they are getting from financial services

[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) ("**Adviser Release**"); 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) ("**Best Interest Release**").

[2] These efforts culminated in 2005, when the Commission expressly permitted brokers to call themselves "advisors" and concluded that virtually all non-discretionary advice given by brokers is "solely incidental" to their brokerage activities. Certain Broker-Dealers Deemed Not To Be Investment Advisers, 74 Fed. Reg. 20424, 20431, 20434, 20437 (Apr. 19, 2005).

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providers.[3] Investors are prone to end up with a product or service that does not meet their needs. All too often, the salesperson gets the real benefit, as is the case when investors end up investing in high-fee proprietary funds or share classes, when other, cheaper options are available.

While it is important for brokers to operate under standards of conduct that protect investors, any further blurring, even if called "harmonization" or branded with another catchy slogan, will only magnify the problem. Instead, we need ***dis***harmonization. We need clear, bright, red lines so investors know exactly what they are getting.

Advisers versus Advisors

Language is a start. In particular, prohibiting brokers and their representatives from calling themselves "advisers" or "advisors" is a good first step. It does not, however, go far enough. The brokerage and advisory businesses need clear, separate words to describe them, as intended by the Securities Exchange Act of 1934, regulating brokers, and the Investment Advisers Act of 1940 ("**Advisers Act**"), regulating investment advisers. To begin with, the Commission ought to rule that only investment advisers not also registered as brokers are permitted to call themselves "advisers." Brokers should be required to call themselves "brokers." Insurance producers, financial planners, and anyone else who may want to give investment advice, should likewise be prohibited from referring to themselves as "advisers." The word "advisor" should be banned entirely. Requiring actors within the financial services industry to accurately describe their role is common sense and good public policy.

Disclosure

I support the Commission's effort to improve disclosure to investors. Disclosure is good, especially if simple and clear. One fundamental weakness with proposed Form CRS, however, is that it fails to communicate that the fiduciary standard under the Advisers Act is a higher standard. If the proposed From CRS is adopted, a broker's Form CRS will say "We must act in your best interest and not place our interests ahead of yours . . . . When we provide any service to you, we must treat you fairly and comply with a number of specific obligations,"[4] and an adviser's Form CRS will simply say "We are held to a fiduciary standard . . . ."[5] Only an industry insider would know that the fiduciary standard is higher and more comprehensive, including a duty of loyalty to the client and a duty of care. Acting in a client's best interests is just one aspect of these duties. For a fair comparison, it needs to be clear that the fiduciary standard is higher and the broker's standard, whatever that may end up being, is lesser. Any list of various broker duties needs to be matched with a more complete explanation of the breadth of the fiduciary standard. Disclosure that relies on jargon—yes, "fiduciary standard" is industry jargon—does not actually provide meaningful clarity to the investor. It becomes just another piece of paper to be ignored or glossed over.

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[3] *See* Relationship Summary Release at 21417.

[4] *Id.* at 21563.

[5] *Id.* at 21567.

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Another weakness with proposed Form CRS is that it gives the impression that the key, understandable, distinction is that brokers give one-time recommendations and investment advisers give advice on a regular or ongoing basis. While the difference may be true generally, it obscures the more important fact that brokers are, at their core, securities distributors. They are selling investment products, usually for a commission. Investment advisers, on the other hand, are service providers. The investor is paying to receive advice from an investment adviser legally bound by duties of loyalty and care, including the duty to provide personalized advice in the client's best interest.[6] This distinction matters to investors, as evidenced by brokers emphasizing their advisory programs and calling themselves "advisors." When you talk to a car dealer, everyone knows the person you talk to will get a commission if he can convince you to buy one of the cars on the lot. Yet, securities brokers have been permitted to hoodwink investors into thinking that when they talk to a representative, they are speaking to financial "advisors." It is a massive, industry-wide scam. The Commission should take this opportunity to address it through strict ***dis***harmonization.

Enforce the Advisers Act; Don't Invent a New Broker Standard

As the Commission makes clear in the Releases, investors are confused, thinking their brokers are investment advisers acting with their best interests in mind, contrary to reality.[7] The Commission's proposed solution is to adjust the wording that describes the duties the broker owes to an investor, while expressly stating that their intent is to not change the relationships that currently exist. This is all wrong. Some of these relationships need to be changed. If they aren't, investors will continue paying for it, literally.

Applying a best interest standard to brokers is counterproductive. It will further confuse by making it harder to differentiate between brokers and investment advisers. If the underlying problem is boundary confusion, changing the wording of the duty a broker owes to an investor does not address the problem. It certainly does not address the fundamental financial incentives tied to compensation. The Commission should instead enforce the boundaries established in the Advisers Act. Specifically, any investment advice given by a broker not also registered as an investment adviser must be "solely incidental" to the broker's brokerage activities.[8]

I urge the Commission to begin strictly enforcing the "solely incidental" language in the Advisers Act, like a parent starting to strictly enforce bedtime after a long summer vacation, which for the brokerage industry has lasted for more than two decades.

As noted above, one factor distinguishing brokers from investment advisers is that brokers tend to give recommendations at a single point in time, while advisers are more likely to monitor portfolios and give advice on an ongoing basis. As the Commission knows,[9] this is not always

[6] Adviser Release at 21205-9.

[7] *See, e.g.*, Relationship Summary Release at 21417; Best Interest Release at 21578.

[8] 15 U.S.C. § 80b-2(a)(11)(C).

[9] Best Interest Release at 21594.

