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Submitted electronically to rule-comments@sec.gov

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: File No. S7-07-18: Regulation Best Interest
File No. S7-08-18: 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: Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers

Dear Mr. Fields:

On behalf of our members, the Insured Retirement Institute ("IRI")[1] appreciates the opportunity to provide comments to the Securities and Exchange Commission (the "Commission" or the "SEC") on proposed Regulation Best Interest ("Regulation BI"), the proposed Form CRS Relationship Summary ("Form CRS"), and the proposed interpretation regarding the standard of conduct for investment advisers (the "IA Guidance," and together with Regulation BI and Form CRS, the "Proposals"). IRI has long supported the principle that financial professionals[2] should be required to act in their clients' best interest when providing

[1] IRI is the only national trade association that represents the entire supply chain of the retirement income industry. IRI has more than 500 member companies, including major life insurance companies, broker-dealers, banks, and asset management companies. IRI member companies account for more than 95 percent of annuity assets in the United States, include the top 10 distributors of annuities ranked by assets under management, and are represented by more than 150,000 financial professionals serving over 22.5 million households in communities across the country.

[2] The terms "financial professional," "financial advisor," and "advisor" are used interchangeably throughout this letter to refer to any individual who provides advice or recommendations about annuities or other insurance or

personalized investment advice, and we commend the SEC for taking the lead in developing a standard of conduct consistent with this principle while also preserving consumer choice and access to the products and services they need to achieve their financial goals.

IRI and our members believe the Proposals provide a solid foundation for appropriate enhancements to the standard of conduct for broker-dealers ("BDs") and their registered representatives. Unlike the recently vacated DOL Rule[3], the Proposals recognize and seek to preserve the important and valuable distinctions between BDs and investment advisers ("IAs"). BDs and IAs simply have different relationships with their clients, and, as such, investors have different expectations depending on whether they are working with a BD or an IA. The principles-based framework embodied in the Proposals will help investors understand the differences between BDs and IAs, thereby enabling them to make informed decisions about the type of financial professional that would best meet their needs.

We also support the decision to rely on existing SEC and FINRA enforcement mechanisms in the Proposals; the private right of action that would have been created under the DOL Rule was among the most problematic aspects of that rulemaking and, in our view, has been appropriately avoided by the Commission.[4] Moreover, the formulation of the best interest standard under Regulation BI would provide a clear and straight-forward compliance roadmap for firms and financial professionals.[5]

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investment products, including state-regulated insurance producers as well as securities-licensed representatives of broker-dealer or investment adviser firms.

[3] As used in this letter, the term "DOL Rule" means, collectively, the final regulation defining the term "fiduciary" (the "Fiduciary Definition Regulation") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the Best Interest Contract Exemption (the "BIC Exemption"), and the amendments to prohibited transaction exemption 84-24 (the "Amended PTE 84-24") issued by the DOL on April 8, 2016 and vacated *in toto* by the United States Circuit Court of Appeals for the Fifth Circuit on March 15, 2018.

[4] On this point, we have reviewed and agree with the analysis and recommendations made in other comment letters submitted to the Commission regarding the Proposals. *See, e.g.,* Comment Letter of Kent A. Mason (July 20, 2018).

[5] We note that some commenters, including members of the Commission, have suggested the need for an explicit definition of "best interest." We respectfully disagree. Regulation BI appropriately describes the obligations firms and financial professionals must satisfy in order to meet the standard. In our view, expressly defining the standard beyond those obligations would have little to no benefit for consumers but would create a significant risk that a firm or individual could fully satisfy those obligations and still somehow fall short of meeting the standard.

In his remarks at the 2018 FINRA Annual Conference, Director Brett Redfearn of the SEC's Division of Trading & Markets explained the decision not to expressly define "best interest," explaining that "it is a facts and circumstances [that] analyzes the reasonableness of the match between the recommendation and the needs of the retail customer." Director Redfearn also noted that the proposing release for Regulation BI "provides extensive guidance as to what 'best interest' means (and does not mean)." SEC Director Brett Redfearn, Division of Trading and Markets, Remarks at the FINRA Annual Conference (May 22, 2018), *available at* https://www.sec.gov/news/speech/redfearn-remarks-finra-annual-conference-052218. We support this principles-based approach.

We would, however, like to offer some comments and recommendations for the Commission's consideration regarding certain aspects of the Proposals. In some cases, we believe additional clarity or guidance is needed to help our members understand and meet the obligations imposed under the Proposals. In other cases, we believe the Commission should adjust certain provisions to avoid unintended consequences. Our comments and recommendations are described in greater detail below.

Executive Summary

The following is an overview of our comments and recommendations regarding the Proposals.

1. Introductory Comments (see pp. 4-6)
    a. Investment professionals should be encouraged to consider their clients' exposure to longevity risk and retirement income needs when appropriate.
2. Comments on the Conflict of Interest Obligation under Regulation BI (see pp. 6-16)
    a. The materiality of conflicts of interest should be assessed by reference to the perception of a reasonable investor.
    b. The conflict of interest obligation should be simplified and streamlined to give BDs the flexibility to determine appropriate steps to manage material conflicts.
    c. The Commission should avoid terminology derived from the DOL Rule (such as "differential compensation criteria based on neutral factors") in the discussion of conflict mitigation techniques.
    d. The inclusion of legal representatives in the proposed definition of retail customer under Regulation BI is unnecessary and inconsistent with existing rules.
3. Comments on the Disclosure Obligations under Regulation BI and Form CRS (see pp. 17-21)
    a. Regulation BI's principles-based approach will encourage the development of innovative disclosure techniques to improve the investor experience.
    b. Duplicative disclosure requirements are in no one's best interest and should be avoided.
    c. Firms should have greater flexibility to tailor the customer relationship summary to their particular businesses.
4. Other Comments on the Proposals (see pp. 21-25)
    a. When applied to retirement plan participants, Regulation BI and Form CRS should adapt to the context of the applicable plan.

b. The regulatory status disclosure is unnecessary, duplicative, and expensive, and should be eliminated.

c. IAs should be subject to the same requirements as BDs regarding licensing and continuing education, provision of account statements, and financial responsibility.

5. Procedural Comments (see pp. 26-28)

a. The SEC should continue to collaborate with other regulators to ensure consistency across jurisdictions.

b. The SEC should move expeditiously to finalize the proposals.

c. The SEC should determine how to proceed without regard to the vacated DOL Rule.

d. The Commission should provide a reasonable implementation period to ensure the industry has adequate time to develop the necessary compliance processes.

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I. Introductory Comments

A. Investment Professionals Should Be Encouraged to Consider Their Clients' Exposure to Longevity Risk and Retirement Income Needs When Appropriate.

Americans today are at risk of outliving their assets. The rapid and continuing shift away from defined benefit plan designs in favor of a defined contribution plan model, increasing life expectancies, and rising health care costs are combining to exert significant pressures on individual consumers, and in particular, middle-income Americans, seeking a financially secure retirement.

Individuals today are living longer than in past generations. The population of older Americans continues to increase at a faster rate than the overall population. For example, between 2000 and 2010, the number of Americans aged 85 to 94 grew by 29.9 percent; by comparison the entire U.S. population increased by 9.7 percent during that timeframe.[6] Moreover, according the Society of Actuaries, a married couple age 65 has more than a 65 percent chance of one or both spouses living to age 90 and a 35 percent chance of one spouse living to age 95.[7]

As a result of these trends, today more than 30 million Baby Boomers are "at risk" for inadequate retirement income; that is, a lack of sufficient guaranteed lifetime income.

[6] United State Census Bureau. *The Older Population 2010*.

[7] Society of Actuaries. *SOA 2012 Individual Annuitant Mortality tables.*

Just as concerning, nearly half (45 percent) of Generation Xers (ages 36-45) are "at risk" for inadequate retirement income. For many investors, their most important goal is to make sure they do not outlive their assets in retirement. In fact, research by one of our members showed that "63 percent of all generations fear running out of money in retirement more than death."[8] This reality underscores the critical importance of encouraging more advisors to help their clients manage their longevity risk.

And longevity risk is just one of the many factors investors and their advisors must consider as they develop a plan to achieve a financially secure retirement or other long-term goals. Many other factors are also extremely important elements of the retirement calculus, including the client's exposure to market risk, inflation risk, and sequence of returns risk; rising health care costs; income objectives in retirement; risk tolerance for income fluctuations in retirement; time horizon until withdrawing income; other sources of guaranteed and non-guaranteed income; whether the client wants to secure income for a spouse or partner; and more.[9]

While we know that many advisors are having conversations with their clients about these topics, IRI and our members are concerned – and we think the Commission should be as well – that some financial professionals may still not be considering these important factors when making recommendations to their clients. The industry is working in a variety of ways to address this potential gap in the financial advice many Americans are receiving,[10] and we believe this rulemaking provides an opportunity for the Commission to support and contribute to these efforts.

