



August 7, 2018

Via E-Mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

Re: 1) Regulation Best Interest (**SEC Release No. 34-83062; File No. S7-07-18**);  
2) Form CRS Relationship Summary, Amendments to Form ADV, Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles (**SEC Release No. 34-83063; IA-4888; File No. S7-08-18**); and  
3) Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation (**SEC Release No. IA-4889; File No. S7-09-18**)

Dear Mr. Fields:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> appreciates the opportunity to comment on the above-captioned proposals (each a “Proposal” and collectively, the “Proposals”). SIFMA supports and commends the Securities and Exchange Commission’s (“SEC” or “Commission”) objectives of enhancing investor protection while at the same time preserving investor access to transaction-based advice and a variety of investment products. We have been supportive of the SEC’s attention to this important investor protection initiative for almost a decade; we want to remain constructive participants in the process and hope you find our response informative and helpful.

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<sup>1</sup> SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

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## **I. Executive Summary.**

SIFMA generally supports the Proposals and commends the SEC for proposing a new best interest standard under the Securities Exchange Act of 1934 (“Exchange Act”), Regulation Best Interest (“Proposed Reg BI”), that would protect retail investors while preserving retail investor choice and access to the brokerage “pay as you go” advice model. The proposed standard significantly strengthens the standard of conduct applicable to broker-dealers by imposing additional investor protections that exceed those of the Financial Industry Regulatory Authority’s (“FINRA”) suitability rule.<sup>2</sup>

For almost ten years, SIFMA has supported enhancing the standard of conduct applicable to broker-dealers when providing personalized investment advice about securities to retail investors and making it comparable to the standard applicable to investment advisers. SIFMA supports the principles-based, non-prescriptive approach the SEC has taken, and we believe the final rules should remain principles-based and non-prescriptive.

As discussed in this comment letter, however, certain key changes must be made to the Proposals to make them workable for the industry and to avoid unintended consequences, such as decreased choice for retail investors and a shift away from the brokerage model.

With regard to Proposed Reg BI, SIFMA believes there are a number of areas that should be modified or clarified. These areas include the following, among others.

- The definition of “retail customer” should be modified to capture those individuals who actually function as retail investors. As discussed below, we believe this definition should be harmonized with FINRA’s definition and doing so would be beneficial for both investors and broker-dealers. As currently drafted, the proposed definition would present significant challenges for firms because it would result in inconsistent and redundant compliance structures to address the different definitions of “retail customer.”
- The proposed interpretation of “material conflicts of interest” should be refined to elicit meaningful disclosures. As currently drafted, the proposed interpretation could result in excessive disclosure that would overwhelm investors. We urge the SEC to adopt, instead, the well-established definition of materiality for purposes of the Exchange Act that was set forth by the U.S. Supreme Court in *Basic v. Levinson*, thereby making Reg BI consistent with the rest of the Exchange Act.
- The Conflict of Interest Obligations should not distinguish between financial and non-financial conflicts of interest. Given that virtually all conflicts of interest have a financial motivation (even if attenuated), we do not believe the distinction between financial and non-financial is meaningful. Instead, the focus should be on whether a

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<sup>2</sup> Proposed Reg BI imposes four new obligations under the Exchange Act: a disclosure obligation set forth in proposed Rule 15l-1(a)(2)(i) (“Disclosure Obligation”); a care obligation set forth in proposed Rule 15l-1(a)(2)(ii) (“Care Obligation”); and two conflicts of interest obligations set forth in proposed Rule 15l-1(a)(2)(iii) (each a “Conflict of Interest Obligation” and collectively, the “Conflict of Interest Obligations”).

conflict is material, and disclosure should be recognized as an effective mitigant for material conflicts arising from financial incentives in certain circumstances. To this end, there should be parity between the treatment of conflicts of interest by investment advisers under the fiduciary standard and by broker-dealers under the best interest standard. Not allowing disclosure to be an effective mitigant effectively holds broker-dealers to a higher standard than the one applicable to investment advisers, which we understand is not the SEC's intent. Additionally, for material conflicts of interest of associated persons, we believe the focus should be on conflicts that arise from that person's financial compensation. This is consistent with our view that conflicts that are material generally have a financial motivation.

- Regarding the Disclosure Obligation, there are certain areas that require further guidance and clarification. For example, we seek confirmation that there is no requirement for a point of sale or point of recommendation disclosure, as such a requirement would be unworkable for the industry. We also seek clarification about when oral disclosures suffice, about the timing and specificity of disclosure, and about the adequacy of website disclosures, among others.
- We ask the SEC to clarify its expectations on how firms can satisfy the Care Obligation. In particular, we seek confirmation regarding the relevance of cost and what actions firms should take when they choose to limit their offering to proprietary and other limited categories of products.

With regard to the Form CRS Relationship Summary ("Proposed Form CRS"), we believe the SEC should adopt a simplified, less confusing, and more flexible approach to disclosure. To this end, Form CRS should be more streamlined and include links to provide investors with more information if they want it. We believe there should not be a "one size fits all" Form CRS – greater flexibility is needed to accommodate various business models, given that different firms offer different products and services.

Our concerns here are particularly acute for dual-registrants, which seem to face more stringent requirements than standalone broker-dealers or investment advisers. In this regard, the proposed dual-registrant Form CRS would further confuse investors by presenting information that may not be relevant to them. For example, a substantial percentage of retail investors do not qualify for investment advisory services given that these typically require a minimum account balance.

We include, at Appendixes 2.a and 2.b, mockup Forms CRS reflecting two different approaches. While not intended to be exclusive, we believe they illustrate alternatives that will better enable investors to understand the relevant information and a firm's advice offerings.

While not a large focus of this letter, SIFMA also generally supports the harmonization of other areas of broker-dealer and investment adviser regulation, including (1) federal licensing and continuing education, (2) provision of account statements, and (3) financial responsibility. We encourage further deliberation by the SEC regarding these discrete regulatory areas, and we hope to engage the Staff in future dialogue on these topics.

Finally, we suggest a 24-month implementation period to ensure timely firm compliance. At the same time, we urge the SEC to move forward without delay on this rulemaking. Because the Proposals represent an important investor protection initiative, the SEC should proceed to final rulemaking as expeditiously as possible.

We discuss these and other comments more fully below.

## **II. SIFMA Generally Supports the SEC's Proposals.**

SIFMA appreciates the opportunity to comment on the SEC's Proposals. For almost ten years, SIFMA has advocated for a heightened standard of conduct for broker-dealers when making personalized recommendations about securities to retail investors. SIFMA's formal written advocacy on this issue includes Congressional testimony on five occasions,<sup>3</sup> seven comment letters to the SEC,<sup>4</sup> and one comment letter to FINRA.<sup>5</sup> Most recently, in 2017, SIFMA advocated for the SEC to build upon FINRA's rules and guidance and adopt a best interest standard of conduct for broker-dealers when making personalized recommendations that encompasses a duty of loyalty, a duty of care, and enhanced up-front disclosures.<sup>6</sup>

SIFMA generally supports the Proposals, including creating a new best interest standard under the Exchange Act that meaningfully raises the bar from the current suitability standard under FINRA rules. SIFMA also commends the SEC's objectives of preserving retail investor choice and access to the brokerage "pay as you go" advice model and providing flexibility for member firms ("firms" or "broker-dealers") to develop reasonably designed policies and procedures using a principles-based approach. Consistent with these objectives, SIFMA endorses the SEC's decision to:

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<sup>3</sup> SIFMA testimony before the Senate Banking Committee (Mar. 10, 2009), *available at* <http://www.sifma.org/issues/item.aspx?id=1510>; SIFMA testimony before the House Financial Services Committee (Jul. 17, 2009), *available at* <http://www.sifma.org/issues/item.aspx?id=1515>; SIFMA testimony before the House Financial Services Committee (Oct. 6, 2009), *available at* <http://www.sifma.org/issues/item.aspx?id=1519>; SIFMA testimony before House Financial Services Committee (Sep. 13, 2011), *available at* <http://www.sifma.org/issues/item.aspx?id=8589935390>; SIFMA testimony before House Financial Services Committee (Jun. 6, 2012), *available at* <http://www.sifma.org/issues/item.aspx?id=8589938957>.

<sup>4</sup> SIFMA comment to SEC (Aug. 30, 2010), *available at* <https://www.sifma.org/issues/item.aspx?id=22263>; SIFMA & Oliver Wyman comment to SEC (Nov. 1, 2010), *available at* <http://www.sifma.org/issues/item.aspx?id=21999>; SIFMA & Oliver Wyman comment to SEC (Nov. 17, 2010), *available at* <http://www.sifma.org/issues/item.aspx?id=22336>; SIFMA comment to SEC (Jul. 14, 2011), *available at* <http://www.sifma.org/issues/item.aspx?id=8589934675>; SIFMA comment to SEC (May 4, 2012), *available at* <https://www.sifma.org/issues/item.aspx?id=8589938634>; SIFMA comment to SEC (Jul. 5, 2013), *available at* <https://www.sifma.org/issues/item.aspx?id=8589944317>; SIFMA comment to SEC (Jul. 21, 2017), *available at* <https://www.sifma.org/resources/submissions/standards-of-conduct-for-investment-advisers-and-broker-dealers/>.

<sup>5</sup> SIFMA comment to FINRA (Dec. 3, 2010), *available at* <http://www.sifma.org/issues/item.aspx?id=22482>. SIFMA's work product also includes two economic study reports quantifying the costs and expenses under various approaches, two reports providing a detailed roadmap for SEC rulemaking under Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), a robust cost-benefit analysis, and proposed rule text.

<sup>6</sup> *See, e.g.*, SIFMA comment to SEC at 4 (Jul. 21, 2017), *available at* <https://www.sifma.org/resources/submissions/standards-of-conduct-for-investment-advisers-and-broker-dealers/>.

- develop a best interest standard applicable to broker-dealers rather than a uniform fiduciary standard;
- use the phrase “without placing the financial or other interest . . . ahead of the interest of the retail customer” instead of the “without regard to” language that appeared in the SEC Staff’s study on broker-dealers and investment advisers;<sup>7</sup>
- focus on recommendations and not impose a new duty on broker-dealers to monitor the performance in a brokerage account; and
- prioritize preserving investors’ choice and access to products, services, service providers, and payment options.

As discussed in more detail below, SIFMA believes that Proposed Reg BI would better protect retail customers because it is significantly stronger than the current suitability standard and provides meaningful protections. Additionally, SIFMA believes that it is appropriate for Proposed Reg BI to be developed through principles-based obligations that provide broker-dealers with flexibility, as is the case with the fiduciary standard under the Investment Advisers Act of 1940 (“Advisers Act”).

To be clear, the implementation costs of Proposed Reg BI and Proposed Form CRS would be significant for the industry. That said, SIFMA believes that these costs could be manageable, provided that certain critical changes and clarifications are made to the Proposals, as discussed below in Sections III, IV, and V.

**A. Proposed Reg BI Would Strengthen the Current Suitability Standard and Create Enhanced Protections for Retail Customers.**

Proposed Reg BI enhances the standards of conduct for broker-dealers and levels the framework under which broker-dealers operate to facilitate better understanding for investors. It does so in at least five key respects.

First, the proposed standard requires that recommendations must be not only suitable, but also in the retail customer’s “best interest.” This means, among other things, that broker-dealers cannot put their financial or other interests ahead of the interests of the retail customer.

Second, the proposed standard clarifies that broker-dealers must more heavily weigh the cost of a security or strategy as a factor (among many factors that should be considered) in determining whether to recommend the security or strategy, but importantly does not make cost the only factor.

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<sup>7</sup> See 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), at 9-10, available at [www.sec.gov/news/studies/2011/913studyfinal.pdf](http://www.sec.gov/news/studies/2011/913studyfinal.pdf) (“Section 913 Study”).

Third, the proposed standard imposes additional requirements with regard to conflicts of interest. In particular, it requires enhanced disclosure about material conflicts of interest to help retail customers evaluate recommendations.

Fourth, the proposed standard mandates specific disclosures about the scope and terms of the broker-dealer's relationship with the retail customer. This requirement will clarify the broker-dealer's obligations to the customer and help alleviate customer confusion.

Finally, the proposed standard is more protective of retail customers than the current suitability standard because it does not require scienter (intent or knowledge of wrongdoing) to establish a violation. In contrast, scienter is required to prove a suitability claim under the antifraud provisions of the federal securities laws. Thus, Proposed Reg BI protects retail customers regardless of whether the broker-dealer knew a recommendation was not in the best interest of the retail customer at the time the broker-dealer made the recommendation.

In short, we believe the criticism that Proposed Reg BI does not adequately protect retail customers is unfounded. In addition to a new Disclosure Obligation, Reg BI imposes a new Care Obligation and two Conflict of Interest Obligations. Under Proposed Reg BI, the standards for evaluating recommendations about a securities transaction or an investment strategy involving securities made by a broker-dealer will provide meaningful new protections to retail customers. While broker-dealers are not subject to a continuous and ongoing fiduciary duty because the best interest obligation applies at a specific point in time (*i.e.*, the time of the recommendation), the obligation imposed by Proposed Reg BI at that specific point in time would be generally consistent with the obligation imposed on an investment adviser when providing personalized investment advice about securities to a client.

## **B. Proposed Reg BI and Proposed Form CRS Provide Meaningful Protections.**

Proposed Reg BI and Proposed Form CRS, together with existing standards, preserve access and choice for investors while providing meaningful protections in areas that the Department of Labor's ("DOL") "conflict of interest" rule ("DOL Fiduciary Rule") sought to address. In particular, under Proposed Reg BI, a broker-dealer making a personalized recommendation about a securities transaction or an investment strategy involving securities must: (1) act in the retail customer's best interest, without placing the financial or other interest of the broker-dealer ahead of the retail customer's interest; (2) act with diligence, care, skill and prudence,<sup>8</sup> and carefully weigh the cost of the security as a factor in determining whether to make the recommendation; and (3) disclose material conflicts of interest. And, under existing

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<sup>8</sup> We understand that the use of "prudence" in Proposed Reg BI is not meant to be used in the same context as in ERISA nor to incorporate ERISA requirements and standards. Reg BI's Proposing Release indicates that the term "prudence" has been used in the federal securities laws in the following contexts: (1) in the context of underwriters of municipal offerings, *see SEC v. Glt Dain Rauscher, Inc.*, 254 F.3d 852, 853 (9th Cir. 2001) (holding that "the industry standard of care for an underwriter of municipal offerings is one of reasonable prudence, for which the industry standard is one factor to be considered, but is not the determinative factor"); (2) in the context of Section 11(c) of the Securities Act of 1933, under which the adequacy of an underwriter's due diligence efforts are assessed based on "the standard of reasonableness [that is] required of a prudent man in the management of his own property." 15 U.S.C. 77k(c). Regulation Best Interest, 83 Fed. Reg. 21574, 21609 n. 224 (proposed May 9, 2018) available at <https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08582.pdf> ("Reg BI Proposing Release" or "Reg BI Proposal").



SEC and FINRA requirements, broker-dealers must satisfy best execution, fair pricing/commission, and just and equitable principles of trade obligations, among many other obligations. They also may not make misleading statements or material omissions of fact.

Additionally, the SEC's Proposed Reg BI and Proposed Form CRS include enhanced disclosure and risk mitigation elements similar to the DOL Fiduciary Rule's Best Interest Contract Exemption ("BIC Exemption"). The Proposals, however, will be more effective because the disclosures are better tailored to the brokerage business model and are intended to be in summary, digestible form that is much more appropriate for retail investors.