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true. Brokers currently provide a range of advisory services, including the ongoing monitoring of a retail investor's investments for purposes of recommending changes in investments.[10] The Releases further explain that the Commission is reconsidering the extent to which a broker could exercise unfettered discretion over an account, without having to register as an investment adviser.[11] Under current legal interpretations, these ongoing advisory services are merely incidental to brokerage activities. Brokers can give ongoing investment advice and even exercise discretion over an account, yet still not be required to register as an investment adviser. No wonder retail investors are confused—the boundaries have practically been erased.

In the Releases, the Commission admits that it considered applying the "solely incidental" language from the Advisers Act more strictly, but declined to do so in favor of a "simpler, more administrable approach."[12] Similarly, the Commission explains that the proposed broker best interest standard "is not intended to change the varied advice relationships that currently exist between a broker-dealer and retail investors."[13] The Releases acknowledge the perverse financial incentives within the industry, noting that "the broker-dealer's financial interest can and will inevitably exist," but the Commission's proposed solution is to simply mandate that "these interests cannot be the predominant motivating factor behind the recommendation."[14] All of this makes me wonder if the new proposed broker standard should even be called a "best interest" standard. It is certainly not how I evaluate what is in the best interests of my clients under the fiduciary standard.

I have been in the industry long enough to know that this new broker standard, if adopted, will change little. Brokers will complain, but they will also develop new policies and disclosure documents that, in large part, will justify business as usual. Brokers may even find great benefit in being able to tell investors that they have a duty to act in their best interests. Sadly, the investors will still be confused and will likely end up with the same products as before.

Using Hats to Hide

Finally, the Commission should go further in addressing the confusion associated with companies and individuals that are registered as both brokers and investment advisers. Within the industry, we refer to them as being dual-registrants or as wearing two hats. This is an area of immense confusion, ripe for abuse.[15]

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[10] *Id.*

[11] *Id.* at 21625-8.

[12] Relationship Summary Release at 21464.

[13] *Id.*

[14] *Id.* at 21586.

[15] *See* Best Interest Release at 21601 ("Retail customers of dual-registrants or of financial professionals who are dually-registered may be more susceptible to confusion regarding the

Rather than excluding the dual registration issue from the scope of its rulemaking,[16] the Commission should propose very clear, bright lines for dual-registrants. They need a completely separate title to classify them, and they should be required to use it exclusively. Perhaps something like "broker-adviser" would work.

Investors don't know which metaphorical hat the dual-registrant is wearing at any given time. In practice, the ability to change hats permits dual-registrants to hide the ugly reality that investors have no idea what they are getting. It could be advice from an investment adviser bound to act in their best interests with care and loyalty, or it could be a suitable product recommendation from a broker required only to treat them fairly. The investor has no way of knowing.

Investors need a reliable way of telling when a dual-registrant is switching hats. The Commission should begin developing a way to do that. The sample disclosure provided in the Releases does not go far enough.[17] Investors won't understand it, and it will be overlooked in a pile of other account opening documents. It would be clearer and more honest to require dual-registrants to preface all broker recommendations with "I am now acting as a broker. If you buy these products, I will get a commission," and all investment advice with "I am now acting as an investment adviser. You pay me a fee for this advice."

Going even further would be better. Perhaps this would mean requiring different ink colors in disclosure documents, requiring different representatives to provide brokerage services and investment advice, requiring a representative to tell an investor each time the role changes, or maybe even requiring individuals to literally switch hats or wear a sign around their necks with the disclosure on it. Maybe the Commission should require all of the above.

As I keep repeating, ***dis***harmonization is the answer. Brokers and investment advisers have distinct and important roles. The Commission should be drawing bright lines between them, not further merging them.

Investment Adviser Financial Obligations

In the Adviser Release, the Commission requests comment on the possibility of imposing various financial obligations on investment advisers.[18] In particular, the Commission asks if requiring privately held investment advisers to publicly disclose their own financial information would

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capacity in which their firms or financial professionals are acting with respect to any particular recommendation.")

[16] *Id.* at 21597.

[17] *Id.* at 21601 ("All recommendations regarding your brokerage account will be made in a broker-dealer capacity, and all recommendations regarding your advisory account will be in an advisory capacity. When we make a recommendation to you, we will expressly tell you which account we are discussing and the capacity in which we are acting.").

[18] Adviser Release at 21213-4.

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invade their privacy. Quite simply, yes. It would. More importantly, it would invade advisers' privacy for no good reason, and may in fact do more harm than good.

Where an investment adviser has custody of client assets, the various financial proposals make sense. Custodians have access to an investor's money. If the custodian does not have enough of its own money to meet its obligations, there is a very strong temptation to take (or, so they claim, "borrow") the client's money. A custodian's financial status may very well be important to a prospective investor, just like a bank's solvency is important to depositors.

The financial proposals in the Adviser Release, however, make no sense if applied to investment advisers that do not have custody. Investment advisers without custody have no ability to access client money. Client assets are safe from misuse by the adviser. If, at any time, the client does not like the advice being given or does not like how the portfolio is being managed, the client has full access to and control over the assets by going to the custodian. Simply put, there is no reason to impose any of the financial obligations mentioned in the Advisers Release on the non-custodial investment adviser.

Even worse, requiring a non-custodial investment adviser to publicly disclose information about its own assets will likely further confuse investors—perhaps even leading them to conclude erroneously that the adviser will use its own money to guarantee a return.

Please do not impose unnecessary and counterproductive financial obligations on non-custodial investment advisers.

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Thank you for taking the time to consider my comments.

Sincerely,

Ken Fisher

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