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[8] Allianz, *Finally Feeling Better About Retirement, Optimistic Baby Boomers Offer Lessons for Younger Generations*, (Sept. 25, 2017), https://www.allianzlife.com/about/news-and-events/news-releases/Generations-Ahead-Study-2017.

[9] FINRA rules require BDs to consider information relating to asset accumulation – such as the customer's age, investment objectives, investment experience, risk tolerance, and more – but they do not specifically require consideration of these other important factors.

[10] As an example, IRI is proud to lead the National Retirement Planning Coalition (the "NRPC"), a group of prominent financial industry associations, consumer organizations (such as America Saves, the Center for Retirement Research at Boston College, and the National Endowment for Financial Education), and regulatory bodies (including a number of state insurance and securities departments) dedicated to raising public awareness of the need for comprehensive retirement planning. Every year, the NRPC presents National Retirement Planning Week ("NRPW"), a week dedicated to this important subject. The NRPC has developed a comprehensive set of tools and resources to help its members and others educate Americans about the importance of retirement saving and planning, including consideration of longevity risk and retirement income needs. These tools and resources are available on the NRPC's website, www.retireonyourterms.org.

Another example is the recently formed Alliance for Lifetime Income, which comprises 24 life insurance and asset management companies who have joined together to educate advisors and consumers on the benefits of including guaranteed lifetime income products as part of a sound retirement plan. More information about the Alliance is available on its websites, www.allianceforlifetimeincome.org and www.retireyourrisk.org.

To be clear, we are not suggesting that financial professionals should be required to always recommend any particular investment solution. We are simply asking the Commission to use its voice to send a strong signal to advisors – including the many new advisors joining the industry every day – that these are important factors that must be part of any discussion with clients about retirement saving and planning.

IRI's Recommendation: The Commission should explain, in the final rule release for Regulation BI, that longevity risk and retirement income needs are important topics for financial professionals to consider and discuss with their clients before making recommendations with respect to retirement saving and planning.

II. Comments on the Conflict of Interest Obligation under Regulation BI

A. The Materiality of Conflicts of Interest Should Be Assessed by Reference to the Perception of a Reasonable Investor.

Proposed Regulation BI defines a "material conflict of interest" as "a conflict of interest that a reasonable person would expect might incline a BD – consciously or unconsciously – to make a recommendation that is not disinterested."[11] This formulation of materiality is highly confusing and would create significant uncertainty for BDs. In essence, it would require one person – the registered representative – to predict whether a hypothetical second person – the reasonable investor – *might* think the first person *could* be influenced, *even without realizing it*, by a particular conflict of interest. In making this prediction, the registered representative would obviously have to disregard his or her own thinking about whether the conflict would actually impact his or her ability to make a disinterested recommendation.

We believe the confusing and uncertain nature of this materiality standard would have two possible effects on disclosure: (1) risk-averse BDs will disclose information that is irrelevant to retail investors; or (2) firms who choose not to disclose information they have deemed irrelevant to retail investors will be vulnerable to private lawsuits led by plaintiffs' lawyers who are pursuing their own private interests.

In addition to the practical difficulties inherent in applying the proposed definition of materiality, it is unclear to IRI and our members how this approach would meet the objective, as outlined in the proposing release for Regulation BI, of better aligning "the legal obligations of the broker-dealer with the investors' expectations."[12]

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[11] Regulation Best Interest, 83 Fed. Reg. 21574, 21618 (May 9, 2018) ("Regulation BI").

[12] *Id.*, at 21584.

According to the proposing release, this definition is drawn from the definition of materiality under the Investment Advisers Act of 1940 (the "Advisers Act"), as interpreted by the Supreme Court in the *SEC v. Capital Gains Research Bureau, Inc*.[13] However, in the adopting release for the 2010 amendments to Form ADV, the Commission explained that, under this standard, information is material if "there is a substantial likelihood that a reasonable investor…would have considered the information important."[14] Similar definitions of materiality apply to the disclosure requirements under the Securities Act of 1933[15] and to BD disclosure obligations under the test outlined by the Supreme Court in *Basic v. Levinson.*[16]

Defining "material conflicts of interest" in Regulation BI based on these precedents would have numerous benefits to investors, the industry, and the SEC. From the investor perspective, this formulation would align with two of the SEC's key goals in Regulation BI – meeting consumer expectations in their relationships with financial professionals and providing investors with information pertinent to their investment decisions while avoiding the problem of over-disclosure.[17] For the industry, using the *Basic* definition would achieve legal certainty, since the industry is already very familiar with it, and has adopted an existing legal framework to draw from when developing a

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[13] *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 191-92, 194 (1963) (stating that as part of its fiduciary duty, an adviser must "fully and fairly" disclose to its clients all material information in accordance with Congress's intent "to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested").

[14] Amendments to Form ADV, Investment Advisers Act Release No. 3060, 75 Fed. Reg. 49234, 49237 (Aug. 12, 2018), *available at* https://www.sec.gov/rules/final/2010/ia-3060.pdf.

[15] Materiality has been the cornerstone of the federal securities laws since Congress incorporated this principle in the first of these laws in the 1930s. It subsequently has been incorporated in SEC rules and pronouncements and interpreted by the U.S. Supreme Court. Congress included the concept of materiality, for example, in both Section 17(a)(2) of the Securities Act of 1933 and Section 18(a) of the Exchange Act. Then, as early as 1947, the Commission adopted rules incorporating and defining materiality, making clear that the focus should be on information relevant to informed investment decisions. Specifically, Rule 405 under the Securities Act defined the term "material" as follows: "when used to qualify a requirement for the furnishing of information as to any subject, [materiality] limits the information required to those matters to which an average prudent investor ought reasonably to be informed before purchasing the security registered." Then, in 1982, the SEC amended the definition of material in Rule 405 in keeping with U.S. Supreme Court decisions: "when used to qualify a requirement for the furnishing of information as to any subject, [materiality] limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered." The U.S. Supreme Court has defined the standard to be used in determining whether information is material in a series of decisions beginning in 1970. See, e.g., *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, (1970); *TSC Indus. Inv. v. Northway, Inc.*, 426 U.S. 438 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014).

[16] *Basic Inc. v. Levinson*, 485 U.S. 224, 230-32 (1988) (holding that an omitted fact is material if there is a substantial likelihood that its disclosure would have been considered significant by a reasonable investor).

[17] *Id*. at 231. (the Court sought to avoid setting too low a standard of materiality, which might lead to "an avalanche of trivial information – a result that is hardly conducive to informed decision making.").

compliance plan, including policies, procedures and training. Similarly, the principle underlying this approach – that investors should have access to the information they need to make informed investment decisions – has guided the SEC since its earliest days, both in terms of providing compliance assistance to firms and financial professionals, and with respect to examinations and enforcement.

To avoid legal uncertainty, we believe the Commission should define materiality in the actual rule. The proposed definition is outlined in the proposing release, but the standard for materiality is critical to compliance with the conflict of interest obligation and therefore should be explicitly stated in the final rule, rather than simply being described in the rule release.

Moreover, in the interest of consistency, we believe the Commission should clear up any confusion about the formulation of materiality in the IA space by clarifying that the standard recommended herein applies to IAs rather than the standard outlined in the proposing release. Consistency in this regard would be of particular importance for dually-registered firms and financial professionals who might otherwise be faced with situations in which a particular conflict is material when acting as a BD but not as an IA (or vice versa).

IRI's Recommendation: The Commission should expressly state in the final version of Regulation BI that "a conflict of interest is material when there is a substantial likelihood that a reasonable investor would view the existence of the conflict as significant." The Commission should also reiterate that this – and not the standard outlined in the proposing release – is the standard for IAs as well.

Alternatively, if the Commission determines to adopt the *Capital Gains* formulation of materiality for purposes of Regulation BI, it should also clearly state in the final rule release – consistent with the approach taken in *Basic v. Levinson,* Rule 405 under the Securities Act, and the 2010 amendments to Form ADV – that a conflict of interest would be considered material under that standard if there is a substantial likelihood that a reasonable investor would view the existence of the conflict as significant.

B. The Conflict of Interest Obligation Should be Simplified and Streamlined to Give BDs the Flexibility to Determine Appropriate Steps to Manage Material Conflicts.

IRI and our members support the requirement in Regulation BI that firms take appropriate steps to prevent material conflicts of interest from impacting recommendations made by advisors to their clients. However, we believe the proposed conflict of interest obligation is overly complicated and confusing. As proposed, this obligation would require the following:

(A) The broker or dealer establishes, maintains, and enforces written policies and procedures reasonably designed to identify and at a minimum disclose, or eliminate, all material conflicts of interest that are associated with such recommendations.