We also note that the SEC's Proposed Reg BI applies more broadly than the vacated DOL Fiduciary Rule because it applies to all retail customer accounts, not just retirement accounts, and it will allow the SEC to enforce a common standard across the industry. At the same time, Proposed Reg BI avoids the many shortcomings that were embedded in the DOL Fiduciary Rule and that threatened to lead to greater cost, less choice, and fewer professional services and options for retirement savers.

### **C. The Best Interest Standard Is and Should Remain a Principles-Based Regime.**

SIFMA believes that it is appropriate for Proposed Reg BI to be developed through principles-based obligations. While some have criticized Proposed Reg BI for not defining the term "best interest," we believe this criticism is unfounded for the following reasons.

First, the proposed best interest standard is appropriately intended to be a principles-based, facts and circumstances approach, and not a defined term.<sup>9</sup> This approach is similar to the fiduciary standard applicable to investment advisers under the Advisers Act, which has been developed through principles-based obligations without defining the term "fiduciary." This principles-based fiduciary standard has worked effectively over the past half-century without a statutory definition of "fiduciary."<sup>10</sup>

Second, a definition of "best interest" is unnecessary because the contours of the "best interest" obligation are delineated by the four obligations Proposed Reg BI imposes. Proposed Reg BI is explicit in stating that the best interest obligation is satisfied by meeting the enumerated Disclosure Obligation, Care Obligation, and Conflict of Interest Obligations. We agree with the SEC that a facts and circumstances approach rather than a "check-the-box" compliance exercise will enhance investor protection, as it will focus on the reasonableness of the recommendation at that specific point in time. What is in any specific retail customer's "best interest" is inherently a facts and circumstances determination; accordingly, a principles-based

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<sup>9</sup> Similarly, the SEC refers to the FINRA concept of "recommendation" rather than prescribing a specific definition. We believe this is appropriate, and we believe that a carveout for educational materials would be consistent with that approach.

<sup>10</sup> Regulators in other countries, such as the U.K. Financial Conduct Authority, have also taken a principles-based approach in regulating areas such as suitability. *See, e.g.* COBS 9.3, Guidance on assessing suitability.

standard allows recommendations to be more meaningfully assessed for consistency with best interest.

### **III. Proposed Reg BI: Necessary Areas for Improvement and Clarification.**

Notwithstanding SIFMA's general support, there are certain areas of Proposed Reg BI that should be modified or clarified in order to allow firms to implement the regulation in an efficient manner that would most effectively benefit investors. Our issues focus primarily on the scope of certain terms in Proposed Reg BI and on practical implementation issues for the proposed Disclosure, Care, and Conflict of Interest Obligations and recordkeeping requirements. Importantly, we believe these critical modifications and clarifications are consistent with the purpose and protections of Proposed Reg BI. We discuss these areas below.

#### **A. The Proposed Definition of "Retail Customer" Should Build Upon Existing FINRA Rules.**

##### **1. The Proposed Definition Creates a New, Inconsistent Definition That Would Present Significant Challenges for Firms.**

Proposed Reg BI's definition of "retail customer," in its current form, will create significant challenges and burdens for firms because it is inconsistent with related definitions for purposes of FINRA rules, Exchange Act Rule 17a-3(a)(17), and Proposed Form CRS. And while the proposed definition purports to use language from Section 913(a) of the Dodd-Frank Act, we note that it is also inconsistent with the Section 913(a) definition of "retail customer," which is limited to natural persons.

Complying with yet another similar yet not the same definition would require substantial compliance builds, create confusion, and result in inconsistent but overlapping internal procedures, without advancing regulatory goals. The logistical difficulties are particularly acute with respect to FINRA's rules since certain of Proposed Reg BI's requirements are based and build on FINRA suitability requirements. Therefore, firms would need to create separate but redundant compliance structures to address two different definitions of "retail customer."

Proposed Reg BI defines a "retail customer" as follows:

a person, or the legal representative of such person, who: (1) 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 (2) uses the recommendation primarily for personal, family, or household purposes.

This proposed definition is different from, and both broader and narrower than, other definitions of "retail customer" or "retail investor" in the following ways. First, it is broader because this definition would include the following persons who are excluded from FINRA's definition of "retail investor": registered investment advisers (if acting as a legal representative for a retail customer) and potentially partnerships, corporations, trusts, and natural persons with

assets of \$50 million or more.<sup>11</sup> By extending the best interest obligation to “legal representatives” of retail customers and other sophisticated investors, the proposed definition would capture scenarios that should not be in scope, such as where a recommendation is provided to a professional fiduciary, and not directly to a retail customer. This could result in some broker-dealers ceasing to support accounts that are institutions handling “retail customer” accounts (*e.g.*, registered investment advisers) as they are not set up to fulfill the best interest obligation. It would also result in the anomaly of applying Reg BI to clients to whom no suitability obligation is owed.

Second, Proposed Reg BI’s definition of “retail customer” is also broader than the definition of “customer” in Exchange Act Rule 17a-3(a)(17) and Section 913(a) of the Dodd-Frank Act because it is not limited to natural persons. In this regard, Proposed Reg BI’s definition is also inconsistent with proposed Form CRS’s definition of “retail investor,” which is limited to natural persons and a trust or other similar entity that represents natural persons.<sup>12</sup>

At the same time, Proposed Reg BI’s definition of “retail customer” is narrower than FINRA’s definition and the other definitions discussed above because it is limited to persons who use a recommendation “primarily for personal, family, or household purposes.” It is not clear what customer, regulatory, or business benefit would be served by limiting the application of Proposed Reg BI to recommendations to be used for a particular purpose. For example, under FINRA’s definition, a charitable organization with assets under \$50 million would be a “retail investor.” This organization, however, would not be a “retail customer” under Proposed Reg BI’s definition because it presumably would not use recommendations for “personal, family, or household purposes.”

This limitation in Reg BI – which defines whether or not someone is a “retail customer” based on how that person plans to use a recommendation – also will create confusion, and present additional compliance burdens for firms. To this end, firms do not always know the purpose for which a customer plans to use a recommendation, and a customer may not want to disclose such purpose.

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<sup>11</sup> FINRA Rule 2210(a)(6) defines a “retail investor” as “any person other than an institutional investor.” An “institutional investor,” in turn is defined in Rule 2210(a)(4) to include, among others, any “institutional account.” The term “institutional account” is defined in Rule 4512(c) as “the account of: (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million.” To the extent a partnership, corporation, trust or other entity has assets of \$50 million or more, it would be captured by the proposed definition in Reg BI if it uses the recommendation “primarily for personal, family, or household purposes.”

<sup>12</sup> We acknowledge that “retail investor” in proposed Form CRS is broader than the definition of “retail customer” in certain respects because it does not require the receipt of a recommendation for personal, family, or household purposes.

## 2. The Definition of “Retail Customer” in Reg BI Should Be Refined and Made More Consistent with Other Definitions.

Given the above concerns with the proposed definition of “retail customer,” we ask that the SEC revise the definition of “retail customer” to be consistent with existing definitions that firms have relied on to develop compliance and supervisory structures. To this end, we believe that FINRA’s definition of “retail investor” is the most appropriate definition for the following reasons.

First, FINRA’s definition is the one that firms have used to develop policies and procedures, controls, and compliance structures that address the same core areas as Proposed Reg BI, namely suitability, communications, and disclosure obligations. Adopting a definition of “retail customer” consistent with FINRA rules would avoid the significant administrative and operational burdens involved in the implementation of new overlapping but different systems and procedures.<sup>13</sup> Firms have already created controls to identify retail investors for purposes of suitability, communications, and disclosure obligations; changing this standard would impose considerable costs and would be operationally burdensome. For example, the proposed definition would require broker-dealers to adjust account opening documentation and processes around disclosures for customers covered out of the same business line based on the purpose of the recommendation. This distinction would be costly to the industry, while the value of such a distinction is unclear.<sup>14</sup> It is possible that this distinction also could result in the same client or account being subject to different standards and processes depending on the client’s ultimate intent with respect to a recommendation. Such a result would be not only operationally challenging, but also confusing to the customer.

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<sup>13</sup> There are several areas where FINRA has distinguished between retail and institutional customers, thus further highlighting the challenges of having a different definition of “retail customer” under Proposed Reg BI. For example, under FINRA Rule 2210 (which incorporates the definition in Rule 4512(c)), a “retail customer” does not include a natural person, corporation, trust partnership, or other entity with assets of \$50 million or more. Such persons would be treated as “institutional customers,” and broker-dealers’ communications with these persons are “institutional communications” that are subject to a different standard of review and disclosure than communications with retail customers. Also, under FINRA Rules 2111 and 4512(c), different suitability and recordkeeping requirements would apply to these persons, who would be considered “institutional accounts” and not “retail.” Further, under FINRA Rule 2242, broker-dealers are able to send institutional debt research to these persons because they qualify as eligible institutional accounts under that rule.

<sup>14</sup> The concept of “primarily for personal, family, or household purposes” also exists in Regulation B (Equal Credit Opportunity Act) and Reg S-P (Privacy of Consumer Financial Information). However, these regulatory obligations are much more limited than the obligations under Proposed Reg BI, and, therefore, an overly broad reading does not present significant burdens and costs.

Second, we believe that FINRA's definition of "retail investor" appropriately captures those persons who need the protections offered by Proposed Reg BI.<sup>15</sup> More specifically, FINRA's definition covers natural persons except for those with \$50 million or more. It also covers any corporations, partnerships, trusts, and certain other accounts with assets of less than \$50 million that would not otherwise qualify as an institutional investor.<sup>16</sup> Customers with assets of \$50 million or more are properly defined as institutional customers because they are among the wealthiest and most sophisticated customers and often have multiple professional fiduciaries and advisers, apart from their broker-dealer relationships. FINRA's exclusion of these persons from the definition of retail customer reflects its understanding that these accounts do not function as "retail customers" and that "a member's relationship with an institutional customer is different than the member's relationship with retail customers."<sup>17</sup> By including natural persons with assets in excess of \$50 million in the institutional customer exception, FINRA has indicated that natural persons with assets in excess of \$50 million are more similar to institutional customers than they are to retail customers with respect to the protections they need. FINRA's treatment of such natural persons as "institutional customers" has worked well for years without

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<sup>15</sup> Specifically, under FINRA rules, retail investors are customers other than institutional investors. Institutional investors are limited to the following persons under FINRA Rules 2210 and 4512(c): (1) bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million; (4) governmental entity or subdivision thereof; (5) employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of such plans; (6) qualified plan, as defined in Section 3(a)(12)(C) of the Exchange Act, or multiple qualified plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but does not include any participant of such plans; (7) member or registered person of such a member; and (8) person acting solely on behalf of any such institutional investor.

<sup>16</sup> For example, a bank, insurance company, registered investment company, and registered investment adviser would all qualify as "institutional" even if they do not have assets of \$50 million or more.

<sup>17</sup> NASD Notice of Filing of Proposed Rule Change and Interpretation of Its Suitability Rule, 60 Fed. Reg. 54530, 54545 (Oct. 24, 1995), available at <https://www.gpo.gov/fdsys/pkg/FR-1995-10-24/pdf/95-26231.pdf>. Note that even if a customer is an "institutional customer," FINRA's suitability obligations still apply to that customer. A broker-dealer must have a reasonable basis to believe that an institutional customer can evaluate investment risks independently and the customer must affirmatively state that it is exercising independent judgment before a broker-dealer can apply the institutional suitability standard.

presenting any suitability, conflicts or disclosure issues that have caused FINRA to propose changes to it.<sup>18</sup>

FINRA's definition also appropriately excludes registered investment advisers and certain other regulated entities. These persons could be captured under Proposed Reg BI's definition of "retail customer" even though they are sophisticated market professionals who cannot fairly be characterized as "retail" investors. Moreover, there is no clear policy reason for treating them as "retail" investors who need the protections afforded by Proposed Reg BI.

Finally, we believe the SEC should adopt a definition of "retail customer" that is consistent with FINRA's definition because the overly-broad definition of "retail customer" in Proposed Reg BI would result in limited customer choice and opportunity – which we understand is not the intended purpose of the regulation. For example, the proposed definition would result in some broker-dealers or certain departments of broker-dealers ceasing to support accounts that are institutions handling "retail customer" accounts (*e.g.*, registered investment advisers) because the firm's or the department's client base is primarily institutional and, thus, they are not set up to fulfill and apply the best interest obligation to such persons. These departments that are set up to serve a primarily institutional client base include, among others, institutional sales, sector strategy, trading, and some research departments.

Also, a broader definition could result in loss of investment opportunity for those sophisticated customers who operate as institutional investors (and would be institutional customers under FINRA's definition) but would need to be treated as retail customers under Proposed Reg BI's definition. An example of a lost opportunity would be if a private equity firm contacts a broker-dealer to inquire about additional co-investors in a private company, where the deal will close in a week. Because the deal has a very short timeframe and the broker-dealer is not acting as an underwriter, the broker-dealer would not conduct the type of due diligence that it would for traditional offerings. Instead, the investor would agree to conduct its own due diligence (and may hire its own team of outside lawyers and consultants) and would have access to confidential documentation provided by the private company. Under Proposed Reg BI's definition, this type of investment opportunity could no longer be provided to sophisticated

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<sup>18</sup> To be sure, the SEC has recognized that not all "natural person" customers require the same protections under the securities laws. For example, in Regulation D, the SEC recognized that persons with net worth over \$1 million qualify as "accredited investors" and may participate in unregistered securities offerings that do not afford all of the disclosure and other protections of registered offerings. The SEC acknowledged that these investors are "those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary." Regulation D Revisions; Exemption for Certain Employee Benefit Plans, 52 Fed. Reg. 3015 (Jan. 30, 1987), *available at* <https://www.govinfo.gov/content/pkg/FR-1987-01-30/pdf/FR-1987-01-30.pdf>. The SEC's 2015 Report on the Review of the Definition of "Accredited Investor" states that financial literacy surveys reflect that higher income individuals have a higher financial literacy score than lower income individuals. SEC Report on the Review of the Definition of "Accredited Investor" at 45 (Dec. 18, 2015), *available at* <https://www.sec.gov/files/review-definition-of-accredited-investor-12-18-2015.pdf>. The report cites several studies that indicate that financial sophistication increases strongly with wealth, concluding that "these findings appear to support the continued use of financial thresholds as one method of qualifying as an accredited investor." *Id.* at 45-46. The SEC notes that "[h]igher net worth and higher income investors may make more rational investment decisions based on past investing experience or outside factors such as education levels or by learning through social interactions . . . they may also have more access to information and technology and may more frequently use outside professional advisors." *Id.* at 46.

customers – even though they are and have been treated as institutional customers under FINRA rules – because Proposed Reg BI’s rigorous Duty of Care would make it impossible to facilitate these types of investment opportunities.<sup>19</sup>

If the SEC is determined to retain the proposed definition, at a minimum we ask for the following refinements so that the definition of “retail customer” is appropriately tailored to those persons who are actually retail customers and need the protections of Reg BI, *i.e.*:

(a) natural persons or trusts or other entities established by natural persons (i) who have assets of less than \$50 million, or (ii) who are unable to affirmatively indicate that they are exercising independent judgment in evaluating the broker-dealer’s or associated person’s recommendations, or (iii) with respect to whom the broker-dealer or associated person does not have a reasonable basis to believe the customer is capable of independently evaluating investment risks; and

(b) legal representatives of such persons who are not professional advisors or fiduciaries (*e.g.*, family offices), are not regulated entities (*e.g.*, other broker-dealers or investment advisers), and are not “institutional investors” under FINRA’s definition.