(B) The broker or dealer establishes, maintains, and enforces written policies and procedures reasonably designed to identify and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with such recommendations. [18]

As a threshold matter, we do not believe it is necessary to establish different rules depending on whether or not a particular material conflict arises from financial incentives. In our view, this distinction offers no meaningful benefit to investors or the industry. In practice, we expect that many firms would simply apply the higher standard under paragraph (B) to all material conflicts, regardless of their nature. With this in mind, IRI and our members believe any conflict that meets the applicable materiality standard should be subject to the same requirements, even if the source of the conflict is not financial in nature.[19]

Similarly, the explicit references to disclosure, mitigation,[20] and elimination render the conflict of interest obligation needlessly complicated. As we understand it, the intent of this obligation is to require BDs to determine and undertake an appropriate course of action for each particular material conflict. Numerous variables could impact a firm's decision about the appropriate course of action, including the nature of the particular conflict, the size and sophistication of the firm, the impacted investors' circumstances, and more. Firms should be given significant latitude to make decisions in light of all relevant factors.

As such, we believe the Commission should remove the references to disclosure, mitigation, and elimination in the rule text, and instead simply require that firms "manage" their material conflicts.

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[18] Regulation BI, at 21575.

[19] The remainder of our comments regarding the conflict of interest obligation are based on the assumption that the formulation of the conflict of interest obligation under paragraph (B) would apply to all material conflicts.

[20] As recently noted by Commissioner Hester Peirce, the obligation to mitigate material conflicts of interest is one of the key distinctions between the best interest standard to which BDs would be subject under Regulation BI and the fiduciary standard to which IAs are subject, which "requires avoidance or, at a minimum, disclosure of material conflicts of interest" but does not require mitigation. Based on this distinction, Commissioner Peirce suggests that, at least with respect to the treatment of conflicts, the best interest standard is arguably "more stringent than the fiduciary standard." SEC Commissioner Hester M. Peirce, *What's in a Name? Regulation Best Interest v. Fiduciary*, Remarks at the 2018 National Association of Plan Advisors D.C. Fly-In Forum (July 24, 2018), *available at* https://www.sec.gov/news/speech/speech-peirce-072418.

We also respectfully urge the Commission to provide additional guidance in the final rule release as to how firms should assess the relevant factors to answer the following key questions:

- When will disclosure be sufficient, and when would mitigation be required in addition to disclosure?
- What would constitute effective mitigation?
- What would make a conflict so problematic that it must be eliminated?

The proposing release for Regulation BI does include some discussion of these critical questions, but we believe the Commission could and should provide even greater clarity as to its intentions and expectations. Our thoughts on each of these questions are described below.

1. <u>When will disclosure be sufficient?</u>

We believe firms should consider two critical factors when determining whether a particular material conflict of interest should be managed through disclosure alone or through disclosure plus mitigation. The first factor is the extent to which the particular conflict is likely to impact a financial professional's ability to make recommendations without placing his or her own interests ahead of his or her client's interests. Put another way, all conflicts are not created equal; some conflicts will be more likely to impact a financial professional's behavior than others.

For example, most retail BDs have arrangements with product sponsors under which they receive revenue-sharing or other similar payments based on sales or AUM. These payments are generally disclosed to investors, but the individual financial professional who makes the recommendation does not typically receive any portion of the payment received by the firm. As such, the existence of this conflict is not likely to create a meaningful incentive for the financial professional to recommend a product that is not in the client's best interest. For these types of firm-level conflicts, disclosure should be sufficient.

Similarly, many BD firms provide incentives designed to encourage financial professionals to bring in new clients (i.e., asset-gathering incentives). These types of incentives are clearly material and should be disclosed. However, as long as they are not tied to the volume or amount of sales of any particular product, there is simply no reason to be concerned that these incentives would influence the specific

recommendations to be made by the financial professional.[21] We believe disclosure alone would be appropriate for these kinds of asset-gathering incentives.

The second factor is whether the conflict can reasonably be mitigated. Certain types of conflicts simply do not lend themselves to mitigation; they either exist or they don't. Attempts to ease such conflicts by, for example, reducing their financial significance would not meaningfully reduce their impact on the financial professional's decision-making process.

For example, rollover recommendations typically involve a fairly straight-forward conflict of interest. If the client acts on the recommendation, the financial professional will receive compensation, whereas he or she receives no compensation if the prospective client declines the recommendation. Recommendations about the type of account an investor should open involves a similar type of conflict; the nature of the compensation associated with a brokerage account is inherently different from the compensation associated with an advisory account. Assuming the client is clearly made aware of these facts, we see no additional steps the firm or the financial professional could take to minimize the impact of the conflict. In these cases, disclosure alone should be sufficient.

2. When would mitigation be required in addition to disclosure and what would constitute effective mitigation?

   Clearly, conflicts can and do exist that could inappropriately influence the advice a financial professional provides to their clients, and in such instances, disclosure alone will not suffice. The proposing release for Regulation BI includes numerous references to the Conflicts of Interest Report issued by FINRA in October 2013 (the "FINRA Conflicts Report").[22] The FINRA Conflicts Report provides valuable guidance as to the elements of an effective practice framework for managing BDs' conflicts of interest, including recommendations for satisfying FINRA's suitability, know-your-customer, and supervision requirements.

[21] We urge the SEC to affirmatively clarify that the provision of benefits to affiliated agents in accordance with the IRS rules governing "Full-Time Life Insurance Salesman" (FTLIS) status – which have been in place for over 60 years and on which some companies rely to provide health, welfare, and retirement benefits to their affiliated agents and families – are not inconsistent with compliance with the conflict of interest obligation under Regulation BI. Relatedly, IRI supports the SEC's conclusion that 'offering only proprietary products by a broker-dealer shall not, in and of itself, violate such a uniform fiduciary standard, but may be subject to disclosure and consent requirements' and commends the SEC's recognition of the value of all current distribution models, including an affiliated agent distribution model.

[22] Financial Industry Regulatory Authority, Report on Conflicts of Interest (October 2013).

Consistent with the guidelines described in the FINRA Conflicts Report, the following are examples of the types of effective conflict management policies and procedures already in place at BD firms:

- Conflicts Committees. Many firms have committees charged with identifying, evaluating, and determining the appropriate course of action with respect to material conflicts of interest.
- Heightened Review. Most firms establish parameters to determine when particular recommendations should be subject to a heightened level of scrutiny. For example, if a particular advisor appears to be recommending the same product to all or most of her clients, the firm will likely investigate to determine whether there is a legitimate reason for the advisor's behavior.
- Product Neutral Payout Grids and Incentives. Many firms use product-neutral payout grids to determine advisor compensation. While these grids can allow advisors to earn higher compensation rates at specified revenue levels, those calculations are based on total annual revenue. Similarly, many firms offer product-neutral incentives, with eligibility determined on the basis of advisors' overall level of customer assets held at the firm. The amount of sales of any particular product or type of product will typically not be taken into account under these types of programs.
- Marketing and Educational Expense Reimbursement Restrictions. Product manufacturers commonly reimburse costs incurred by a BD or advisor in connection with client marketing activities such as seminars. Similarly, manufacturers often reimburse firms and advisors for the cost of attending educational meetings hosted by the manufacturer to help firms and advisors understand the products they offer. Firms generally have detailed policies and procedures regarding these types of reimbursements, including limitations on the cost, manner, content and location of events, as well as pre-approval requirements.
- Gifts and Entertainment. BD firms adhere to strict limits on the type and value of gifts and entertainment advisors can accept from product manufacturers.

We would strongly encourage the Commission to discuss how these and other practices (including those described in the FINRA Conflicts Report) can be used by BDs to effectively mitigate material conflicts of interest.

3. What would make a conflict so problematic that it must be eliminated?

In our view, elimination is the most extreme form of mitigation a firm could undertake when faced with a material conflict of interest. As an extreme measure, we believe it should be reserved for extreme circumstances. Many conflicts of interest arise as a result of firms' efforts to provide products or services in response to investor needs or demands. Eliminating conflicts, then, could effectively deprive investors of access to valuable products and services that could be in their best interest, even if the conflicts associated with those products and services could be effectively managed through disclosure and mitigation. We recognize that elimination may be the appropriate outcome in certain circumstances, but we urge the Commission to exercise caution before branding any particular practice as so severe or problematic that it must always be eliminated.

If the Commission determines that any particular practices result in material conflicts of interest that can never be effectively managed through disclosure and mitigation, and therefore should always be eliminated, it should undertake rulemaking (or direct FINRA to undertake rulemaking) to expressly prohibit those practices. Firms should not be expected to infer such prohibitions from dicta in the proposing release or the final rule release for Regulation BI, nor should firms be exposed to enforcement risk based on an informal position that particular types of conflicts must always be eliminated.

On a related note, we respectfully urge the Commission to clearly affirm that, with respect to material conflicts of interest arising from practices that are not expressly prohibited under SEC or FINRA rules, elimination would only be required when a firm determines, based on the relevant facts and circumstances, that the conflict could not be effectively managed through disclosure and mitigation.

IRI's Recommendation: The Commission should revise the conflict of interest obligation to read as follows:

(iii) Conflict of Interest Obligation. The broker or dealer establishes, maintains, and enforces written policies and procedures reasonably designed to identify and **manage** material conflicts of interest associated with such recommendations.

Alternatively, if the Commission determines that the final rule should explicitly reference disclosure, mitigation and elimination, it could revise the conflict of interest obligation to read as follows:

(iii) Conflict of Interest Obligation. The broker or dealer establishes, maintains, and enforces written policies and procedures reasonably

designed to identify, disclose, and**, where reasonably necessary based on the totality of the circumstances,** mitigate **(to the extent reasonably practicable)** or eliminate all material conflicts of interest associated with such recommendations.

In either case, the Commission should provide more substantial guidance in the final rule release to help firms identify and evaluate the factors that should be taken into account when deciding how to manage material conflicts of interest, including the extent to which a conflict would directly impact a financial professional's behavior.

C. The Commission Should Avoid Terminology Derived from the DOL Rule (Such as "Differential Compensation Criteria Based on Neutral Factors") in the Discussion of Conflict Mitigation Techniques.

The DOL Rule's concept of "differential compensation criteria based on neutral factors" is identified in the proposing release for Regulation BI as an example of potentially effective conflict mitigation practices.[23] Referencing this concept as an example rather than a formal, stand-alone requirement (as in the BIC Exemption) represents a significant improvement over the DOL Rule, but we believe the Commission should avoid this terminology entirely.

Numerous factors contribute to the differences in compensation between different types of products. For example, the amount of time and work involved in selling a variable annuity as compared to an equity stock or a mutual fund will vary depending on the advisor's level of expertise, the investor's level of sophistication, the complexity of the specific product(s) being recommended, and so on. Many of these factors simply cannot be valued in a formulaic, mathematically precise manner.

The DOL Rule failed to clearly recognize this fact, and as a result, our members were compelled to expend hundreds of thousands of dollars and countless man-hours attempting to develop a reasonable and rational methodology to evaluate the compensation associated with different product types, taking into account the numerous variables at play. These efforts ultimately proved fruitless. While firms had some success in identifying neutral factors that could reasonably serve as the basis for variances in compensation across different product categories, our members were never able to determine how to appropriately value those factors.

To be clear, IRI and our members support and agree with the notion that firms should have policies and procedures reasonably designed to reduce the likelihood that a financial professional would choose to recommend one type of product over another

[23] Regulation BI, at 21621.

based on the different amounts or types of compensation he or she would receive for those different product types. Our concern lies in the SEC's use of the terms "neutral factors" and "differential compensation" to describe this idea. Incorporating these terms into the proposing release creates the perception that disparities in compensation amounts between different product categories will have to be justified, with mathematical and legal certainty, by reference to the factors that distinguish those product categories from each other. We have already experienced the futility of such an exercise, and we see no benefit to requiring the industry to make another attempt.

We believe the overall framework established under Regulation BI, combined with existing rules and regulatory guidance,[24] would already require firms to consider compensation differences,[25] along with other actual or potential material conflicts of interest, both in setting its compensation rates (including, where it deems appropriate, limiting the differentials between those rates), and in designing and administering its detailed conflict management policies and procedures. The other examples of potentially effective mitigation techniques outlined in the proposing release are helpful, but the industry's recent experience in trying to develop "differential compensation criteria based on neutral factors" under the DOL Rule renders that particular example highly troubling and problematic.

IRI's Recommendation: The Commission should omit the concept of "differential compensation criteria based on neutral factors" in the final rule release.

D. The Inclusion of Legal Representatives in the Proposed Definition of Retail Customer under Regulation BI is Unnecessary and Inconsistent with Existing Rules.

Regulation BI defines "retail customer" as "a person, or the legal representative of such person, who: (A) 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 (B) Uses the recommendation primarily for personal, family, or household purposes."

This definition is broader than the related definitions of "retail customer" or "retail investor" in Exchange Act Rule 17a-3(a)(17), Section 913(a) of the Dodd-Frank Act and FINRA Rule 2210. These rules include only natural persons, and not their "legal representatives," in the definitions of "retail customer" and retail investor." As such,

[24] *See, e.g.,* FINRA Conflicts Report.

[25] FINRA Conflicts Report at 26-36 (describing effective techniques to identify and manage compensation-related conflicts) ("The use of 'product agnostic' compensation grids (also referred to as "neutral grids") can be an effective practice to reduce incentives for registered representatives to prefer one type of product (e.g., equities, bonds, mutual funds, variable annuities) over another.")

implementation of the proposed definition would likely result in additional regulatory costs and uncertainty for firms as they undertake to comply with varying and inconsistent definitions of these key terms. More importantly, IRI and our members believe this expanded concept of "retail customer" is unnecessary, inconsistent with the expectations of reasonable investors, and detrimental to consumers and their advisors.

For example, we believe this proposed definition would discourage product manufacturers and wholesalers from providing valuable information about their products to customer-facing advisors due to the inclusion of "legal representatives" in the definition, which could be interpreted to include a retail customer's financial advisor. Information or sales materials provided to an advisor by a product manufacturer or wholesaler could then be treated as a recommendation to the advisor's client, which would be subject to Regulation BI despite the lack of direct contact with the client. To avoid this result, we suspect many manufacturers and wholesalers would significantly limit the information they provide to advisors.

Investors clearly benefit from working with well-informed advisors; conversely, inhibiting the flow of information about products to advisors would work to the detriment of investors and therefore should be avoided where reasonably possible.

While the proposing release expressly states that this definition would cover participants in ERISA-covered plans,[26] it is less clear as to whether plan sponsor fiduciaries or their representatives would be considered "legal representatives" under this definition. We do not believe these entities should be treated as "retail customers," nor do we believe this was the Commission's intent. Providing clarity on this point would strike the proper balance for accounts under these plans, avoiding any mistaken conclusions that interactions with a plan sponsor or other plan representative (whether or not a fiduciary) might fall within the scope of Regulation BI.

These entities select investment options for employer-based retirement plans, but do not use BD recommendations primarily for personal, family, or household purposes. Moreover, the "retail investor customer profile," a core concept in Regulation BI, has little to no applicability to these types of entities. Most importantly, plan sponsors and their representatives are regulated under ERISA and as such, are already subject to extensive fiduciary duties and disclosure obligations designed to ensure a prudent, well informed process for the selection of investment options to include in their plans.

IRI's Recommendation: The Commission should remove the reference to legal representatives in the definition of "retail customer" under Regulation BI.

[26] Regulation BI, at 21598.

III. Comments on the Disclosure Obligations under Regulation BI and Form CRS

A. The Proposals' Principles-Based Approach Will Encourage the Development of Innovative Disclosure Techniques to Improve the Investor Experience.

IRI agrees with and supports the SEC's principles-based approach to disclosure in Regulation BI and Form CRS. The goal of disclosure should be to provide investors with the material information a reasonable investor would want to know before making an investment decision. As the Commission acknowledged in the proposing release for Regulation BI, disclosure should serve as an educational tool to reduce confusion and help investors about the exact terms of their relationship with investment professionals.

Moreover, IRI applauds the SEC's proposal for recognizing limits on disclosure. Regulation BI and Form CRS do not require firms to provide complete disclosure of all information; instead, they use an objective, reasonable investor standard to determine what information must be disclosed to the investor. This objective standard will help BDs avoid overwhelming investors with mountains of information. As recent economic evidence has indicated, there are cognitive limits on the amount of information people can consume.[27] Therefore, providing too much information to investors makes it difficult for investors to identify pertinent information, and may cause investors to ignore the disclosure all together if they are intimidated by the size and number of disclosure documents. Investor overload not only serves to cause investor confusion, but it also dampens the investor experience and may reduce investor appetite for BD services.