With respect to (a), we believe that this language will provide greater clarity and precision for firms regarding the meaning of “retail customer” and would be consistent with the SEC’s objectives of (i) capturing certain non-natural persons that represent the assets of a natural person, such as trusts, and may benefit from the protections of the rule,<sup>20</sup> and (ii) at the same time, avoiding a definition that includes institutional accounts that generally should not be in-scope.<sup>21</sup> Consistent with FINRA’s standard, this definition applies a very high dollar threshold in determining which investors are retail versus institutional. However, in addition to satisfying this threshold, this definition requires the customer to affirmatively indicate that it is exercising independent judgment in evaluating recommendations and requires firms to make a separate and independent determination that the customer is capable of evaluating investment risks independently.<sup>22</sup>

With respect to (b), we believe this limitation will more appropriately address the types of persons for which the protections of Proposed Reg BI are intended. It is also more consistent with FINRA’s rules, which exclude professional fiduciaries such as registered investment

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<sup>19</sup> We appreciate that the Duty of Care is triggered by the provision of a “recommendation”; however, given that a “recommendation” has been interpreted to include a “call to action,” a broker-dealer likely would not take the risk that identifying these opportunities would not be a recommendation.

<sup>20</sup> Reg BI Proposing Release at 21596.

<sup>21</sup> *Id.* at 21597 (“[W]e are concerned that this rule would apply to recommendations that are primarily for business purposes (such as any recommendations to institutions), which is beyond the intended focus of Regulation Best Interest . . .”).

<sup>22</sup> Under FINRA’s suitability rule (Rule 2111), these persons are considered “retail accounts.” An account that qualifies as an “institutional account” under FINRA rules is still covered by FINRA’s customer-specific suitability standards if the account is unable to affirmatively indicate that it is exercising independent judgment in evaluating recommendations *or* if the broker-dealer or the associated person does not have a reasonable basis to believe that the institutional customer is capable of evaluating investment risks independently.

advisers and bank trust departments, and entities such as multi-family offices from the definition of “retail customer.” As discussed above, these persons are sophisticated market professionals who do not need the protections that Proposed Reg BI is intended to provide to retail investors. Moreover, in some instances, firms may have no relationship with the underlying retail customers that these professionals, such as bank trust departments, represent.

Additionally, if the SEC maintains the condition that the recommendation is used primarily for personal, family, or household purposes, the SEC should both (i) clarify what “primarily” means in this context, and (ii) refine the condition to focus on whether an account is primarily being used for personal, family or household purposes as opposed to whether each recommendation is being used for those purposes. A customer is unlikely to use a single account for both personal, family or household reasons and for business or other commercial purposes. Therefore, the additional protection to customers provided by requiring brokers to obtain the customer’s purpose for each investment being recommended would be small. Further, this standard would allow broker-dealers to use their existing account opening process to document the client’s purpose for an account, which would greatly reduce the administrative burden of this specific provision.

Finally, and importantly, the definition of “retail customer” should be harmonized with the proposed definition of “retail investor” in Proposed Form CRS in its limitation to natural persons, and both definitions should exclude institutional investors as recommended above (except that Proposed Reg BI should not apply to prospective customers). Having Proposed Reg BI potentially apply to a much broader universe of non-natural persons and legal representatives would be burdensome and confusing.

## **B. The Proposed Interpretation of “Material Conflicts of Interest” Should Be Refined to Elicit Meaningful Disclosures.**

The Reg BI Proposing Release includes the following interpretation of the phrase “material conflicts of interest”:

a conflict of interest that a reasonable person would expect might incline a broker-dealer – consciously or unconsciously – to make a recommendation that is not disinterested.<sup>23</sup>

While this language has been articulated in federal case law as a fiduciary standard for investment advisers under the Advisers Act,<sup>24</sup> we believe that applying it in the context of determining what conflicts of interest are material for purposes of Proposed Reg BI is directly contrary to the Commission’s desire to avoid overloading retail customers with disclosures “that would not ultimately affect a retail customer’s decision about a recommended transaction or strategy and might obscure the more important disclosures.”<sup>25</sup> Using this interpretation to set the standard for materiality raises more questions than it provides clarity. It could result in

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<sup>23</sup> Reg BI Proposing Release at 21602.

<sup>24</sup> See, e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) (“Capital Gains”).

<sup>25</sup> Reg BI Proposing Release at 21603-21604.



disclosures that are so over-inclusive as to overwhelm meaningful disclosure of material conflicts of interest to retail customers. In that regard, we believe a more appropriate standard is the long accepted “materiality” standard set by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*<sup>26</sup> and reaffirmed in *Basic, Inc. v. Levinson*.<sup>27</sup> We see no reason to use a different standard of “materiality” for purposes of Proposed Reg BI and make it inconsistent with the rest of the Exchange Act.<sup>28</sup>

1. Capital Gains Sets an Ill-Suited Standard of “Materiality” for Reg BI.

The *Capital Gains* description of “conflicts of interest” is ill-suited to serve as the “material conflicts of interest” standard for Proposed Reg BI. Notably, the precise language of *Capital Gains* quoted in the Proposed Reg BI release is not explicitly used by the Supreme Court to define “material conflicts of interest,” but rather, the language is used to describe broadly an investment adviser’s obligations to its clients: “The Investment Advisers Act of 1940 thus reflects a congressional recognition ‘of the delicate fiduciary nature of an investment advisory relationship,’ as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.”<sup>29</sup> Given the SEC’s stated purpose here of crafting a narrower rule for broker-dealers to focus only on “material” conflicts of interest, the *Capital Gains* standard is not appropriate.<sup>30</sup> Indeed, we believe this broad interpretation would result in precisely the “lengthy disclosures that do not meaningfully convey the material facts and material conflicts of interest and may undermine the Commission’s goal of facilitating disclosure to assist retail customers in making informed investment decisions.”<sup>31</sup> Because the proposed interpretation does not distinguish conflicts that are of little if any consequence from those that would reasonably impact recommendations, firms may develop disclosures that would identify every possible conscious and unconscious conflict, thus forcing investors to sift through extensive conflict disclosures to find the ones they may actually care about.

2. Reg BI Should Use the Time-Tested Definition of “Materiality” Set Forth by the Supreme Court in *Basic v. Levinson*.

Consistent with the SEC’s objective of capturing only those conflicts that are “material” (as opposed to “any conflicts of interest” that a broker-dealer may have with a retail customer),

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<sup>26</sup> 426 U.S. 438 (1976).

<sup>27</sup> 485 U.S. 224 (1988).

<sup>28</sup> See, e.g., FINRA Rule 2210 (requiring disclosure of material facts) and Rules 2241 and 2242 (requiring disclosure of material conflicts of interest in research).

<sup>29</sup> *Capital Gains*, 375 U.S. at 191-92.

<sup>30</sup> As the Proposal states, “[l]imiting the obligation to ‘material’ conflicts is consistent with case law under the antifraud provisions, which limit disclosure obligations to ‘material facts,’ even when a broker-dealer is in a relationship of trust and confidence with its customer. We believe that expanding the scope of the obligation more broadly to cover any conflicts a broker-dealer may have would inappropriately require broker-dealers to provide information regarding conflicts that would not ultimately affect a retail customer’s decision about a recommended transaction or strategy and might obscure the more important disclosures.” Reg BI Proposing Release at 21603-21604 (emphasis in original).

<sup>31</sup> *Id.* at 21604.

we urge the SEC to use the well-established definition of “materiality” as it has been understood and interpreted by the courts for purposes of the federal securities laws. That definition focuses on the significance a reasonable investor would place on the withheld or misrepresented information. We believe that adopting an overbroad standard that does not use the word “material” would result in excessive disclosures that would be counterproductive.

When complying with Proposed Reg BI, firms should be allowed to use the long-accepted materiality standard articulated by the Supreme Court in *TSC Industries v. Northway* and *Basic v. Levinson*. As described in the following excerpt from *Basic v. Levinson*, this standard clearly meets the SEC’s stated objective of focusing on *material* conflicts of interest for purposes of Proposed Reg BI:

The Court also explicitly has defined a standard of materiality under the securities laws, *see TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), concluding in the proxy-solicitation context that “[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” *Id.*, at 449. Acknowledging that certain information concerning corporate developments could well be of “dubious significance,” *id.*, at 448, *the Court was careful not to set too low a standard of materiality; it was concerned that a minimal standard might bring an overabundance of information within its reach, and lead management “simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking.” Id.*, at 448-449. It further explained that to fulfill the materiality requirement “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” *Id.* at 449. We now expressly adopt the *TSC Industries* standard of materiality for the §10(b) and Rule 10b-5 context.<sup>32</sup>

Adopting the materiality standard used under the Exchange Act will promote consistency with the rest of the Exchange Act and achieve the SEC’s goal of meaningful disclosures.

### **C. The SEC Should Clarify the Types of Conflicts of Associated Persons That May Be “Material Conflicts of Interest.”**

We understand that the SEC is seeking to create a standard that asks whether a conflict impacts the recommendation in a material way, and that the focus is on significant financial conflicts of interest and not merely any conflict of interest. However, the application of this standard – even with a *Basic v. Levinson* definition of “materiality” – is still difficult, especially when applied to conflicts of interests of associated persons.

Accordingly, we ask the SEC to provide a limiting principle with respect to conflicts of associated persons so that broker-dealers do not need to second-guess whether something constitutes a material conflict of interest. Specifically, we suggest that the limiting principle for conflicts of associated persons be, as a general matter, that only those conflicts that affect the

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<sup>32</sup> *Basic*, 485 U.S. at 231-32 (footnotes omitted).

financial compensation of the associated person may constitute “material conflicts of interest.”<sup>33</sup> That is, to the extent an individual associated person has a conflict, the focus should be on conflicts that arise from that person’s financial compensation. This is consistent with FINRA’s 2013 Conflicts of Interest Report, which specifically identified financial compensation as the major source of conflicts of interest for associated persons.<sup>34</sup> In addition, this limiting principle would be consistent with the approach of allowing firms to rely on a “risk-based compliance and supervisory system” instead of “a detailed review of each recommendation of a securities transaction or security-related investment strategy to a retail customer” – which is an approach we endorse.<sup>35</sup> Thus, we ask the SEC to confirm that, as a general matter, a material conflict of interest of an associated person relating to a recommendation means conflicts relating to an associated person’s financial compensation, consistent with the FINRA Conflicts Report.

To the extent that the SEC believes there are certain conflicts of associated persons that do not relate to financial compensation but may be material conflicts that must be disclosed, we ask that the SEC identify examples of those specific conflicts. Providing more targeted guidance regarding specific conflicts will facilitate the creation and implementation of policies and procedures under both the Disclosure and Conflict of Interest Obligations. Without such limitations and guidance, firms may bear the enormous burden of monitoring the potential conflicts of interest of thousands of associated persons relating to thousands of securities that may be the subject of a recommendation. Creating an infrastructure to identify and retain written CUSIP level disclosure that could be associated person-specific along with CUSIP-specific disclosure would be extraordinarily challenging. Managing disclosure at the CUSIP level, even by asset class, would be difficult. Like in Form ADV Part 2A, broker-dealers should be able to make general disclosure of conflicts at a firm level, rather than an individual associated person or product level. This is a much more scalable and manageable solution than individual disclosures for individual associated persons or products.

In sum, we reiterate the importance of further narrowing the scope of the proposed interpretation of material conflicts of interest as it relates to associated persons. It would be extremely challenging to establish policies, procedures, and infrastructure to identify, disclose, and monitor material conflicts of interest that each associated person who makes a recommendation of a security may have with respect to each possible security that he or she could theoretically recommend at any particular point in time.

#### **D. The SEC Should Provide Additional Guidance Regarding Its Expectations for the Disclosure Obligation.**

We appreciate the notion of a “layered disclosure regime” involving general disclosures up front, followed by more particular disclosures before or at the time of the recommendation, including through offering documents. We also appreciate that the Disclosure Obligation

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<sup>33</sup> This will capture all the obvious conflicts, such as insider trading, churning to generate commission, recommendations of proprietary or high-commission funds, front-running of customer orders, cross-client trading, and ex-post trade allocation.

<sup>34</sup> See FINRA Report on Conflicts of Interest (Oct. 2013), *available at* <https://www.finra.org/sites/default/files/Industry/p359971.pdf> (“FINRA Conflicts Report”).

<sup>35</sup> Reg BI Proposing Release at 21618.

provides firms flexibility and does not include any specific requirement to disclose at any point in time. We understand that Form CRS can be a substantial portion of the layered disclosure regime that firms will adopt under Reg BI. While we believe addressing the scope of material conflicts of interest will make the Disclosure Obligation more effective and manageable, we also request clarification and guidance for certain aspects that are unclear and at times inconsistent. In particular, we ask the SEC to confirm our understanding in the following areas.

1. Point of sale or point of recommendation disclosure.

We understand that it is not the SEC's intent to impose a written point of sale or point of recommendation disclosure obligation. We support that position, as mandatory point of sale disclosures would result in significant costs and burdens, particularly where such disclosure must occur prior to the execution of a transaction.<sup>36</sup> There are high costs associated with producing and maintaining the point of sale information current, including costs in the form of delays in providing timely recommendations and trade executions. Firms would be required to design new systems to create new written disclosure documents regarding each recommendation and ensure that an updated disclosure document is available for distribution to clients at every location in which the firm's associated persons meet with clients, or electronically deliver it. Moreover, ensuring delivery prior to trade execution and monitoring compliance with point of sale requirements would be very challenging, if not impossible. Firms would have to establish and monitor supervisory and compliance procedures to ensure that the disclosures are made in customer interactions (including live meetings and telephone calls) before an order is accepted. This type of point of sale or point of recommendation disclosure is impracticable. Finally, conflicts that relate either to structural issues regarding the associated person's or firm's compensation for particular types of securities can be effectively disclosed at certain points in time such as account opening or annually, and conflicts related to whether the firm is executing trades on a principal or agency basis can be effectively disclosed on a confirmation after the transaction.<sup>37</sup>

Our member firms estimate that the per firm implementation costs of complying with point of sale disclosures would be approximately \$1,000,000-\$1,200,000. This figure is based on the large operational and technological effort required to put a point of sale disclosure into effect. The annual costs of maintaining and updating the necessary systems and procedures would also be substantial.<sup>38</sup>

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<sup>36</sup> See Securities Industry Association comment to SEC (Apr. 12, 2004), *available at* <https://www.sifma.org/resources/submissions/sia-submits-comments-to-the-sec-on-point-of-sale-disclosure-requirements/> ("2004 Letter"); SIFMA, IOSCO Point of Sale Disclosure Issues Paper (Oct. 1, 2008), *available at* <https://www.sifma.org/wp-content/uploads/2017/05/sifma-submits-comments-to-iosco-on-the-iosco-point-of-sale-disclosure-issues-paper.pdf>.

<sup>37</sup> For example, Exchange Act Rule 10b-10, which mandates certain disclosures "at or before completion of [a] transaction," contemplates that the required disclosures (such as whether the broker-dealer is acting as agent or principal) will be made in the trade confirmation.

<sup>38</sup> In 2004, in response to proposed Rule 15c2-3 (point of sale requirements for transactions in certain mutual funds and other securities), SIFMA estimated that implementation costs of the rule would be in the order of \$500,000 per firm, and the annual costs of maintaining and updating the necessary systems and procedures would also be in the order of \$500,000 per firm. See 2004 Letter, *supra* note 36, at 12-13.

Given these concerns, we ask the SEC to state explicitly in Reg BI or the Adopting Release that, as a general matter, Reg BI gives broker-dealers the flexibility to design a compliant layered disclosure regime that does not mandate a point of recommendation or point of sale disclosure.<sup>39</sup>

## 2. Oral disclosures.

Related to the above discussion regarding written point of recommendation disclosures, we understand and ask the SEC to clarify that, under the layered disclosure regime of Proposed Reg BI, a written disclosure is not always required. Indeed, it may be appropriate to provide oral disclosures instead, as long as there is at least one initial disclosure in writing that explains how and when other material disclosures may be provided to the customer. In the Reg BI Proposing Release, the SEC provided one example of a situation where it would be permissible to provide such a disclosure. We would like to confirm that the flexibility with the manner of disclosure includes written disclosures up front followed by an oral disclosure.

For example, with securities orders by phone, product-specific disclosure in writing would be challenging. The Proposed Reg BI release contemplates that when a broker-dealer is taking an order over the phone, the broker-dealer may meet the written disclosure obligation by sending the disclosure via email “during the telephone conversation.”<sup>40</sup> We believe this is not practical. First, not all customers have computers readily available while they are speaking with an associated person. In addition, during a market downturn or other period of significant activity, several customers may be calling at the same time, and adding a written disclosure requirement to each call would make it more difficult for firms to answer the calls and fill the customers’ needs. In many instances, it is not logistically possible to provide more than oral disclosure at the time of the recommendation.

Accordingly, we seek clarification that oral disclosure at the time of the recommendation may be sufficient to satisfy Proposed Reg BI’s Disclosure Obligation if either (a) the associated person documents that the oral disclosure was made, or (b) the firm provides written disclosure after the trade. With regard to (a), we also ask that the SEC provide firms with flexibility regarding the manner in which they may document any oral disclosures that are made.

## 3. Timing of disclosure.

We understand that the “layered disclosure regime” permits a broker-dealer to provide a retail customer with a written disclosure explaining the different types of conflicts that may arise in different scenarios and how the broker-dealer intends to disclose such conflicts at a later point in time, including by disclosure in the trade confirmation and periodic statements.

We ask the SEC to confirm that it is permissible for broker-dealers to provide disclosures on a website or on a post-trade basis, provided customers have been informed in advance of the

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<sup>39</sup> Disclosure may be required, however, when there is a change in the financial compensation of the associated person that would be a disclosable conflict under Proposed Reg BI and this change has not been disclosed in writing at the time of the recommendation.

<sup>40</sup> Reg BI Proposing Release at 21604.

timing of those disclosures (*i.e.*, on a website or post-trade). We believe this approach would not deprive the retail customer of important, timely information because a firm could provide customers with information regarding material conflicts through a persistent and prominent link on the firm's website. That would permit retail customers and others to see all necessary disclosure information for evaluating a firm's and its representatives' material conflicts of interest related to various types of recommended securities and investment strategies at or before the time of a recommendation. For the small number of investors who do not have access to the Internet, we suggest that firms make the information available by a toll-free number and by mail in response to a client's request. Firms should be required to remind investors periodically about the existence of this information at account opening, at least once a year, and in each trade confirmation.

#### 4. Website disclosures.

We also seek clarification that a website disclosure can satisfy the Disclosure Obligation, even for clients who have not opted into electronic delivery, as long as the broker-dealer prominently informs clients in writing where to access such website disclosure.<sup>41</sup> To this end, we note that the SEC has endorsed website disclosure (along with periodic paper reminders about where to find the website disclosure) in several contexts,<sup>42</sup> particularly when the information is data-intensive and there is a benefit of allowing investors to compare similar disclosures from different firms. Firms could inform clients of where to find such website disclosure at account opening and on account statements and trade confirmations.

#### 5. Specificity of disclosure.

We ask the SEC to confirm our understanding regarding the specificity of disclosures that must be provided under Proposed Reg BI. We believe disclosure of a range of customer costs per product should be sufficient, since costs vary based on account and trade size as well as other factors, including discounting. We also believe that when several products meet the same investment objective (*e.g.*, provide a return based on the S&P 500) but have separate cost structures, terms, and conditions, it is enough to disclose that different products are available with different costs. That is, firms do not need to show the customer all of the different products and then document why the firm recommended one product over another. Additionally, we believe that for proprietary products, if a firm only offers internal products, such as over-the-counter derivatives, it is sufficient that the firm disclose that it only offers proprietary products and also disclose the cost structure of these products. Similarly, if the firm only offers proprietary and complementary products, the firm only needs to disclose that it is not offering products that compete with its proprietary products. To the extent a broker-dealer offers third-

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<sup>41</sup> We ask that the SEC consider an "access equals delivery" standard for disclosure. Any form of delivery that complies with the electronic delivery standards should be satisfactory. Posting disclosures for review when a customer first logs in via a specified link on that page or thereafter, or on a publicly accessible website with a link sent via email, should suffice.

<sup>42</sup> For example, firms provide order execution and order routing information required under Exchange Act Rules 605 and 606 on their websites.

party products along with proprietary products, it should be able to disclose that although such products are available, the firm recommends its own products.

6. Existing conflict of interest disclosure regimes.

We further ask the SEC to confirm and clarify that the Disclosure Obligation does not apply in contexts where there is already an expansive conflict of interest disclosure regime – such as for equity and debt research analysts and research reports. As written, Proposed Reg BI could apply to research analysts if their research reports were considered a specific security recommendation to a retail customer, but we believe that the conflict of interest disclosures required by FINRA Rules 2241 and 2242 and Regulation Analyst Certification are at least as extensive, if not more, than the disclosures contemplated by Proposed Reg BI. In addition, research analysts and research reports are subject to a substantial regulatory scheme with comprehensive independence and disclosure standards designed to meet the needs of retail customers. Compliance with these other disclosure requirements should satisfy the Proposed Reg BI requirements.

7. Prospective investors.

We ask the SEC to confirm that the requirement to provide written disclosure at or prior to the recommendation does not apply to recommendations made to prospective investors even if they subsequently become customers. In addition, we ask the SEC to clarify when the Disclosure and Care Obligations of Proposed Reg BI begin. Specifically, we ask the SEC to confirm that providing disclosures at account opening is always acceptable. Providing disclosures any time prior to account opening is unworkable and inconsistent with how firms provide other disclosures today. Moreover, tracking prospective investors who then become actual customers will be very difficult to achieve operationally. Instead, we believe that if an associated person provides a recommendation to a prospective investor who does not have a brokerage relationship with the associated person's firm, the Disclosure or Care Obligations of Reg BI do not apply,<sup>43</sup> although the associated person would still have a general reasonable-basis suitability obligation under FINRA rules. If the prospective investor subsequently becomes a customer of the broker-dealer, the Disclosure and Care Obligations would apply if the associated person reiterates the recommendation or provides a new recommendation to the now-customer.

In addition, we ask the SEC to confirm that the Disclosure and Care Obligations would not apply in the case where a prospective investor approaches a broker-dealer and an associated person makes a recommendation to move assets to its firm. That recommendation could involve the liquidation of assets (in the context of a rollover or account transfer) that are held at a different broker-dealer. A contrary interpretation would create difficult challenges for firms because (i) significant time may pass between the time a prospective investor receives a recommendation and when he or she decides to open a customer account with the firm, and (ii)

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<sup>43</sup> In contrast to the definition of “retail investor,” we understand that “retail customer” is not intended to include persons who are not customers. Reg BI Proposing Release at 21596, n.160 and related text (“Regulation Best Interest only applies in the context of a brokerage relationship with a brokerage customer, and in particular, when a broker-dealer is making such a recommendation in the capacity of a broker-dealer.”).

firms and associated persons engaged in marketing activities may not keep detailed records of which potential investors participate in which activities.

8. Account type.

With respect to account types, we ask the SEC to confirm that the Disclosure and Care Obligations do not apply with respect to a recommendation regarding the selection of an account type. For instance, the making of a recommendation to open a brokerage account as opposed to an advisory account, or vice versa. These recommendations do not involve a recommendation of a securities transaction or investment strategy involving securities.

9. Dual-registrants.

Finally, we ask the SEC to provide clarity regarding the application of the Disclosure Obligation to dually registered broker-dealers and investment advisers and dual-hatted personnel. The application of these provisions to dual-registrants and dual-hatted persons is unclear. Providing clarity in this context is particularly important. For example, it is not clear what and how frequently disclosure is required to put a customer on notice of the capacity in which a dually-registered broker-dealer and investment adviser is acting.

We seek guidance that neither oral nor written disclosure regarding the capacity in which the broker-dealer is acting is required at the time of the recommendation.<sup>44</sup> Instead, an upfront written disclosure of capacity should be sufficient as long as the nature of the account (*i.e.*, advisory versus brokerage) does not change. We believe that point-of-recommendation disclosure regarding capacity would be redundant and confusing to retail customers and would not confer any additional investor protection benefit. It would also unnecessarily delay communication and distract the client from more important disclosures regarding account and investment selection, features, and associated costs.

**E. The Conflict of Interest Obligations Should Be Revised to Recognize That Disclosure Is Mitigation and Not Differentiate Between Different Types of Conflicts.**

Proposed Reg BI's Conflict of Interest Obligations require broker-dealers to identify and address (1) material conflicts of interest arising from financial incentives associated with covered recommendations, and (2) all other material conflicts of interests that are associated with the recommendation. Consistent with current standards applicable to both broker-dealers and investment advisers, the proposed provision for identifying and addressing "all other material

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<sup>44</sup> The Proposal appears to require an up-front written disclosure regarding capacity, followed by a written or oral disclosure regarding capacity at the point of recommendation. "[W]e preliminarily believe that a broker-dealer would satisfy the Disclosure Obligation expressly by providing written disclosure setting forth when the broker-dealer is acting in a broker-dealer capacity versus an advisory capacity and how the broker-dealer will clarify when it is making a recommendation whether it is doing so in a broker-dealer capacity versus an advisory capacity. However, one important distinction is that the written disclosure requirement would apply to the initial disclosure (*i.e.*, setting forth when the broker-dealer is acting in a broker-dealer capacity and the method it will use to clarify the capacity in which it is acting at the time of the recommendation), but we would not consider the subsequent disclosure of capacity at the time of recommendation to also be subject to the "in writing" requirement (*i.e.*, a broker-dealer could clarify it orally)." *Id.* at 21605, n. 216.



conflicts” recognizes that the disclosure of conflicts may be an effective mitigant and, thus, requires firms to “at a minimum, disclose, or eliminate, all material conflicts of interest that are associated with such recommendation.”<sup>45</sup> However, the proposed provision for identifying and addressing material conflicts of interest arising from financial incentives departs from these well-established standards and states that broker-dealers must “disclose and mitigate, or eliminate” such conflicts.

We believe this distinction between material conflicts arising from financial incentives and other material conflicts is not appropriate for the following reasons.

First, it fails to recognize that disclosure, itself, may be an effective mitigant in some circumstances.<sup>46</sup>

Second, this approach applies a different standard to broker-dealers (which, as Proposed Reg BI is currently drafted, cannot satisfy their obligations in some cases through disclosure, alone) and investment advisers (which are permitted to satisfy their obligations through disclosure, alone). Applying a more restrictive standard to broker-dealers than investment advisers would be inconsistent with Proposed Reg BI’s goal of establishing obligations generally consistent with those imposed on an investment adviser when providing personalized investment advice about securities to a client. Broker-dealers and investment advisers should be on equal footing with respect to addressing material financial conflicts of interest associated with recommendations. The SEC should avoid imposing different obligations on the two business models that have the effect of favoring one over the other.<sup>47</sup>

Finally, not allowing broker-dealers to satisfy their obligations in some cases through disclosure, alone, may undermine a broker-dealer’s ability to provide certain products and services to clients. For example, assume a broker-dealer offers a bond platform that recommends particular bonds for which the firm acts as a placement agent. The broker-dealer may offer other less expensive products on other platforms, but because these other products are not part of the

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<sup>45</sup> *Id.* at 21585, 21652.

<sup>46</sup> We agree that in certain situations, such as where an associated person is recommending the more expensive of two otherwise identical securities, additional mitigation measures such as supervisory review or other control measures should supplement any disclosure.

<sup>47</sup> As noted above, Proposed Reg BI requires broker-dealers to “disclose and mitigate, or eliminate” material conflicts of interest arising from financial incentives associated with recommendations. In contrast, the companion release regarding investment advisers plainly anticipates that advisers may satisfy their obligations through disclosure, alone, in many instances and there is no requirement that advisers must “disclose and mitigate, or eliminate” conflicts arising from financial incentives. See Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, 83 Fed. Reg. 21203, 21208-09 (proposed May 9, 2018) available at <https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08679.pdf> (“IA Proposing Release”). The release further acknowledges that clients have the ability to understand such disclosures and make informed decisions whether to accept the material conflict and continue doing business with the investment adviser. Any disclosure must be clear and detailed enough for a client to make a reasonably informed decision to consent to such conflicts and practices or reject them. An adviser must provide the client with sufficiently specific facts so that the client is able to understand the adviser’s conflicts of interest and business practices well enough to make an informed decision.

bond platform offering, they are not considered when the broker-dealer, based on a customer's investment objectives and risk tolerance, recommends particular bonds from the bond platform.

In the Proposed Reg BI context, it appears the broker-dealer would be unable to mitigate any material firm conflicts raised by the bond platform by disclosing to customers that the bond platform is limited to certain bond offerings and there may be other, less costly investment products available on other platforms. It is not clear what additional mitigation would be necessary or possible for the broker-dealer to make in order to satisfy the proposed Conflict of Interest Obligations.<sup>48</sup> It is also unclear how the broker-dealer could satisfy the proposed Care Obligation if the broker-dealer is unable to define or limit the universe of products that are in scope for a particular recommendation. These concerns could lead to broker-dealers offering fewer products and services to retail customers.

For these reasons, we urge the SEC to revise the Conflict of Interest Obligation relating to financial incentives so that it is consistent with the Conflict of Interest Obligation for other material conflicts of interest. The SEC should eliminate the more restrictive standard for broker-dealers and permit them to satisfy their obligations, even for financial conflicts, through the same kind of clear, detailed and sufficiently specific disclosures that are permissible for investment advisers. To do this, the SEC might adopt a single provision for identifying and addressing conflicts of interest, *i.e.*:

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, including material conflicts of interest arising from financial incentives.

**F. The SEC Should Provide Additional Clarity on How Firms Can Satisfy the Care Obligation.**

As discussed above, we support the SEC's approach to make the best interest obligation a principles-based standard that assesses the adequacy of a recommendation based on the particular facts and circumstances of each case. We ask the SEC to confirm our understanding of the following aspects of the Care Obligation under a principles-based regime.

1. Relevance of cost.

We understand the Care Obligation is not a lowest cost obligation, and broker-dealers would be allowed to recommend securities or investment strategies that are more expensive if

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<sup>48</sup> This example could play out in many other contexts, for example, an associated person (such as a sales, trading, or research analyst) who specializes in REITs or sovereign debt and who recommends particular REITs or sovereign debt securities to a customer, without considering less expensive securities outside of those sectors that are also offered by the broker-dealer. Beyond making clear and detailed disclosure to the customer of the financial incentive conflict, it is not clear how the associated person or broker-dealer can otherwise mitigate the conflict.

they are in the best interest of the customer.<sup>49</sup> However, it is difficult to determine how a broker-dealer must weigh financial factors when applying the Care Obligation, especially since disclosure alone may not discharge the obligation. We therefore ask the SEC to:

(a) confirm that when referring to financial factors (*i.e.*, cost to customers and remuneration to broker-dealers), any focus and analysis should be on the product and not the account type (*e.g.*, cash account versus margin account); and

(b) provide an example of a recommendation where, based on an analysis of all the relevant elements, recommending the lowest cost option would not satisfy Reg BI.