This principles-based disclosure regime, which leverages the benefits of layered disclosure, will provide the industry an opportunity to combat information overload with innovative disclosure methods, thereby enhancing the investor experience. Because disclosures are part of the investor experience, industry participants have the incentive to design user-friendly disclosure methods. This means industry participants are likely to incorporate technological improvements (such as pop-ups/mouse-overs, podcasts, interactive video modules, and interactive performance reporting and goal tracking tools) into their disclosures along with making them readable and accessible to everyday investors.[28] We have attached as Appendix A to this letter a mock-up of the

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[27] George Loewenstein, Cass R. Sunstein, and Russell Golman, "Disclosure: Psychology Changes Everything", Annu. Rev. Econ. 2014 ("The standard economic account would emphasize that attention is a scarce resource and would suggest that people make rational (even if fairly rapid) decisions about how to allocate it. This account implies not merely that too much disclosure can be a nuisance, but also that it can be affirmatively counterproductive when it distracts from other, possibly more important, information. Because it is a scarce resource, people's lack of attention, and their resulting misconceptions, should come as no surprise.")

[28] Our members have told us, anecdotally, that many of their customers (including many Baby Boomers) prefer to receive information electronically, are more likely to take positive action when they receive information in an

SEC staff's hypothetical dual registrant customer relationship summary (as attached to proposed Form CRS). Among other things, our mock-up illustrates how some of the content included in the form can be streamlined through the use of pop-ups or mouse-overs (see the section on "Fees and Costs").

Similarly, the Proposals' flexible approach regarding the form, manner, timing, and frequency of disclosure delivery also allows the industry to find innovative solutions to help investors understand material information related to BDs recommendations. Specifically, the proposed rule suggests firms could consider graphical illustrations to help investors understand the disclosure.[29] However, technological improvements allow for much greater improvements to disclosures than mere illustrations. In addition to the obvious cost savings associated with a move away from printing and delivering paper disclosures, permitting online and digital delivery systems will allow firms to improve the investor experience by creating interactive disclosures, which stand to benefit investors much more than standardized forms.

IRI's Recommendation: The Commission should retain the principles-based approach to disclosure in the final versions of Regulation BI and Form CRS.

B. Duplicative Disclosure Requirements Are In No One's Best Interest and Should Be Avoided.

The proposing releases for Regulation BI[30] and Form CRS[31] generally acknowledge that BDs and IAs are already subject to extensive disclosure requirements under common law, the federal securities laws, and SEC and FINRA rules. The releases also recognize the risk posed by overwhelming investors with excessive disclosure documents (as discussed above). However, the Proposals provide no way for firms to avoid duplication where these new disclosure requirements overlap with existing rules. This omission should be remedied in the final rule releases.

One possible solution would be to expressly permit (but not require) firms to use incorporation by reference to satisfy particular components of the disclosures required

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immediately actionable format, and want choice about how to access information (i.e., on a computer or a mobile device).

[29] Regulation BI, at 21604 ("Broker-dealers may also, for example, consider whether the use of graphics could help investors better understand and evaluate these disclosures.")

[30] Regulation BI, at 21600.

[31] Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles, Exchange Act Release No. 83063 (Apr. 18, 2018), 83 Fed. Reg. 21416, 21559-71 (May 9, 2018), *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08583.pdf ("Form CRS").

under Regulation BI and/or Form CRS. In other words, if an investor already receives a particular piece of information in an existing disclosure document (including disclosures required under the federal securities laws, SEC or FINRA rules, ERISA, or DOL rules) the firm should be permitted to merely reference that existing document (with sufficient information for investors to locate or obtain that document).

Alternatively, the Commission could allow firms to use their Regulation BI and/or Form CRS disclosures to satisfy disclosure requirements imposed under the federal securities laws, other SEC rules, or FINRA rules.

IRI and our members believe these approaches would be consistent with the goals of these new disclosure requirements. Simply stated, we believe the Commission's objective is to ensure that investors receive the information they need to make informed investment decisions. Absent clear guidance from the Commission, some firms may choose to duplicate disclosures rather than running the risk of possible enforcement action or private litigation for failure to disclose.

To be clear, we are not suggesting that compliance with other regulatory requirements should automatically constitute full compliance with Regulation BI and/or Form CRS. Rather, we are merely recommending that the SEC provide a clear path to enable firms to avoid duplication between existing requirements and these new rules.

IRI's Recommendation: The Commission should revise the disclosure obligations under Regulation BI and Form CRS to expressly permit (but not require) incorporation by reference of information disclosed pursuant to other statutory or regulatory requirements, provided that sufficient information is provided to enable an investor to locate or obtain the referenced disclosure documents.

C. Firms Should Have the Flexibility under Form CRS to Either Use a Broader Range of SEC-Approved Disclosures or Tailor Their Disclosures to Their Particular Businesses.

According to the proposing release for Form CRS, the customer relationship summary is intended to "alert retail investors to important information for them to consider when choosing a firm and a financial professional,…prompt retail investors to ask informed questions [and] facilitate comparisons across firms that offer the same or substantially similar services."[32] IRI and our members are supportive of these goals and believe the customer relationship summary could be effective in achieving them.

However, as proposed, Form CRS is too prescriptive – and the prescribed language included in the instructions for Form CRS is too narrow – to allow firms to provide

[32] Form CRS, at 21420.

information consistent with these goals. In particular, we note that Form CRS would require BDs to include specific language describing brokerage accounts but does not contemplate the valuable services offered by many firms outside of brokerage accounts. For example, variable annuities are not typically sold and held within brokerage accounts; rather, when a client purchases a variable annuity recommended by a BD, the product is typically held by the insurance company that issues the product. The BD's recommendation to purchase the variable annuity, and any other services associated with the product, are non-brokerage services that cannot be readily described within the confines of the proposed customer relationship summary.

The need to distinguish between brokerage and non-brokerage services would be most critical in Item 2 (Relationship and Services) and Item 4 (Summary of Fees and Costs) in the proposed customer relationship summary. We do not view the prescribed language in the other sections of the form as problematic, but in these two sections, firms need more latitude to meet the objectives outlined above. There are simply too many variables in the types of services firms can provide to impose one-size-fits-all disclosures about the nature of brokerage relationships or the fees and costs associated with those relationships.

We believe the Commission could address this concern in two ways:

1. Principles-Based Approach. The Commission could require firms to provide a brief, narrative description of the types of services they offer and the types of fees they may charge. This approach would give firms the flexibility to determine exactly what information their clients and prospective clients need when selecting a firm or advisor.

2. Safe Harbor or Model Language Approach. The Commission could produce a wider variety of pre-approved disclosures describing the different types of services available in the marketplace and the fees and charges associated with them.[33] The Commission and the industry would have to collaborate on this effort to ensure the pre-approved disclosures are accurate, complete, clear, effective, and appropriately concise. Firms would then select the pre-approved disclosures applicable to their

[33] There is precedence for this type of "plug-and-play" approach to disclosure, though not (to our knowledge) in existing SEC rules. Both the DOL and the Internal Revenue Service ("IRS") have adopted regulations that provide a safe harbor for regulated entities that use pre-approved language, as applicable, in their disclosure documents. *See, e.g.,* 29 CFR 2550.404a-5(d)(vii) (requiring disclosure of specified information about annuity options, but only if such options are available in the relevant retirement plan); Internal Revenue Serv., U.S. Dep't. of the Treasury, Sample Automatic Enrollment and Default Investment Notice (Relating to Code Sections 401(k)(13) and 414(w) and ERISA sections 404(c)(5) and 514(e)(3)), available at https://www.irs.gov/pub/irs-tege/sample_notice.pdf; Internal Rev Serv., U.S. Dep't of the Treasure, Notice 2009-68, Safe Harbor Explanation – Eligible Rollover Distributions, available at https://www.irs.gov/pub/irs-drop/n-09-68.pdf.

businesses to produce their customer relationship summary. This approach would eliminate the litigation risk associated with open-ended disclosure requirements.

We believe the SEC should take both of these approaches. Some of our members have expressed a clear preference for the principles-based approach and are willing to bear the risks associated with that approach, while others prefer the legal certainty of the safe harbor or model language approach and are willing to sacrifice control over the content of these new disclosure documents. Both approaches would, in our view, achieve the goals referenced above, and we see no reason why the Commission could not allow firms to decide which approach works better for their particular businesses.

We would be happy to work with the SEC staff to develop the pre-approved disclosures for the businesses in which our members operate. To initiate this process, we have included suggested language describing non-brokerage services such as variable annuity recommendations (as well as a few other suggested modifications) in the mock-up of a hypothetical dual-registrant's Form CRS attached to this letter as Appendix A.

On a related note, we are concerned about the requirement that standalone BDs would be required to provide information about the services offered by IAs in their customer relationship summaries (and vice versa).[34] This requirement would put advisors in a position of having to explain and answer questions about professional services they are neither trained or licensed to perform. To minimize this risk, the SEC could include information in Form CRS to help retail customers learn more about services not offered by the firm delivering the customer relationship summary.