2. Proprietary and other limited categories of products.

As was the case under Section IV of the DOL Fiduciary Rule's BIC Exemption,<sup>50</sup> a firm should be allowed to limit its offerings to a particular subset of its customers to proprietary products or revenue sharing products. This should be permissible as long as: (a) the broker-dealer discloses to its customer that it is limiting the recommendation to a specific set of securities; and (b) the specific set of securities contains appropriate securities to meet the customer's needs. We believe this is consistent with the SEC's statement that firms are allowed to limit recommendations to proprietary or other limited categories of products as long as the firm discloses this and meets the other requirements of Proposed Reg BI, and we ask the SEC to confirm that this is the case.<sup>51</sup>

3. Best interest versus best possible recommendation.

We ask the SEC to confirm our understanding that "best interest" does not mean the absolute best, just as "best execution" does not mean "best" price. "Best interest" is a more flexible term than "best possible recommendation." The term "best interest" acknowledges that a broker-dealer will not look at every single possible security, but rather look at the appropriate securities offered on its platform, when making a recommendation.<sup>52</sup> Further, because what is in

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<sup>49</sup> The release makes clear that if two products are identical, a broker-dealer can recommend the more remunerative product. Reg BI Proposing Release at 21588 ("[T]his does not mean that a broker-dealer could not recommend the more remunerative of two reasonably available alternatives, if the broker-dealer determines the products are otherwise both in the best interest of – and there is no material difference between them from the perspective of – the retail customer, in light of the retail customer's investment profile.").

<sup>50</sup> See Best Interest Contract Exemption, 81 Fed. Reg. 21002, 21052 (Apr. 8, 2016) *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-04-08/pdf/2016-07925.pdf>.

<sup>51</sup> "We preliminarily believe that a material conflict of interest that generally should be disclosed would include material conflicts associated with recommending: Proprietary products, products of affiliates, or limited range of products; one share class versus another share class of a mutual fund; securities underwritten by the firm or a broker-dealer affiliate; the rollover or transfer of assets from one type of account to another (such as recommendations to rollover or transfer assets in an ERISA account to an IRA, when the recommendation involves a securities transaction); and allocation of investment opportunities among retail customers (*e.g.*, IPO allocation)." Reg BI Proposing Release at 21603; "Broker-dealers may offer a limited range of products, for instance, products sponsored or managed by an affiliate or products with third-party arrangements (*e.g.*, revenue sharing)." *Id.* at n. 202.

<sup>52</sup> We understand that there could be more than one recommended product or strategy that could be in the best interest of the customer, and that Reg BI allows for that range of possibilities.

the customer's best interest inherently involves a level of subjectivity, it is not something that should be assessed with perfect hindsight.

4. Quantitative suitability.

We believe that quantitative suitability obligations should apply only to those accounts over which a member firm has "control." In 2010, when FINRA codified the line of cases on churning in FINRA Rule 2111,<sup>53</sup> FINRA accepted that the control element was part of the burden of proof. Because evidentiary burdens are part of due process, the control element is an essential due process protection for an associated person. It prevents unfairness where, *e.g.*, if the high-volume trading is profitable, the customer takes the profit; and if the high-volume trading is not profitable, the customer can force the firm to reimburse the losses under a churning claim.<sup>54</sup>

If the SEC does not include the control element of FINRA Rule 2111 as part of the Care Obligation, the SEC should at a minimum confirm that this requirement applies only to recommendations by a single associated person, not across multiple associated persons at the firm who act independently.<sup>55</sup> To this end, it would be impractical to impose this requirement to recommendations across multiple associated persons at the firm who are not responsible for and may be unaware of what others recommend.<sup>56</sup>

**G. The SEC Should Clarify a Broker-Dealer's Obligation to Mitigate Conflicts of Interest in Specific Contexts.**

The Reg BI Proposing Release contains strong criticism of certain types of financial incentives, and it is not clear how related conflicts may be mitigated without eliminating them altogether. Accordingly, we ask the SEC to provide more guidance with respect to the following conflicts.

1. Non-grid compensation and revenue sharing.

A compensation structure for associated persons common in the industry aggregates revenue, including commissions resulting from transactions recommended by that person, and applies an escalating "grid" to the associated person's compensation. We do not see Proposed Reg BI as creating new concerns with that structure. We seek clarification, however, that other types of compensation arrangements for associated persons (*i.e.*, compensation that is not tied to revenues and commissions generated based on recommendations) are not per se prohibited by Proposed Reg BI as long as any material conflicts of interest relating to such arrangements are disclosed and mitigated, as appropriate. We also seek clarification that revenue sharing

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<sup>53</sup> FINRA Regulatory Notice 18-13 at n. 4, available at <http://www.finra.org/industry/notices/18-13>.

<sup>54</sup> See SIFMA comment to FINRA at 2-3 (June 18, 2018), available at [http://www.finra.org/sites/default/files/notice\\_comment\\_file\\_ref/18-13\\_SIFMA\\_Comment.pdf](http://www.finra.org/sites/default/files/notice_comment_file_ref/18-13_SIFMA_Comment.pdf).

<sup>55</sup> Reg BI Proposing Release at 21613.

<sup>56</sup> Some customers, such as high net worth customers, may have multiple points of contact at a broker-dealer (*e.g.*, research analysts, equity sales, fixed income sales, etc.) who at different points recommend securities or investment strategies to the customer.

arrangements are not per se prohibited by Proposed Reg BI as long as any material conflicts of interest relating to such arrangements are disclosed and mitigated, as appropriate.

2. Sales contests.

We understand that the SEC is concerned about sales contests that may create incentives for associated persons to recommend a security regardless of whether it is in the customer's best interest. We believe such concerns around incentives do not exist with respect to programs that reward asset growth (including non-product specific sales contests) or asset flows, or recruitment bonuses tied to assets under management, total production, or revenue growth because these programs do not give associated persons an incentive to recommend specific securities that may not be consistent with a customer's best interest. Accordingly, we ask that the SEC confirm that programs that reward asset growth and the other areas set forth above generally do not raise concerns regarding incentives.

With respect to product-based sales contests, we agree that in instances where a firm cannot adequately mitigate incentives that are misaligned with the customer's best interest, the firm should eliminate such sales contests. A firm, however, may be able to mitigate such conflicts through several methods, including: (1) eliminating or leveling compensation in products through methods such as fee offsets; (2) implementing rewards programs for providing advice that is in the customer's best interest; and (3) increasing transparency regarding where associated persons stand in relation to other associated persons. Additionally, firms can increase monitoring and surveillance of investment recommendations to ensure the recommendations are in the customers' best interest. We believe the above methods would be elements of an effective mitigation program and ask the SEC to confirm our view. Further, under a principles-based regime, we ask that the SEC allow firms to decide whether to mitigate or eliminate such conflicts.

3. Neutral factors.

The Proposal references the "neutral factors" approach for mitigating financial conflicts of interest set forth in the DOL's BIC Exemption.<sup>57</sup> Under that approach, the provision of different compensation to individuals (whether in type or amount, including commissions) based on investment recommendations must be based on neutral factors such as the time or complexity and the work involved with respect to a particular product or service. In examining means to comply with the former DOL standard, a number of SIFMA member firms explored implementing a "neutral factors" approach. Most ultimately determined that it would be impractical and burdensome to attempt to categorize a universe of thousands of potential investments by such factors and that doing so would not clearly improve client service experience or better address clients' needs. Accordingly, we believe the "neutral factors" approach should not be viewed as a one-size-fits all solution. Rather, firms should be permitted

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<sup>57</sup> Reg BI Proposing Release at 21622, n. 324 and 325 and accompanying text.

to adopt a range of alternatives to meet their mitigation obligations under the Proposal. We ask the SEC to confirm that our understanding is correct.

**H. The Recordkeeping Obligations Associated with Proposed Reg BI Should Be Modified to Be More Consistent with Current Recordkeeping Requirements.**

We understand that Proposed Reg BI's "retail customer investment profile" is based on FINRA Rule 2111's definition of retail customer investment profile. However, the Proposed Reg BI requirement goes well beyond the notion of a "customer investment profile," which requires broker-dealers to obtain and retain certain information about a retail customer. That is the case because Proposed Reg BI would also require broker-dealers to retain all of the related and underlying communications that convey such information.

Under Proposed Reg BI, broker-dealers would be required to retain all the information collected from or provided to each retail customer pursuant to Proposed Reg BI, including when the information was replaced or updated. That would entail an expansive new set of documentation that broker-dealers would have to retain. This documentation would be in addition to the Proposed Reg BI provision requiring the retention of any conflict disclosures made to the customer on a recommendation-by-recommendation basis. Broker-dealers must already retain certain records of written and electronic communications, and a retention requirement relating to oral communications poses a significant challenge.

Accordingly, we urge the SEC to limit the new recordkeeping requirement to customer profile information contained in the communication only, and not the related communication itself. Thus, broker-dealers would retain the information that makes up the retail customer investment profile for six years. We note that any email or other written or electronic communication in which customer profile or disclosure information is transmitted would, in any event, be retained with other broker-dealer written and electronic communications for three years pursuant to current Rule 17a-4(b)(4). We note that this would be consistent with what broker-dealers do today under both SEC and FINRA rules, which would substantially reduce the burden on broker-dealers. Alternatively, we ask that the SEC clarify what communications are in scope for this new Proposed Reg BI requirement and explain why it is necessary to include a "communications" retention requirement beyond the retention requirement set forth in Rule 17a-4(b)(4).

As a separate matter, we request that the SEC clarify that, except with respect to the specific recordkeeping requirements set forth in the proposed rule text, Proposed Reg BI does not require any additional set of records to evidence best interest determinations. Specifically, we believe that the type of documentation generally maintained by broker-dealers for suitability purposes is sufficient for documenting Proposed Reg BI determinations and disclosures. We accordingly believe that Proposed Reg BI does not contemplate broker-dealers needing to create and maintain records of why certain products were recommended over others on a recommendation-by-recommendation basis.

**I. Broker-Dealer Exclusion from the Definition of “Investment Adviser” Under Section 202(a)(11)(C) of the Advisers Act.**

Broker-dealer customers regularly grant different forms of discretionary authority to their broker-dealers. For example, customers often give their broker-dealers discretion to trade certain securities at specific prices during particular time periods (known as “time and price discretion”). According to our members, full discretionary authority of this sort is commonly subjected to significant internal review by a broker-dealer before and after the trades are made. Moreover, such authority must be exercised in accordance with various regulations to which broker-dealers are subject.

The wide variety of discretionary arrangements into which broker-dealers enter with customers reflect the expressed needs of those customers. A customer who expects to be on vacation, for example, may provide his or her broker-dealer with discretion limited as to a particular time period, as to the specific type of security, and/or as to the price at which the security could be bought or sold.

As another example, a customer may provide his or her broker-dealer with discretion with respect to cash held in the customer’s account. In such case, the customer may provide the broker-dealer with a list of the types of investments that may be purchased with the cash, characterized, for example, by liquidity, concentration and credit rating.

In addition, a customer, particularly an institutional customer, may provide discretion as to cash management pursuant to written guidelines from the customer contemplating the purchase and sale of certain types of securities with limitations as to credit quality and maturity. This sort of limited discretion lacks the supervisory or managerial character of investment discretion warranting protection of the Advisers Act. These institutional customers are not confused by the broker-dealer’s role and benefit from the more efficient execution and the access to original issue and secondary market securities that typically trade on a principal basis.

In our view, as has been the standard practice in the industry for many years without raising undue regulatory issues, the use of discretionary authority in connection with the sorts of accounts noted above would not appear to raise regulatory concerns or otherwise necessitate application of the Advisers Act. Accordingly, in our view, broker-dealers that have discretion limited by written customer instructions as to: (1) time periods of a temporary nature; (2) one or more specific securities or types of securities; (3) prices at which they can be purchased and in some cases, sales can be made; and (4) any other account recognized by the SEC, are exercising discretionary investment advice that is “solely incidental” to the broker-dealer’s business under Advisers Act Rule 202(a)(11)(C).<sup>58</sup>

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<sup>58</sup> See SIFMA comment to SEC (Feb. 7, 2005), available at <https://www.sifma.org/resources/submissions/sia-submits-comments-to-the-sec-on-the-secs-release-relating-to-broker-dealers/> (setting forth SIFMA’s prior consistent commentary regarding discretionary accounts).

## **J. The SEC Should Confirm the Application of Proposed Reg BI to Specific Factual Scenarios.**

In order to better understand the practical application of Proposed Reg BI, we set forth below nine scenarios that explain our understanding of how the best interest obligation would apply under different circumstances. For purposes of these scenarios, we assume the customer is a “retail customer.” We ask that the SEC either confirm or correct our understanding.<sup>59</sup>

1. Unsolicited Transaction – Brokerage Account – Example 1: Lucy directs her broker to purchase 100 shares of ABC in her transactional account. The broker believes that ABC is overpriced and does not recommend this transaction. Broker purchases ABC at Lucy’s request and marks the transaction “unsolicited.” Client receives a confirmation of the transaction.

Unsolicited Transaction – Brokerage Account – Example 2: Jose, an 89-year-old, directs his broker to sell and reinvest 100% of his assets in XYZ, a highly volatile investment. The broker does not recommend this transaction and communicates that to Jose when he or she receives the order. Broker purchases XYZ and marks the transaction “unsolicited.” Client receives a confirmation of the transaction.

Application of Proposed Reg BI: Proposed Reg BI does not apply to self-directed or otherwise unsolicited transactions by a customer who may otherwise receive other recommendations from the broker-dealer. Proposed Reg BI also does not require the broker-dealer to refuse to accept a customer’s order that is contrary to the broker-dealer’s recommendation. Consistent with current practice, the broker’s marking the order as “unsolicited,” which will appear on the client’s confirmation, will adequately document that Proposed Reg BI was not triggered.

2. Solicited Transaction – Brokerage Account: Broker calls Jon and recommends purchasing 500 shares of ABC in Jon’s brokerage account. Jon agrees and the purchase is marked “solicited.” Jon receives a confirmation.

Application of Proposed Reg BI: Under Proposed Reg BI, the broker’s obligations in satisfying the best interest standard include meeting the Disclosure, Care, and Conflict of Interest Obligations. With regard to the customer-specific Care Obligation, the broker must have reasonably believed that the purchase of ABC was in Jon’s best interest, after weighing all the applicable factors, which may include costs, the product’s investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions. There would be no ongoing duty to monitor the performance of the account. The broker also must have exercised reasonable diligence, care, skill, and prudence. This encompasses reasonable basis suitability, customer-specific suitability, and quantitative suitability. Under Proposed Reg BI, cost and associated

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<sup>59</sup> The first eight of these scenarios appeared in one of our earlier comment letters. See SIFMA supplemental response to SEC (May 4, 2012), available at <https://www.sifma.org/wp-content/uploads/2017/05/sifma-submits-supplemental-response-to-the-sec-on-the-framework-for-rulemaking-under-the-fiduciary-duty-provision-of-the-dodd-frank-act.pdf>.



financial incentives are important factors to consider when making a recommendation.

3. Transactions – Recommendation to Open a Fee-based Account: A financial adviser of a dually registered broker-dealer and investment adviser, wearing her “adviser hat,” recommends that Lucy open a fee-based account, which offers specific asset classes or multi-asset class diversified portfolios to provide broad diversification for her portfolio.

Application of Proposed Reg BI: Proposed Reg BI would not apply here even if the recommendation to open the fee-based account constitutes a recommendation of an investment strategy involving securities. But the Proposed Form CRS disclosure requirements would apply, under which Form CRS must be given to the customer at or before the opening of the account.

4. Principal Trading: The Smiths are interested in purchasing certain corporate bonds. The firm has a deep inventory of corporate bonds, and the broker recommends a bond that would be filled from the firm’s inventory.

Application of Proposed Reg BI: Under Proposed Reg BI, principal trading is not prohibited. The broker may have to disclose the conflicts surrounding principal trading before or at the time the recommendation is made, given that this might be a material conflict of interest.<sup>60</sup> Although the use of disclosures in account opening agreements is allowed and may be sufficient, the broker may determine that more specific disclosures regarding capacity would be appropriate closer to the time of the recommendation. The capacity disclosure may also be provided on a post-recommendation basis in the customer confirmation that is required by Exchange Act Rule 10b-10.

5. Initial Public Offering (“IPO”): Broker recommends that the Smiths purchase shares in ABC’s IPO. The firm or its affiliate is the underwriter.

Application of Proposed Reg BI: Under Proposed Reg BI, the broker must satisfy the Care Obligation before recommending participation in the IPO. In connection with recommending the IPO, the broker would need to disclose that the firm or its affiliate is an underwriter or other distribution participant, given that this could be a material conflict. This disclosure would need to be made in writing prior to or at the time of the recommendation, provided that the firm may satisfy this obligation by delivering a preliminary prospectus or final prospectus for SEC registered offerings. The prospectus would address, inter alia, underwriter compensation, underwriter material conflicts, and dealer selling concessions. For exempt offerings or securities, this obligation may be satisfied by providing offering documentation that addresses these aspects. In the alternative, the firm may satisfy its obligations by providing a standalone written disclosure concerning its or its affiliate’s involvement in the distribution that is provided to the customer prior to the time of the recommendation, which may, but is not required to, accompany the offering document for the securities. If the SEC views this communication as a prospectus, an exemption or other guidance should be provided by the SEC to permit firms to use such communications in furtherance of Proposed Reg BI compliance.

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<sup>60</sup> For example, depending on the trade size and markup, it may not be a material conflict.

6. Holistic Review of “Client Relationship”: As a result of several months of market volatility, Lucy and Jon ask their financial adviser (who is an employee of a dually registered investment adviser and broker-dealer) to meet with them to provide a review of the overall performance of all of the family’s accounts held at the firm. The financial adviser responds and provides the Smiths with a review of the fee-based as well as other accounts including transactional brokerage and self-directed accounts.

Application of Proposed Reg BI: Whether or not the financial adviser must comply with Proposed Reg BI depends on the capacity in which she is acting (*i.e.*, on behalf of the broker-dealer or investment adviser). If the financial adviser is acting on behalf of the broker-dealer, Proposed Reg BI would only apply if she makes a recommendation of a securities transaction or investment strategy involving a security in the course of the holistic review (and not to the review itself).

7. Sale of Proprietary Products: A dual-hatted representative recommends a variety of mutual funds managed by an affiliate to Lucy and Jon for their fee-based advisory accounts and brokerage accounts. There are a variety of similarly performing mutual funds available. While the mutual funds managed by an affiliate have similar fees to the client, they will generate higher overall revenue to the firm. The dual-hatted representative believes that these mutual funds managed by an affiliate are appropriate for the Smiths given multiple factors including performance.

Application of Proposed Reg BI: To the extent the representative is acting on behalf of the broker-dealer in providing the recommendation, Proposed Reg BI would apply. Under Proposed Reg BI, the customer must receive a disclosure, in writing, regarding material conflicts of interest relating to the recommendation including the manner and capacity in which the representative will be acting, such that the customer understands the standard of conduct that applies to those recommendations.

With regard to the Care Obligation, “best interest” does not necessarily mean “best price” or lowest cost option. As such, a broker-dealer can recommend a security that is more expensive, or more remunerative to the firm, if it is in the best interest of the customer. That determination can be made by weighing costs, the product’s investment objectives, characteristics, (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions. This good faith determination by a broker-dealer is sufficient to satisfy the Care Obligation under Proposed Reg BI.

8. Allocation of Investment Opportunities: A broker has a group of clients with similar accounts and investment objectives who also have multiple accounts with the firm. The broker frequently shares investment ideas that he or she presents to some of these clients. The broker does not present these ideas to all clients in each instance or at the same time.

Application of Proposed Reg BI: Proposed Reg BI does not require brokers to provide recommendations to all clients. However, to the extent a broker does provide such recommendations, the Disclosure, Care, and Conflict of Interest Obligations would apply.

9. Model Portfolio and Asset Allocation: Jane is online and sees that she can self-identify her investment objective or risk tolerance (such as conservative/aggressive/moderate) and view a model portfolio with preset asset allocation and a basket of mutual funds and/or ETFs that she can purchase and manage on her own. Assume that the allocation tool would be excluded from FINRA's suitability rule because it does not include a recommendation of a particular security or securities and meets the other factors in Supplementary Material .03.

Application of Proposed Reg BI: FINRA Supplementary Material .03 to Rule 2111 provides certain categories of "investment strategies involving a security or securities" that are excluded from suitability requirements, provided they meet certain conditions. If a communication meets the conditions in these exemptions and therefore is not covered by Rule 2111, we believe the communication similarly would not be covered by Proposed Reg BI.

#### **IV. Proposed Form CRS and Use of Titles: Necessary Areas for Improvement and Clarification.**

##### **A. Proposed Form CRS Should Give Firms Flexibility to Both Bifurcate and Streamline Their Disclosure.**

We understand that Proposed Form CRS is not intended to serve as a comprehensive information disclosure but rather, as a "conversation starter" with the retail customer about (1) the standard of conduct that applies to the relationship, (2) the types of compensation the firm may receive and the customer may pay, and (3) potential material conflicts of interest. To effectively communicate those elements, we believe Proposed Form CRS should use the fewest words and concepts necessary to achieve its objective and avoid creating unnecessary complexity or trying to accomplish too many objectives, while referring to additional information should an investor want it. To that end, we recommend that Proposed Form CRS enable the use of a one-page or two-page visually appealing relationship summary that gives firms the flexibility to provide short answers to key investor questions about their current or potential brokerage or investment advisory relationship and refer clients to a website or other disclosure documents where clients can find more detailed information about their account. At the same time, we ask that Proposed Form CRS provide firms with flexibility to adapt the Form to their particular business models and offerings.

Consistent with our view that there should be a streamlined and flexible approach, we include as Appendix 2.a and 2.b two examples of disclosures we believe would satisfy the Form CRS requirements. Appendix 2.a is a proposed Form CRS for a brokerage relationship, and Appendix 2.b is a proposed Form CRS that compares different types of accounts a firm offers. We note that these two examples are not intended to reflect what we believe are the only possible options, as we do not believe it is appropriate to have a "one size fits all" Form CRS. These examples reflect different firm business models and highlight the numerous benefits of allowing firms flexibility when preparing their Form CRS.

##### **1. Streamlined Approach Including Links.**

Firms should retain the flexibility to simplify, focus and layer – and thereby shorten – their Proposed Form CRS disclosures to encourage their retail customers to actually read and

understand the material. Proposed Reg BI endorses a layered disclosure regime. In the interest of consistency and in order to effectuate such a regime, Proposed Form CRS should similarly embrace layered disclosure.

Specifically, Proposed Form CRS disclosure should be substantially shortened by providing top-line disclosures in each topic area, followed by links and references to the broker-dealer's or investment adviser's website or other materials made available at account opening that contain more details.<sup>61</sup> Proposed Form CRS should not dictate the precise wording for information disclosed in the form. It should simply articulate the primary topic headings and content to be communicated and the order in which the topics should be presented. That would allow firms reasonable latitude to draft their own firm-specific summary disclosure while still enabling investor comparison of different firms. We note that this is how Form ADV brochures work today. The firm's relevant, layered disclosures could be provided at account opening, annual mailing (reminders and updates), and prominently on a broker-dealer's and investment adviser's website, including disclosure of material conflicts of interest with respect to particular product sales.<sup>62</sup>

Attached as Appendix 2.a is one example of a streamlined, Proposed Form CRS for a brokerage account relationship that we believe should satisfy the purpose of the disclosure. This document exemplifies simplicity and plain English, avoiding complexity, extraneous language, and the industry lexicon of defined terms. It is also more focused and less confusing because it: (a) highlights only the most important information that a retail investor would want to know and could readily digest and understand, (b) primarily addresses the type of account that the investor is in the process of selecting (thereby avoiding any potential confusion of mixing-up account types), and (c) embraces layered disclosure with links to more in-depth information on the firm's website, links to summaries of advisory accounts to compare if desired, and links to objective third-party sites (*i.e.*, [brokercheck.finra.org](http://brokercheck.finra.org) and [investor.gov](http://investor.gov)). We recommend that Proposed Form CRS should explicitly grant firms the flexibility to streamline and layer their required disclosures in a similar manner.

## 2. Flexible Approach Reflecting a Firm's Specific Business Model.

In addition, firms should be permitted to create a version of Form CRS that matches their business model and the offering that they provide to clients. Key components of Proposed Form CRS, including the relationship, obligation, costs, and conflicts may differ even within a brokerage offering, making a single relationship summary confusing. For example, for firms that offer brokerage accounts in which a registered representative makes recommendations and also

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<sup>61</sup> For example, to the extent that Form ADV items are covered in Form CRS, Form CRS can provide links to Form ADV to address these items. Upon an investor's request, firms could be required to provide a paper copy of the Form CRS along with any other firm disclosures that are linked from the summary. We request clarification from the SEC that this layered disclosure taking advantage of digital and electronic methods with an option for paper would satisfy the Disclosure Obligation even if the customer or prospective customer had not elected electronic delivery. Firms would need to provide reasonable accommodations to provide the linked disclosures to customers and prospective customers who do not have Internet access.

<sup>62</sup> Today, many member firms provide customers with relationship guides and other documentation that disclose the various products, services, and compensation the firms receive. Such documentation may be referenced in Form CRS.

offer entirely self-directed accounts, the Proposed Form CRS “brokerage accounts” explanation becomes less helpful to a client’s understanding because the relationship, obligation, costs, and conflicts may differ.

For these reasons, firms should be permitted to craft a Form CRS that reflects both the key elements of the form and matches the options available to its clients. Such an option could improve the initial client understanding and determination about account and service choices. This option should also allow for a simplified, focused, layered and shortened Form CRS. Attached as Appendix 2.b is one example of a Proposed Form CRS that reflects a firm’s offering to its clients. We recommend that Proposed Form CRS should explicitly grant firms the flexibility to streamline and layer their required disclosures in a similar manner.

### 3. Dual-Registrant Proposed Form CRS.

Consistent with the above comments regarding the need to allow firms flexibility in crafting their respective Forms CRS, we recommend that dually-registered firms should have the flexibility to use either the dual-registrant form, or the separate brokerage and advisory account forms. As currently proposed, the dual-registrant Proposed Form CRS appears to be designed to achieve two different goals at the same time: (a) to compare and contrast brokerage and advisory accounts, and (b) to clearly and concisely summarize the actual client relationship, whether brokerage or advisory. In this respect, the dual-registrant Proposed Form CRS is trying to do too much and for that reason, may contribute to, rather than alleviate, investor confusion. Moreover, it would be a significant challenge, if not impossible, for dual-registrant firms to pack all the necessary information into just four pages as set forth in the Proposal without it being boilerplate to investors. In addition, some of SIFMA’s members offer multiple service arrangements, including hybrid arrangements where, for example, individual registered representatives offer brokerage services through a dually-registered SIFMA member firm, and advisory services through an independent investment adviser firm. A brokerage customer of such a registered representative could potentially receive a dual-registrant Proposed Form CRS from the dually-registered SIFMA member firm, and a separate investment advisory account Proposed Form CRS from the independent advisory firm. Such an outcome would likely raise more questions than it would answer for the customer.

For these reasons, the SEC should provide dually-registered firms with the flexibility to use either the dual-registrant form, or the separate brokerage and advisory account forms. For firms that choose the latter approach, the prospective benefit to the retail customer is that he or she would receive a summary of only the account type that he or she plans to open, or has already opened, rather than a side-by-side comparison to a different account type that such customer may or may not have or plan to open. Indeed, many retail investors of dually-registered firms do not qualify for investment advisory services because these services typically require a minimum account balance. Firms that choose the bifurcated approach could simply include in each of their respective forms a reference and link to the other account type they offer, as well as to the Proposed Form CRS for that other account type. Likewise, firms that offer multiple service arrangements, as discussed above, should have the flexibility to develop multiple Forms CRS to reflect each of their various service offerings and advisory programs.

Without this flexibility, Proposed Form CRS would impose burdens on dual-registrant firms that go beyond the burdens imposed on stand-alone broker-dealers and investment advisers. We believe a more flexible approach also would facilitate firms' ability to offer investors the widest range of choices possible and describe these choices in a clear, concise manner.

**B. The Ten Questions in Proposed Form CRS Are Too Many and Should Not Create New Disclosure or Recordkeeping Requirements.**

We support efforts to encourage retail investors to have conversations about important aspects of their relationship with their financial services provider because we believe informed investors make better decisions. However, we believe it would be better and promote clearer communication in a shorter and more meaningful way if the form itself required firms to answer four to five key questions (rather than suggesting an investor ask ten questions).<sup>63</sup> To reduce the number of questions and eliminate the need for the section that compares brokerage and advisory accounts, a link could be provided to the SEC's educational materials to inform all investors about the important differences and the choices they have (*e.g.*, links to investor.gov and other SEC education materials). We believe this "link approach" also would help focus investors on the important, firm-specific disclosures in Form CRS and avoid these disclosures from getting lost among the other, more basic disclosures that apply generally across broker-dealers and investment advisers.

As a separate matter, we believe that certain of the "key questions" could be quite burdensome for firms. To this end, creating supervisory and compliance policies and procedures relating to how financial professionals would respond to the "key questions" would be extremely difficult. For example, most firms do not currently have systems in place to allow the financial professionals to answer questions such as customer-specific "Do the math for me" requests. For a brokerage account, for example, there are too many unknown variables at the time the Proposed Form CRS is delivered to the customer to provide a reasonably informed response to "Do the math" (*e.g.*, the anticipated number and type of trades, the number of shares, the firm's minimum/maximum commission limits, etc.). Thus, having such a client-specific discussion with a customer would be practically and logistically challenging.

The request for comments in the Proposal indicates how complicated the process could

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<sup>63</sup> See Appendix 2.a and 2.b for examples.

be.<sup>64</sup> If the final rule includes the ten questions, we urge the Commission to clarify that the questions in Proposed Form CRS are designed to be prompts for conversations and that they are not mandatory disclosures and do not impose any new recordkeeping obligations. We further recommend that the Commission not mandate the inclusion of the questions in Proposed Form CRS. Instead, firms should have the flexibility to phrase their own question if they deem appropriate. Finally, we recommend that the Commission eliminate altogether the “Do the math for me” question for brokerage accounts for the reasons stated above.

**C. Proposed Form CRS Should Be Revised to Make Clear That Only “Material” Conflicts Are Disclosable.**

The discussion of conflicts of interest with respect to Proposed Form CRS sometimes refers broadly to “conflicts of interest” rather than “material conflicts of interest.”<sup>65</sup> We ask that the SEC revise Proposed Form CRS to be consistent with Proposed Reg BI and clarify that broker-dealers are required to disclose, reduce, or eliminate only conflicts that are material conflicts.