IRI's Recommendation: The Commission should revise Form CRS to provide general instructions as to the information required to be disclosed under Items 2 and 4 but should not mandate the use of specific verbiage that is not applicable to all firms. The Commission should also revise Form CRS to provide pre-approved disclosure language describing a wider variety of services offered in the marketplace and provide a safe harbor for firms that use pre-approved language in their customer relationship summaries.

IV. Other Comments on the Proposals

A. When Applied to Retirement Plan Participants, Regulation BI and Form CRS Should Adapt to the Context of the Applicable Plan.

As noted above, we understand the Commission clearly intends that Regulation BI would apply with respect to participants in employer-based retirement plans. The

[34] Form CRS, at 21439.

parameters of a particular plan will, however, impact the way in which these obligations can be met. For example, plan sponsors or their representatives select the investment options available to participants. With this in mind, the care obligation should not require financial professionals to consider investment options beyond those selected by the plan sponsor or its representative. Similarly, financial professionals should only be required to disclose information that is relevant to the plan and should be permitted to deliver the disclosures required under both Regulation BI and Form CRS in any form (or media) otherwise permitted or designated by the plan sponsor, including but not limited to posting on a website established for, and expected to be used by, plan participants.

IRI's Recommendation: The Commission should provide clear guidance as to how financial professionals are expected to comply with Regulation BI and Form CRS when providing recommendations to participants in employer-based retirement plans.

B. The Regulatory Status Disclosure Is Unnecessary, Duplicative, and Expensive, and Should be Eliminated.

The SEC is proposing to establish new rules under the Exchange Act and the Advisers Act to disclose, in retail investor communications, the firm's registration status with the Commission and the associated natural person's relationship with the Firm.[35] The regulatory status disclosure would be required in all print or electronic communications, including televised or video presentations (where a voice overlay and on-screen text would be necessary according to the SEC).[36]

The SEC's rationale for this disclosure is that using the "legal terms" for "investment adviser" and "broker dealer" in print and electronic communications would help investors "determine which type of firm is more appropriate to their specific investment needs"[37] and "facilitate investor understanding, even if investors currently may not understand the differences between investment advisers and broker-dealers."[38]

For dual-registrants, the firm would need to prominently disclose the following on their print or electronic communications: "[Name of Firm], an SEC-registered broker-dealer and SEC-registered investment adviser." Associated natural persons would be required to prominently disclose on their business card or signature block on emails: "[name of professional], a [title] of [Name of Firm], an associated person of an SEC-registered broker-dealer and a supervised person of an SEC-registered investment adviser."

[35] *Id*. at 21467.

[36] *Id.* at 21468.

[37] *Id*. at 21467.

[38] *Id*. at 21468.

Form CRS also requires disclosure of the capacity in which a firm is acting when making a recommendation and the differences between a BD and an IA. In addition, FINRA Rule 2210(d)(3) requires that member firms disclose their names on any retail communications and correspondence. The proposed Regulatory Status Disclosure would clearly be duplicative of these other requirements, and therefore would provide almost no benefit to investors.

The SEC asks whether the proposed disclosure would "give greater clarity about various aspects of their relationship with a financial professional."[39] We firmly believe the answer to that question is no; the Regulatory Status Disclosure is unnecessary, will not alleviate investor confusion, and will be costly to implement and supervise.

First, the purported rationale that using "legal terms" such as "SEC registered broker-dealer" and "SEC registered investment adviser" in print or electronic communications will assist investors in "determining" which type of legal entity to choose is dubious, and not based on any demonstrable research. The SEC asks whether "retail investors understand what it means for a firm to be "registered" with the Commission or a state."[40] We believe that they do not. The legal terms themselves are not easily understood by the investing public. The recipients who would conceivably understand and appreciate those legal terms are securities lawyers. Merely putting these legal terms on a business card, or on an email signature block, does not, in and of itself, aid a retail investor's understanding of what the terms actually mean.

If the purpose of requiring a capacity disclosure is to raise questions in the investor's minds, then the Form CRS accomplishes that goal because that form at least requires an explanation of the terms. Thus, the Regulatory Status Disclosure is unnecessary and duplicative of the Form CRS.

Moreover, the costs to amend tens of thousands of business cards to add the new required disclosure outweighs any intended benefit, particularly since the Form CRS already accomplishes the same objective and does so with an actual explanation. There is no such possible explanation on a business card, email signature block, or video overlay, and yet, firms will need to incur significant costs to purchase new business cards and replace existing ones, and modify systems and existing print material, to include the new Regulatory Status Disclosure.

In addition, for video presentations like WebEx or Skype for Business, adding, as suggested by the SEC, a "voice overlay and on-screen text" may be difficult to implement and to effectively supervise. Registered representatives routinely use these

[39] *Id*.

[40] *Id*.

means of communication, and firms will be required to ensure that each time a WebEx or Skype for Business presentation is made, even where there is just one investor who is attending, then the voice overlay and on-screen text will be mandatory. Firms will incur significant costs and resources to monitor such presentations for the sole purpose of the display of the on-screen text and voice overlay of the regulatory status disclosure even though that same client already received the Form CRS disclosure. It is unclear what the benefits are for requiring such costs.

IRI's Recommendation: The Regulatory Status Disclosure requirement included in proposed Form CRS should be eliminated in its entirety.

C. IAs Should Be Subject to the Same Requirements as BDs Regarding Licensing and Continuing Education, Provision of Account Statements, and Financial Responsibility.

In the IA Guidance, the Commission requests comment regarding areas of enhanced IA regulation.[41] This request focuses on three specific topics: federal licensing and continuing education; provision of account statements; and financial responsibility.

The SEC staff's study conducted pursuant to section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "913 Study")[42] concluded that, "where investment advisers and broker-dealers perform the same or substantially similar functions, they should be subject to the same or substantially similar regulation."[43] We agree.

The 913 Study included an analysis of several topics where regulations differ between BDs and IAs, including advertising and other communications, the use of finders and solicitors, remedies, supervision, licensing and registration of firms, continuing education requirements, and books and records.[44] The IA Guidance focuses on the same three topics, and we believe the Commission should propose rules to harmonize regulation in these areas.

First, the Advisers Act imposes no continuing education or licensing requirements for SEC-registered advisers. The SEC has asked whether IAs should be "subject to federal continuing education and licensing requirements." We fully support such requirements.

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[41] Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, Investment Advisers Act Release No. 4889, 83 Fed. Reg. 21203, 21211-21214 (May 9, 2018) ("IA Guidance").

[42] Staff of the U.S. Securities and Exchange Commission, *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.

[43] *Id*. at 130.

[44] *Id*. at 130-139.

The lack of a continuing education requirement is clearly a gap for IAs, as noted by the Staff in the 913 Study.[45] We urge the SEC to remedy this gap and mandate continuing education for IAs. To the extent that a representative is dually registered with FINRA and the SEC, the FINRA continuing education requirements (existing Rule 1250) should satisfy such a requirement.[46] FINRA-registered representatives must complete the Regulatory Element on their second anniversary date and thereafter every three years from their anniversary date. Investor protection will be enhanced if IAs are subject to the same continuing education requirement. We urge the SEC to work together with FINRA and the states to establish continuing education course and attendant requirements, including topics to be addressed and methods of delivery.

Second, the SEC asked whether retail clients of IAs should receive account statements, directly or via the client's custodian.[47] To the extent that retail clients are not receiving account statements directly from their IA or from the custodian of their assets, the SEC should address this gap through this rulemaking.

Lastly, the SEC requested comment on whether it should undertake rulemaking to adopt rules for IAs based on various BD financial responsibility rules, such as Rule 15c3-1 (net capital), 15c3-3 (customer protection), as well as the extensive recordkeeping and reporting, audit, fidelity bond, and SIPC membership requirements to which BDs are already subject. We support rulemaking in these areas to enhance investor protection.

The SEC noted in the IA Guidance that many "investment advisers have relatively small amounts of capital, particularly compared to the amount of assets that they have under management."[48] Strengthening capital requirements for IAs would undoubtedly benefit their clients since it would reduce risk. Investors harmed by IAs will also benefit, as the SEC noted that "when we discover a serious fraud by an adviser, often the assets are insufficient to compensate clients for their loss." [49] Requiring IAs to hold more capital, and to obtain a fidelity bond, would better protect investors. These are sensible topics for SEC rulemaking and will only lead to more investor confidence in our industry.

IRI's Recommendation: The Commission should undertake rulemaking to harmonize the rules for IAs and BDs in the areas of licensing and continuing education, provision of account statements, and financial responsibility.

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[45] *Id*. at 138.

[46] This rule will be superseded by FINRA Rule 1240 on October 1, 2018.

[47] IA Guidance, at 21213.

[48] *Id*.

[49] *Id*.

V. Procedural Comments

A. *The SEC Should Continue to Collaborate with Other Regulators to Ensure Consistency Across Jurisdictions.*

In past submissions to the Commission[50] and other regulators, IRI has urged the Commission to engage in a constructive dialogue with the Department of Labor ("DOL"), the National Association of Insurance Commissions ("NAIC"), the Financial Industry Regulatory Authority ("FINRA"), and the North American Securities Administrator Association ("NASAA") as it considers rulemaking regarding the standards of conduct for financial professionals. We understand that this dialogue has been taking place, and we commend the Commission and its fellow regulators for recognizing the importance of collaboration in this space. Only by working together can regulators develop clear and consistent standards of conduct for recommendations made by all licensed financial professionals with respect to any securities or insurance product.

IRI's Recommendation: The Commission should continue to constructively engage with its fellow regulators throughout the rulemaking process.

B. *The SEC Should Move Expeditiously to Finalize the Proposals.*

As noted in the proposing release for Regulation BI, the SEC and other regulators have been considering whether and how to enhance the standards of conduct for financial professionals for more than 20 years. We believe this debate has gone on long enough. The vast majority of financial professionals already act in their clients' best interest, but still have been living under a cloud of uncertainty for far too long. With the issuance of the Proposals (combined with the work being done by state insurance regulators through the NAIC), the issue is finally being taken up by the appropriate regulators in a manner that is generally workable for the industry. More importantly, the Proposals will enhance investor protection in a meaningful way without impairing investors' access to the products and services they need to achieve their financial goals. IRI and our members stand ready to assist the Commission to advance this rulemaking effort with due haste.

IRI's Recommendation: The Commission should move expeditiously and with appropriate diligence to finalize the Proposals after considering and addressing the concerns and recommendations outlined in this letter.

[50] *See, e.g.,* comment letter submitted by IRI (December 13, 2017).

C. *The SEC Should Determine How to Proceed Without Regard to the Vacated DOL Rule.*

The DOL's goal in proposing and ultimately adopting the DOL Rule were largely consistent with the goal of the Proposals – to ensure that American consumers receive investment advice that is in their best interests. The DOL effectively elevated the public discourse on this critical topic, and for that, they should be applauded.

However, the DOL Rule was flawed in many respects (both substantive and procedural), and its vacatur provides an opportunity for the SEC to reassert its authority with respect to the regulation of investment professionals. Even in their initial form, the Proposals represent a vast improvement over the DOL Rule. Moreover, the DOL Rule applied only to advisors to ERISA retirement plans and IRAs, while the SEC has jurisdiction to regulate the vast majority of the investment industry, and it is therefore appropriate for the SEC – not the DOL – to lead this effort.

Nevertheless, the proposing release for Regulation BI goes to great lengths to explain how the Proposals would be consistent with the approach taken in the DOL Rule. Given that the proposing release was largely developed prior to the issuance of the Fifth Circuit's decision to vacate the DOL Rule (and prior to issuance of the Court's mandate), this comparison was wholly appropriate (and, in fact, would have been consistent with our desire for regulatory coordination and collaboration). Moving forward, though, the Fifth Circuit's decision relieves the Commission of the burden of conforming its rulemaking to the DOL's flawed and harmful approach.[51]

To be clear, however, we do believe the Commission should continue to consult and coordinate with the DOL as it moves through the rulemaking process. The vacatur of the DOL Rule (and in particular, the BIC Exemption) has left some in the industry without access to an applicable exemption from the prohibited transaction rules under ERISA and/or the Internal Revenue Code. As such, the DOL may need to undertake new rulemaking to provide appropriate relief for impacted firms and financial professionals. The SEC should work with the DOL to ensure that such rulemaking is consistent and compatible with the final versions of the Proposal.

IRI's Recommendation: The Commission should consult with the DOL throughout the rulemaking process but should formulate the final version of the Proposals based on its own assessment of this critical topic without giving undue deference to the substance or structure of the DOL Rule.

[51] See Section II.C below for a discussion of IRI's recommendation that the SEC refrain from using terminology taken from the DOL Rule, such as "differential compensation" and "neutral factors," in the final rule release for Regulation BI.

D. The Commission Should Provide a Reasonable Implementation Period to Ensure the Industry Has Adequate Time to Develop the Necessary Compliance Processes.

The regulatory changes contemplated by the Proposals will, of course, require our members to develop and implement systems and operational changes to implement the new rules. For example, firms will need to craft new policies and procedures, and perform extensive information technology re-designs and build outs, to comply with the requirements to be established under the Proposals. Given that the Proposals are likely to evolve based on the comments submitted to the Commission, we are not prepared to suggest a specific duration for the implementation period; rather, we respectfully encourage the SEC to consider how much time industry will reasonably need to implement the final rules. Based on our past experience with the DOL Rule, we believe a reasonable estimate would likely fall within the range of 18-24 months.

IRI's Recommendation: The Commission should provide a reasonable amount of time following adoption for firms and individuals to come into compliance with the final versions of the Proposals.

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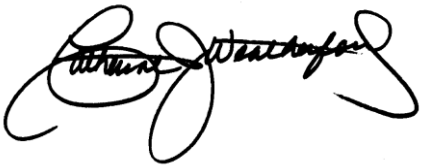
Conclusion

Once again, we commend the Commission and its staff for constructing a solid foundation for enhancements to the standards of conduct for financial professionals while also preserving Americans' access to retirement planning products and services. Thank you for the opportunity to share our comments and recommendations. We hope the thoughts and ideas presented in this letter are helpful to the Commission as it moves to finalize the Proposals.

If you have questions about anything in this letter, or if we can be of any further assistance in connection with this important regulatory effort, please feel free to contact me or Jason Berkowitz, IRI's Vice President and Counsel for Regulatory Affairs.

Sincerely,



Catherine J. Weatherford
President & CEO
Insured Retirement Institute

APPENDIX A

IRI Mock-Up of SEC Staff's Hypothetical Relationship Summary for Dually Registered Investment Adviser and Broker-Dealer Offering Brokerage and Non-Brokerage Services

Which Type of Account is Right for You — Brokerage, Investment Advisory or Both?

There are different ways you can get help with your investments. You should carefully consider which types of accounts and services are right for you.

Depending on your needs and investment objectives, we can provide you with brokerage services (inside or outside of a brokerage account), investment advisory ~~account~~ services, or both at the same time. This document gives you a summary of the primary types of services we provide and how you would pay for them. We can also provide additional services related to your investments that are not described in this document but may be described in other documents we can give you. Please ask us for more information. ~~There are some suggested~~ Some questions you may want to ask us are listed on page 4.

Broker-Dealer Services ~~**Brokerage Accounts**~~	***Investment Adviser Services*** ~~**Advisory Accounts**~~
Types of Relationships and Services. *Our accounts and services fall into two categories.*	
• As a broker-dealer, we may recommend investments you can purchase inside a brokerage account, meaning you will receive statements and other information about those investments directly from us. For investments held in ~~If you open~~ a brokerage account, you will pay us a ***transaction-based fee***, generally referred to as a commission, every time you buy or sell an investment. • We may also recommend investments you can purchase outside of your brokerage account, meaning you will receive statements and other information about those investments from a third party. For these types of products, you may pay us a transaction-based fee, generally referred to as a sales charge, or we may be paid by third parties. • You may select investments or we may recommend investments for your account, but the ultimate investment decision for your investment strategy and the purchase or sale of investments will be yours. • We can offer you additional services to assist you in developing and executing your investment strategy and monitoring the	• As an investment adviser, we may recommend investments you can purchase inside an advisory account. If you open an advisory account, you will pay an on-going ***asset-based fee*** for our services. • We will offer you advice on a regular basis. We will discuss your investment goals design with you a strategy to achieve your investment goals, and regularly monitor your account. We will contact you (by phone or e-mail) at least quarterly to discuss your portfolio. • You can choose an account that allows us to buy and sell investments in your account without asking you in advance (a "***discretionary account***") or we may give you advice and you decide what investments to buy and sell (a "***non-discretionary account***"). • Our investment advice will cover a limited selection of investments. Other firms could provide advice on a wider range of choices, some of which might have lower costs.