**D. The Form CRS Delivery Obligation Triggered by a Material Change Should Be Clarified and Amended.**

The Proposed Form CRS Proposal requires delivery of a Proposed Form CRS to an existing customer before or at the time:

- (ii) changes are made to the retail investor’s existing account(s) that would ***materially change*** the nature and scope of the relationship with the retail investor, including before or at the time you recommend that the retail investor transfer

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<sup>64</sup> The request for comment questions include the following:

“Would financial professionals be able to answer these ‘Key Questions to Ask’? Do they have access to personalized information about the retail investor and the retail investor’s account to be able to, for example, put together personalized fee information and estimates during the account opening process? To the extent responses would require information about the particular retail investor, would firms need to change the account opening process in order to obtain that information and provide responses?” Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles, 83 Fed. Reg. 21416, 21450 (proposed May 9, 2018), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08583.pdf> (“Form CRS Proposing Release”).

“Would firms create policies and procedures, including supervision and compliance reviews, relating to how their financial professionals respond to these questions? Would implementing and maintaining such processes be burdensome or costly for firms? Why or why not? Do investment advisers and broker-dealers currently have systems in place to answer these questions, particularly the request to ‘do the math for me’ and provide not only fee information related to the relationship and certain externalized fees, but also information about fees that are implicit to a given product?” *Id.*

“Do firms anticipate that they would implement recordkeeping policies and procedures to address communications between financial professionals and retail investors about the ‘Key Questions to Ask’? What kind of recordkeeping policies and procedures would firms anticipate implementing in order to address such communications?” *Id.* at 21451.

<sup>65</sup> Proposed Form CRS states: “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.”

from an advisory account to a brokerage account, transfer from a brokerage account to an advisory account, or move assets from one type of account to another in a transaction not in the normal, customary, or already agreed course of dealing. Whether a **change** would require delivery of the Form CRS would depend on the specific facts and circumstances.<sup>66</sup>

We appreciate that Proposed Form CRS will provide important information about a customer's relationship with a broker-dealer or investment adviser. We believe, however, that the trigger for a "material change" should be defined as changes from an advisory account to a brokerage account or vice versa, and not include asset movements from one type of account to another or "other material changes." As described below, we believe this trigger is appropriate because (1) it is not clear what "other material" changes or assets movements "not in the normal, customary, or already agreed course of dealing" would be; (2) even if it was clear what these other triggers are, firms would need to build processes to track them and satisfy this delivery requirement, which could delay asset transfers and be detrimental to the customer; and (3) we do not believe these additional trigger points are necessary because customers will receive Form CRS at periodic intervals throughout the relationship, and customers will have continual online access to a firm's Form CRS via a website posting, making the need to "push out" the Form CRS at additional points unnecessary.

With regard to the first point, it is unclear what changes made to a retail investor's existing account(s) would **materially change** the nature and scope of the relationship beyond those already enumerated in the proposed rule (*i.e.*, the advisor's recommended transfer from advisory to brokerage, or vice versa). Moreover, the third enumerated item (*i.e.*, recommended asset move from one type of account to another in a transaction not in the normal, customary, or already agreed course of dealing) is unclear. It also would impose a disproportionate burden on firms without commensurate benefit to customers. As a threshold matter, the delivery of Form CRS in connection with such recommendations would be entirely redundant. No new account is being opened, and, by definition, the customer already will have received Form CRS in respect of each of the two accounts involved, brokerage and advisory.

Additionally, it is not unusual for a household that has an investment advisory relationship with a firm to also have one or more brokerage accounts. That is what the SEC encourages – investor choice in the types of accounts and types of fee arrangements. Thus, it is very common for representatives and their customers to make decisions together in terms of moving assets from one type of account to another. In other words, this is always in the normal course, and any asset move related to an investment recommendation is covered by the obligations under Proposed Reg BI.

With regard to the second point, because delivery of Form CRS in connection with such recommendations could be divorced from any account opening process, it would necessitate the construction of entirely new operational and supervisory processes designed to identify potentially triggering asset movements (firm-recommended but not customer-initiated; brokerage to advisory and vice versa, but not brokerage to brokerage or advisory to advisory) before they

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<sup>66</sup> Proposed Rule 240.17a-14(c)(2) (Form CRS, for preparation, filing and delivery of Form CRS) and proposed Rule 275.204-5 (Delivery of Form CRS) (emphasis added).



are effectuated. New operational and supervisory processes would also be needed to review for whether the proposed movement is “not in the normal, customary, or already agreed course of dealing” and, depending on the conclusion, either to deliver Form CRS and create and preserve a record of the delivery or to create and preserve a record of the conclusion that no such delivery was required. In addition to the difficulty of any attempt to assess prior to each such recommendation whether the proposed asset movement is “not in the normal, customary, or already agreed course of dealing,” the review necessary to ensure compliance with such a requirement would inevitably delay asset movements that are in the best interest of the customer, with potentially adverse financial consequences.

With regard to the third point, we believe the Form CRS delivery obligation should apply to each retail investor who engages a firm’s services before or at the time such services are engaged. It should also require an annual reminder or update of the Form CRS, and the current version of Form CRS should always be available on a firm’s public website (or by mail upon request).<sup>67</sup> Form CRS should also be delivered any time an account is converted from an advisory account to a brokerage account or vice versa. For the initial delivery, most brokerage firms likely will include it with account applications or other account opening materials, while investment advisers will include it with their Form ADV. Given this already thorough delivery coverage, the need for any more frequent updates should be narrowly defined.

Providing Form CRS to investors at the stages we have articulated and making it available at all times on a firm’s website should give investors numerous opportunities to view the form at meaningful points in the prospective and current relationship. Providing Form CRS to investors beyond these points could overwhelm them with duplicative or redundant information. It also would be counterproductive because if investors are overwhelmed with documents, it is less likely they will digest the information. Given that most people communicate and do business using the internet, making Form CRS available at all times to investors on every firm’s website will achieve more than providing duplicative or redundant paper.

For these reasons, we recommend that the proposed broker-dealer delivery obligation rule (§240.17a-14(c)(2)) be amended with the following changes in bold:

**~~“(ii) changes are made to the retail investor’s existing account(s) that would materially change the nature and scope of the relationship with the retail investor, including before or at the time~~ you recommend that the retail investor transfer from an advisory account to a brokerage account, ~~or~~ transfer from a brokerage account to an advisory account.”**, **~~or move assets from one type of account to another in a transaction not in the normal, customary, or already agreed course of dealing. Whether a change would require delivery of the Form CRS would depend on the specific facts and circumstances.”~~**

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<sup>67</sup> Providing important disclosures through a website or mail, upon request, is an approach that has worked well for other regulatory purposes. For example, for purposes of research analyst conflicts rules, broker-dealers are permitted to provide certain important conflict of interest disclosures to retail customers either electronically through websites or upon request. Also, there is no requirement to maintain a record every time this information is provided to customers.

Similarly, we recommend that the proposed investment adviser delivery obligation rule (§275.204-5(b)(2)) should be amended with the following changes in bold:

**~~“(ii) changes are made to the retail investor’s existing account(s) that would materially change the nature and scope of the relationship with the retail investor, including before or at the time you recommend that the retail investor transfer from an advisory account to a brokerage account, or transfer from a brokerage account to an advisory account.”, or move assets from one type of account to another in a transaction not in the normal, customary, or already agreed course of dealing. Whether a change would require delivery of the Form CRS would depend on the specific facts and circumstances.”~~**

We also ask the SEC to confirm that the obligation to provide the Form CRS in Proposed Exchange Act Rule 17a-14(c)(1) and Proposed Advisers Act Rule 204-5(b)(1) applies only to retail investors who engage a firm’s services. As discussed below in Section E, it would be very burdensome and not practical in many instances to keep track of Forms CRS that are provided to retail investors who never seek to establish a relationship with a firm.

#### **E. The Recordkeeping Obligation in Proposed Form CRS Should Be Revised with Respect to Prospective Clients and Sporadic Events.**

The recordkeeping requirement for Proposed Form CRS requires broker-dealers and investment advisers to keep records of dates when they delivered the Proposed Form CRS and amendments “to any client **or to any prospective client who subsequently becomes a client**, as well as to any retail investor **before such retail investor opens an account.**”<sup>68</sup> As currently drafted, this recordkeeping requirement would require firms to keep records of dates that Proposed Form CRS was delivered to all prospective clients and prospective retail investors, even if they never became actual clients, or never opened a retail investor account. Such an obligation would be extremely burdensome because firms do not currently have systems and procedures in place to capture such pre-relationship dates. It also would be impractical in some cases.

At the same time, it is not clear that such an obligation would serve a legitimate regulatory purpose – particularly in cases where firms provide potential investors with access to the Form CRS on a public firm website on an ongoing basis. For these reasons, we ask the SEC to confirm that the recordkeeping requirement should apply when (1) Form CRS is delivered to a prospective customer along with account opening documents, or (2) Form CRS is delivered to customers as required by Proposed Exchange Act Rule 17a-14(c)(2), (4) and (5) (for broker-dealers) and Proposed Advisers Act Rule 204-5(b)(2), (4) and (5) (for investment advisers).

The costs associated with tracking when Form CRS is provided to prospective customers would be extraordinary. Firms do not have systems in place to track every prospective customer who never opens an account. As a separate matter, tracking distribution to prospective customers in certain situations is impractical, such as when a firm distributes Form CRS at an

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<sup>68</sup> Form CRS Proposing Release at 21458 (emphasis added).

event (either by handing them out or by having investors pick up the Form CRS from a stack). This would require creating a log of every prospective investor, which creates a disproportionate amount of work for firms that is not commensurate to the benefit to investors. Firms also do not have a way to track and make records of individuals who may access Form CRS on a public or firm website, nor should they be required to do so.

Given these concerns, we recommend that the proposed broker-dealer recordkeeping rule (§240.17a-3(a)(24)) be amended with the changes in bold:

**“A record of the date that each Form CRS was provided to each a retail investor in the ordinary course of business, and a record that a Form CRS was provided to such retail investor: (i) at the time the retail investor was provided with account opening documents; and (ii) at the other times required by Rule 17a-14(c)(2), (4) or (5).”**

Similarly, the investment adviser recordkeeping obligation (§275.204-2(a)(14)(i)) should be amended with the following changes in bold:

**“a record of the dates that each ... Form CRS ... was given to any client in the ordinary course of business, and a record that a Form CRS was given to such client: (i) at the time he or she became a client; and (ii) at the other times required by Rule 204-5(b)(2), (4) or (5).”**

**F. The Definition of “Retail Investor” Should Be Harmonized with the Definition of “Retail Customer” in Proposed Reg BI, and Institutional Investor Relationships Should Not Require Delivery of Proposed Form CRS.**

As discussed above, we recommend that the definition of “retail customer” in Proposed Reg BI should be harmonized with the proposed definition of “retail investor” in Proposed Form CRS in its limitation to natural persons, among other things. A retail investor who receives Proposed Form CRS may assume that Proposed Reg BI applies even though it only applies to certain persons. Any recipient, even if not within the ambit of Proposed Reg BI, would have an argument that Proposed Reg BI should apply based on the Proposed Form CRS representation.

Example: Jane Smith has an individual account she uses for her sole proprietorship business. She would not fall under Proposed Reg BI’s definition of a “retail customer” since the purpose of recommendation is not for personal, family, or household use. However, she would be considered a “retail investor” for Proposed Form CRS purposes. If a broker-dealer sends her a Proposed Form CRS stating it owes her a best interest obligation, the broker-dealer would assume Proposed Reg BI responsibilities it would not otherwise owe her under Proposed Reg BI itself.

Given that link between Proposed Reg BI and Proposed Form CRS, the definition of “retail customer” and “retail investor” should be harmonized, and both should be limited to natural persons and subject to an institutional investor exemption. In that regard, we further recommend that the proposed definition of “retail investor” in Proposed Form CRS exclude an “institutional investor” as defined under FINRA Rule 2210. That is because, as discussed above, such investors are already subject to a distinct institutional suitability standard under FINRA

Rules and are not otherwise the intended beneficiaries of Proposed Reg BI's best interest obligation.

**G. The SEC Should Not Impose a “Waiting Period” for Form CRS Before Investors Can Engage a Financial Professional.**

The SEC requested comment on whether Proposed Form CRS should be delivered “a certain amount of time before the firm enters into an agreement with a retail investor (*e.g.*, 48 hours or a 15 minute waiting period)?”<sup>69</sup> We believe that such a requirement would be unnecessary, given that Form CRS is a short, plain English summary, designed and intended to be contemporaneously read and understood. Requiring advance delivery would needlessly delay, frustrate, and in some cases derail, a retail customer's efforts to begin his or her relationship with a financial services provider.

**H. The SEC Should Provide Practical Flexibility Regarding Use of Titles.**

The Commission proposes restricting a broker-dealer's use of the title “advisor” or “adviser” in the interest of reducing investor confusion.<sup>70</sup> Investors are apparently confused about the different services, fee models, conflicts, and legal standards applicable to broker-dealers versus investment advisers. Such confusion should be appropriately addressed through clear, concise and simple disclosure to the investor about the specific client relationship. To our understanding, that is precisely what Proposed Form CRS is intended to accomplish.

The confusion over the title “advisor” is alternatively cast as investors believing they are getting the benefit of a fiduciary standard when they are not. We believe that Proposed Reg BI solves that confusion as well. Although the proposed best interest standard for broker-dealers is not labeled as a fiduciary one, it clearly has the hallmarks of a fiduciary standard, including a duty of care and a duty of loyalty. Collectively, Proposed Reg BI and Proposed Form CRS obviate any perceived need to restrict broker-dealer's use of the title “advisor” or “adviser”

In addition, the current Proposal to limit the use of titles does not adequately consider certain practical implications, such as dual-registrants who may go through periods (including the ramp-up process) when they do not have any advisory clients, or dual-registrants who are registered as a registered representative at a broker-dealer and as an investment adviser representative at an unaffiliated investment adviser firm. Under the proposed rule, they would be precluded from using the title “advisor” or “adviser.” If the Commission determines to retain the current Proposal regarding titles, we request that the Commission provide exceptions that allow associated persons who are dual-registrants to use the titles “advisor” and “adviser” when providing brokerage services.

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<sup>69</sup> *Id.* at 21456.

<sup>70</sup> SIFMA has historically opposed such a restriction because the title “financial advisor,” for example, is quite descriptive of the services provided by a typical broker-dealer representative. See SIFMA comment to SEC at 12 (Feb. 7, 2005), available at <https://www.sifma.org/resources/submissions/sia-submits-comments-to-the-sec-on-the-secs-release-relating-to-broker-dealers/>. We would not oppose restrictions on the use of the title “investment advis[e/o]r” which is a defined term under the Advisers Act.

Moreover, many firms have been using these titles for years, and there would be significant costs and burdens associated with “unwinding” the use of these terms. Extensive repapering would be necessary, as firms may have to create a second set of agreements and other client-facing communications for their population of representatives who can no longer use the titles.

## **V. Other Comments.**

### **A. SIFMA Generally Supports Regulatory Harmonization but Requires Further Detail to Meaningfully Comment.**

The Proposals seek comment on prospective regulatory harmonization in the following discrete areas of prospective, enhanced adviser regulation: (1) federal licensing and continuing education, (2) provision of account statements, and (3) financial responsibility.<sup>71</sup> Consistent with our previously expressed support for regulatory harmonization relating to the provision of services to retail investors, we remain generally supportive of regulatory harmonization initiatives and are eager to engage in a dialogue with the Staff on this important topic.<sup>72</sup>

Specifically, SIFMA agrees with the SEC staff’s previous recommendation that “when broker-dealers and investment advisers are performing the same or substantially similar functions, the regulatory protections should be the same or substantially similar; that is, that harmonization should be considered to the extent that such harmonization appears likely to add meaningful investor protection.”<sup>73</sup> SIFMA also shares the staff’s assessment that regulatory differences between the two regimes “could be exploited by the industry through regulatory arbitrage and, in any event, may need to be addressed in order to improve the effectiveness of both regimes by providing more consistent protections to investors and reducing investor confusion.”<sup>74</sup>

As we have said in the past, however, the devil is in the details. Our support remains conditioned on achieving harmonization in a manner that would decrease regulatory burdens, reduce incentives for regulatory arbitrage, and result in a more streamlined, transparent, and rational regulatory framework. Harmonized rules need to be sufficiently tailored to account for the differing operational and business models of broker-dealers and investment advisers. Thus, we believe that it would be most helpful for us to respond to a more fully developed and detailed

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<sup>71</sup> The SEC requests feedback on regulatory harmonization in Section III.B. of the IA Proposing Release.