Broker-Dealer Services ~~Brokerage Accounts~~	*Investment Adviser Services* ~~Advisory Accounts~~
performance of your account but you might pay more. We will deliver account statements to you each quarter in paper or electronically. • We offer a limited selection of investments. Other firms could offer a wider range of choices, some of which might have lower costs.	
Our Obligations to You. ~~*We must abide by certain laws and regulations in our interactions with you.*~~ *While many of our obligations will be described in a written agreement, applicable laws and regulations also impose some important obligations based on the type of services being provided.*	
• We must act in your best interest and not place our interests ahead of yours when we recommend an investment or an investment strategy involving securities. When we provide any service to you, we must treat you fairly and comply with a number of specific obligations. Unless we agree otherwise, we are not required to monitor your portfolio or investments on an ongoing basis. • Our interests can conflict with your interests. When we provide recommendations, we must eliminate these conflicts or tell you about them and in some cases reduce them.	• We are held to a fiduciary standard that covers our entire investment advisory relationship with you. For example, we are required to monitor your portfolio, investment strategy and investments on an ongoing basis unless otherwise stipulated in the written agreement. • Our interests can conflict with your interests. We must eliminate these conflicts or tell you about them in a way you can understand, so that you can decide whether or not to agree to them.
Fees and Costs. *Fees and costs affect the value of your account over time. Please ask your financial professional to give you personalized information on the fees and costs that you will pay.*	
• *Transaction-based fees*. You will pay us a fee every time you buy or sell an investment. This fee, commonly referred to as a commission, is based on the specific transaction and not the value of your account. ~~With stocks or exchange-traded funds, this fee is usually a separate commission. With other investments, such as bonds, this fee might be part of the price you pay for the investment (called a "***mark-up***" or "***mark-down***"). With mutual funds, this fee (typically called a "***load***") reduces the value of your investment.~~	• *Asset-based fees*. You will pay an on-going fee at the end of each quarter based on the value of the cash and investments in your advisory account. The amount paid to our firm and your financial professional generally does not vary based on the type of investments we select on your behalf. The asset-based fee reduces the value of your account and will be deducted from your account. ~~For some advisory accounts, called ***wrap fee programs***, the asset-based fee will include most transaction costs and custody services,~~

Broker-Dealer Services ~~Brokerage Accounts~~	*Investment Adviser Services* ~~Advisory Accounts~~
~~• Some investments (such as mutual funds and variable annuities) impose additional fees that will reduce the value of your investment over time. Also, with certain investments such as variable annuities, you may have to pay fees such as "***surrender charges***" to sell the investment.~~ • Our fees vary and are negotiable. The amount you pay will depend, for example, on how much you buy or sell, what type of investment you buy or sell, and what kind of account you have with us. Click on the following links for more information: ○ Stocks and ETFs ○ Bonds ○ Mutual Funds ○ Variable Annuities ○ Alternative Investments • We charge you additional fees, such as custodian fees, account maintenance fees, and account inactivity fees. • The more transactions in your account, the more fees we charge you. We therefore have an incentive to encourage you to engage in transactions. • From a cost perspective, you may prefer a transaction-based fee if you do not trade often or if you plan to buy and hold investments for longer periods of time.	~~and as a result wrap fees are typically higher than non-wrap advisory fees.~~ ~~• Some investments (such as mutual funds and variable annuities) impose additional fees that will reduce the value of your investment over time. Also, with certain investments such as variable annuities, you may have to pay fees such as "***surrender charges***" to sell the investment.~~ • Our fees vary and are negotiable. The amount you pay will depend, for example, on the services you receive and the amount of assets in your account. Click on the following links for more information: ○ Stocks and ETFs ○ Bonds ○ Mutual Funds ○ Variable Annuities ○ Alternative Investments ○ Wrap Fee Programs ~~For accounts not part of the wrap fee program, you will pay a transaction fee when we buy and sell an investment for you. You will also pay fees to a broker-dealer or bank that will hold your assets (called "***custody***").~~ ~~Although transaction fees are usually included in the wrap program fee, sometimes you will pay an additional transaction fee (for investments bought and sold outside the wrap fee program).~~ • The more assets you have in the advisory account, including cash, the more you will pay us. We therefore have an incentive to increase the assets in your account in order to increase our fees. You pay our fee quarterly even if you do not buy or sell. ~~• Paying for a wrap fee program could cost more than separately paying for advice and for transactions if there are infrequent trades in your account.~~

Broker-Dealer Services ~~**Brokerage Accounts**~~	***Investment Adviser Services*** ~~**Advisory Accounts**~~
	• An asset-based fee may cost more than a transaction-based fee, but you may prefer an asset-based fee if you want continuing advice or want someone to make investment decisions for you. You may prefer a wrap fee program if you prefer the certainty of a quarterly fee regardless of the number of transactions you have.
Conflicts of Interest. *We benefit from the services we provide to you.*	
• We can make extra money by selling you certain investments, such as [__], either because they are managed by someone related to our firm or because they are offered by companies that pay our firm to offer their investments. Your financial professional also receives more money if you buy these investments. We have an incentive to offer or recommend certain investments, such as [_], because the manager or sponsor of those investments shares with us revenue it earns on those investments. • We can buy investments from you, and sell investments to you, from our own accounts (called "***acting as principal***"). We can earn a profit on these trades, so we have an incentive to encourage you to trade with us.	• We can make extra money by advising you to invest in certain investments, such as [__], because they are managed by someone related to our firm. Your financial professional also receives more money if you buy these investments. • We have an incentive to advise you to invest in certain investments, such as [_], because the manager or sponsor of those investments shares with us revenue it earns on those investments. • We can buy investments from you, and sell investments to you, from our own accounts (called "***acting as principal***"), ***but only with your specific approval on each transaction***. We can earn a profit on these trades, so we have an incentive to encourage you to trade with us.
Additional Information. *We encourage you to seek out additional information.*	
• ~~We have legal and disciplinary events.~~ Visit Investor.gov for a free and simple search tool to research our firm and our financial professionals, including our legal and disciplinary history. • For additional information about our brokers and services, visit Investor.gov or BrokerCheck (BrokerCheck.Finra.org), our website (SampleFirm.com), and your account agreement. For additional information on advisory services, see our Form ADV brochure on IAPD, on Investor.gov, or on our website (SAMPLEFirm.com/Form ADV) and any brochure supplement your financial professional provides. • To report a problem to the SEC, visit Investor.gov or call the SEC's toll-free investor assistance line at (800) 732-0330. To report a problem to FINRA, [ ]. If you have a problem with your investments, account or financial professional, contact us in writing at [ ].	

Broker-Dealer Services ~~**Brokerage Accounts**~~	***Investment Adviser Services*** ~~**Advisory Accounts**~~
Key Questions to Ask. *Ask our financial professionals these key questions about our investment services and accounts.*	
1. Given my financial situation, why should I choose an advisory account? Why should I choose a brokerage account? 2. Do the math for me. How much would I expect to pay per year for an advisory account? How much for a typical brokerage account? What would make those fees more or less? What services will I receive for those fees? 3. What additional costs should I expect in connection with my account? 4. Tell me how you and your firm make money in connection with my account. Do you or your firm receive any payments from anyone besides me in connection with my investments? 5. What are the most common conflicts of interest in your advisory and brokerage accounts? Explain how you will address those conflicts when providing services to my account. 6. How will you choose investments to recommend for my account? 7. How often will you monitor my account's performance and offer investment advice? 8. Do you or your firm have a disciplinary history? For what type of conduct? 9. What is your relevant experience, including your licenses, education, and other qualifications? Please explain what the abbreviations in your licenses are and what they mean. 10. Who is the primary contact person for my account, and is he or she a representative of an investment adviser or a broker-dealer? What can you tell me about his or her legal obligations to me? If I have concerns about how this person is treating me, who can I talk to?	

[The following data would be displayed when the mouse hovers over the product name to provide more information. Similar information could be developed for other types of investments.]

Stocks & ETFs

- The fee for the purchase of stocks or exchange-traded funds in a brokerage account is usually a separate commission.

Bonds

- Fees are usually part of the price you pay for the investment (called a "***mark-up***" or "***mark down***").

Mutual Funds

- Mutual funds impose additional fees (typically called a "***load***") that will reduce the value of your investment over time.
- If you purchase mutual funds outside of a brokerage account, you may pay us a transaction-based fee, generally referred to as a sales charge, every time you invest in the mutual fund.

Variable Annuities

- Annuities impose additional fees that will reduce the value of your investment over time. You may also have to pay fees such as "***surrender charges***" to sell the investment or withdraw funds before a specified date.

Alternative Investments

- Alternative investments may impose additional fees that will reduce the value of your investment over time.

Wrap Fee Programs

- For some advisory accounts, called wrap fee programs, the asset-based fee will include most transaction costs and custody services, and as a result wrap fees are typically higher than non-wrap advisory fees.
- Although transaction fees are usually included in the wrap program fee, sometimes you will pay an additional transaction fee (for investments bought and sold outside the wrap fee program).
- Paying for a wrap fee program could cost more than separately paying for advice and for transactions if there are infrequent trades in your account.
- For accounts not part of a wrap fee program, you will pay a transaction fee when we buy and sell an investment for you as well as pay fees to a broker-dealer or bank that will hold your assets (called "custody").