<sup>72</sup> In response to the SEC’s 2013 request for comment on whether to pursue broader harmonization of broker-dealer and investment adviser regulations, SIFMA expressed support for regulatory harmonization relating to the provision of services to retail customers. See Duties of Brokers, Dealers, and Investment Advisers, 78 Fed. Reg. 14848 (Mar. 7, 2013), available at <https://www.gpo.gov/fdsys/pkg/FR-2013-03-07/pdf/2013-05222.pdf>; SIFMA comment to SEC (Jul. 5, 2013), available at <https://www.sifma.org/wp-content/uploads/2017/05/sifma-submits-comments-to-the-sec-on-data-relating-to-the-duties-of-brokers-dealers-and-investment-advisers.pdf>.

<sup>73</sup> Section 913 Study at 129.

<sup>74</sup> *Id.* at 104.

Proposal, which would allow us to provide more meaningful and specific commentary, rather than offering general commentary.<sup>75</sup>

Separately, we also believe that harmonization with the municipal advisor regulatory regime would be important and beneficial to both market participants and investors. Therefore, we encourage the SEC to apply the same standards in Proposed Reg BI to municipal advisor regulations and urge the relevant SROs to do so.

**B. There Are Significant Uncertainties with the Treatment of Dual-Registrants.**

We ask that the SEC provide more guidance regarding what is expected of dual-registrants when offering products in advisory accounts versus brokerage accounts. For example, where a dual-registrant offers certain products either in an advisory account or a brokerage account, with different consequences for fees, discretion, and the like, we assume it suffices for the dual-registrant to tell the client that both an advisory account and a brokerage account are available, and the client is free to choose between the accounts.

In the Proposals, the SEC imposes additional burdens on dual-registrants and dual-hatted personnel that we believe are unwarranted. Instead of making it harder for dual-registrants to operate, the SEC should make it easier, or at least have the same number of requirements as for stand-alone broker-dealers and investment advisers.

**C. The Requirement That A Firm Disclose Its Regulatory Status and A Financial Professional's Association Should be Eliminated.**

We ask that the SEC eliminate the requirement that a firm disclose its regulatory status and a financial professional's association under proposed Exchange Act rules 15l-3(a) and (b) and proposed Advisers Act rules 211h-1(a) and (b). The stated purpose of this regulatory status disclosure is to ensure that investors know what type of firm they are dealing with, even if representatives use misleading titles. In light of this stated purpose, we believe the regulatory status disclosure is not necessary because information regarding regulatory status is contained in Proposed Form CRS, and Proposed Form CRS is available at all times on a firm's website, in addition to periodic distribution to clients. Any confusion regarding whether a registered representative or a firm is a broker-dealer or an investment adviser is addressed with the disclosures in Proposed Form CRS.

For these reasons, we do not believe the regulatory status disclosure would have an obvious benefit to investors. At the same time, the costs of such a requirement would be significant. For example, firms would need to reprint all business cards to include this disclosure. They also would need to make changes to firm technology and electronic communications to

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<sup>75</sup> The Asset Management Group ("AMG") of SIFMA is submitting a separate comment letter on the SEC's proposed interpretation regarding the standards of conduct applicable to investment advisers in the IA Proposing Release. With respect to regulatory harmonization, the AMG comment letter expresses the separate and distinct views of SIFMA AMG members as investment managers to institutional (versus retail) clients.

disclose such status, among other changes.<sup>76</sup> Given that Proposed Form CRS contains this information and is available to clients at all times, the benefit of the regulatory status disclosure appears disproportionately outweighed by its costs.

**D. The SEC Should Not Make Proposed Reg BI Stricter Than It Already Is.**

We believe Proposed Reg BI will be beneficial for retail customers and workable for broker-dealers, assuming the important changes noted above are made. However, we caution the SEC that imposing additional requirements may result in the rule becoming so burdensome that retail customers may lose access to transaction-based advice. Proposed Reg BI already contains requirements that significantly increase investor protection over the current broker-dealer standard.

We do not believe it is practicable to respond to all the questions posed throughout the Proposals. To the extent that the questions ask whether the rule should pile on additional requirements, we believe that the rule strikes the proper balance in providing meaningful protections to retail customers and imposing heightened conduct standards and regulatory obligations on broker-dealers.

For example, the release asks whether the SEC should require that disclosure be “full and fair.” First, the “fully and fairly” disclose language comes from *Capital Gains*, which discusses an investment adviser’s obligation, not the obligation of a broker-dealer that provides only transaction-based advice. Second, such language is not only inapplicable, but also unnecessary because Proposed Reg BI’s Disclosure Obligation already requires disclosure of all the material facts and material conflicts of interest that an investor would want to know about.

**E. The SEC Should Provide an Adequate Implementation Period Once the Proposals are Adopted.**

A new standard of conduct would raise a variety of detailed practical issues for the SEC, FINRA, and the broker-dealer industry. In order to comply with these requirements, firms will have to develop extensive infrastructure and policies and procedures. Firms will need sufficient time to implement training programs and to build systems to comply with any standard of conduct that is adopted. Any new rule should have a reasonable effective date that allows firms to adequately prepare for its implementation.

We request a sufficiently long implementation period to come into compliance. We suggest that the Proposals have an implementation period of at least 24 months, or at a minimum, have a phased-in approach such that the requirements are adopted at different points in time.

At the same time, as previously stated, while a sufficiently long implementation period will be necessary to ensure timely firm compliance, we are by no means suggesting that the Proposals should be delayed. To the contrary, the Proposals represent an important investor

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<sup>76</sup> For example, the Proposal contemplates that if a communication is delivered through “a televised or video presentation, a voice overlay and on-screen text could clearly convey the required information.” Form CRS Proposing Release at 21468. We believe this requirement is completely unwarranted given that clients will have access to Proposed Form CRS which contains this information.

protection initiative, and for that reason, the SEC should move forward without delay and proceed to final rulemaking as expeditiously as possible.

\* \* \*

We appreciate the opportunity to comment and your consideration of our views. If you have any questions or require any additional information, please feel free to contact our staff leads: Ira D. Hammerman, [ihammerman@sifma.org](mailto:ihammerman@sifma.org) and Kevin Carroll, [kcarroll@sifma.org](mailto:kcarroll@sifma.org).

Also feel free to contact our counsel at WilmerHale: Yoon-Young Lee, [Yoon-Young.Lee@wilmerhale.com](mailto:Yoon-Young.Lee@wilmerhale.com); Stephanie Nicolas, [Stephanie.Nicolas@wilmerhale.com](mailto:Stephanie.Nicolas@wilmerhale.com); and Cristina Jaramillo, [Cristina.Jaramillo@wilmerhale.com](mailto:Cristina.Jaramillo@wilmerhale.com).

Sincerely,

A handwritten signature in blue ink, appearing to read "Ken Bentsen", with a long horizontal flourish extending to the right.

Kenneth E. Bentsen, Jr.  
President and CEO  
SIFMA

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



## **APPENDIX 1 - EMPIRICAL STUDIES**

In response to the specific requests for data and information set forth in Section IV, Economic Analysis, of proposed Reg BI, SIFMA directs the SEC's attention to the following empirical studies which include quantitative data and findings relevant to the SEC's Proposal.

### ***NERA Economic Consulting, Comment on the Department of Labor Proposal and Regulatory Impact Analysis (July 17, 2015) ("NERA Study")***<sup>77</sup>

- Investors select the fee model (commission versus fee) that best suits their own needs and trading behavior, according to account-level data. Investors who expect to trade often rationally choose fee-based accounts, and those who do not trade often are likely to choose commission-based accounts.<sup>78</sup>
- The evidence shows that commission-based accounts and fee-based accounts exhibit similar performance and returns.<sup>79</sup>
- If the costs associated with maintaining commission-based accounts become too high for firms, then many investors would lose access to advice, because many commission-based account balances are too small for advisory accounts.<sup>80</sup>
  - Using a conservative minimum account balance of \$25,000, over 40% of commission-based accounts would be unable to open fee-based account.<sup>81</sup>
  - Using a \$50,000 threshold, over 57% of accounts would not meet minimum balance requirements for fee-based accounts.
  - If the threshold is \$75,000, then two-thirds of account holders would be left without any professional advice.
- Losing access to advice would detrimentally impact individual investors because individual investors make systematic errors when investing on their own.<sup>82</sup>
- The benefits of financial advisors include: (i) their ability to help investors stop making investment mistakes, (ii) portfolio allocations that are more diversified and closer to

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<sup>77</sup> Available at <https://www.sifma.org/wp-content/uploads/2017/05/nera-analysis-comment-on-the-department-of-labor-proposal-and-regulatory-impact-analysis.pdf>.

<sup>78</sup> *Id.* at 6-7.

<sup>79</sup> *Id.* at 10-11.

<sup>80</sup> *Id.* at 9.

<sup>81</sup> *Id.* at 12 (citing 76 Fed. Reg. 66136, 66151, Investment Advice – Participants and Beneficiaries (October 25, 2011), available at <https://www.gpo.gov/fdsys/pkg/FR-2011-10-25/pdf/2011-26261.pdf>).

<sup>82</sup> *Id.* at 13-16 (citing 76 Fed. Reg. 66136, 66153 – 54, Investment Advice – Participants and Beneficiaries (October 25, 2011), available at <https://www.gpo.gov/fdsys/pkg/FR-2011-10-25/pdf/2011-26261.pdf>).

model portfolios, (iii) tax minimization, (iv) increased savings, and (v) economies of scale with respect to the cost of information.<sup>83</sup>

**Deloitte, *The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors* (August 9, 2017) (“Deloitte Study”)**<sup>84</sup>

- 53% of study participants eliminated or limited access to brokerage advice services as part of their approach for complying with the DOL Fiduciary Rule.<sup>85</sup>
- The shift of retirement assets to fee-based or advisory programs has accelerated as a result of the elimination or limitation of brokerage advice services.<sup>86</sup>
- DOL Fiduciary Rule implementation and ongoing compliance efforts have caused significant operational disruption and increased costs for financial institutions.<sup>87</sup>

**SIFMA Data Relating to the Duties of Brokers, Dealers & Investment Advisers (July 5, 2013) (“SIFMA Data”)**<sup>88</sup>

- SIFMA previously submitted to the SEC recommendations and costs estimates for implementing new disclosure obligations in connection with a heightened standard of conduct.<sup>89</sup>
- SIFMA also submitted to the SEC projected costs to develop and implement compliance and supervisory systems and procedures and related training programs to adapt to the new heightened standard of conduct.<sup>90</sup>

**Oliver Wyman, SIFMA, *Standard of Care Harmonization, Impact Assessment for SEC* (October 2010) (“OW Study”)**<sup>91</sup>

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<sup>83</sup> *Id.* at 17-21.

<sup>84</sup> Available at <https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf>.

<sup>85</sup> *Id.* at 5, 11.

<sup>86</sup> *Id.* at 5, 12.

<sup>87</sup> *Id.* at 6, 17-24.

<sup>88</sup> Available at <https://www.sifma.org/resources/submissions/sifma-submits-comments-to-the-sec-on-data-relating-to-the-duties-of-brokers-dealers-and-investment-advisers/>.

<sup>89</sup> *Id.* at 17-20.

<sup>90</sup> *Id.* at 20-23.

<sup>91</sup> Available at <https://www.sifma.org/wp-content/uploads/2017/05/study-standard-of-care-harmonization-impact-assessment-for-sec.pdf>.

- 95% of households hold commission-based accounts, whereas only 5% of households hold fee-based accounts.<sup>92</sup>
- Fee-based services are 23 – 27 basis points more expensive than brokerage.<sup>93</sup>
- For an investor with \$200,000 in assets, the cost of shifting to fee-based pricing would reduce returns by more than \$20,000 over a 20-year horizon.<sup>94</sup>
- Access to investment products offered on a principal basis (*i.e.*, corporate and municipal securities) is more affordable through commission-based accounts, particularly for small investors.<sup>95</sup>

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<sup>92</sup> *Id.* at 4.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See Oliver Wyman, SIFMA supplement to SEC (Nov. 17, 2010), available at <https://www.sifma.org/resources/submissions/sifma-submits-comments-to-the-sec-on-study-regarding-obligations-of-brokers-dealers-and-investment-advisers/>.

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## A Summary of Your Brokerage Account Relationship with [FIRM]

The purpose of this summary is to inform you about the nature of our relationship for this brokerage account. For a more detailed explanation, please go to [LINK].

### What is your obligation to me as a broker-dealer when it comes to investment advice?

- You may invest on your own in this account without any advice from us.
- Even when we give you investment advice, you make the final decisions.
- If we recommend to you an investment or investing strategy, we will act in your best interest and will not place our interests ahead of yours.
- We will not manage or monitor this or other brokerage accounts. We offer investment advisory accounts, which include management of your investments for an ongoing fee. To inquire whether that type of account is right for you, talk to a firm representative or go to [link] to see a summary like this one for advisory accounts.

### How do you pay your professionals who give me investment advice?

- We compensate our representatives who provide investment advice. [Briefly describe compensation model.]
- For further details on how we pay representatives, go to [link].

### What are the fees and costs I will pay for investment advice?

- If you decide to buy or sell a stock, certain exchange-traded funds, mutual funds, or bonds, you will pay a commission or transaction fee. For other investments, the price of the investment includes compensation for our firm.
- You pay the same amount whether we recommend an investment to you or not.
- For details on fees and pricing, go to [link].

### How does your firm make money and what conflicts of interest do you have?

- Our firm makes more money from some investments you may select compared to others, whether or not a firm representative recommends the investment to you.
- For example, our firm and its affiliates earn more if you purchase a firm-affiliated mutual fund or exchange-traded fund than if you purchase one managed by another company.
- For a detailed explanation about how our firm makes money depending on the investments you choose and our related conflicts of interest, go to [link].

### What additional information should I consider?

- For more information about different types of investing account relationships and services that may be available to you at our firm, go to [link].
  - For free and simple tools to research our firm, our representatives, and other firms, including disciplinary events, go to investor.gov and brokercheck.finra.org.
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# The Benefits of a Streamlined Approach

## Simple

Plain English, easy-to-read content in brief, one-page format.

- Covers key questions and provides answers

## Focused

Includes easy-to-understand information on the most important components of Form CRS proposal:

- Relationship and corresponding obligations
- Services
- Fees and costs
- Conflicts of interest
- Additional information

## Visual

Employs a variation of the Pew disclosure format, making it easier for investors to find and follow information conveyed.

## Relevant

Focuses on the type of account an investor is in process of selecting in this case, brokerage).

- Avoids potential confusion of mixing account types
- Instead, links to summaries of advisory accounts to compare if desired

## Layered

Q&A approach provides top-line answers on each topic area, as well as links to more in-depth information on company website.

## Resourceful

Provides links to additional information on other relationships available with the firm, and links to objective, third-party sites to view any disciplinary history

APPENDIX 2.a.

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The purpose of this summary is to inform you about the nature of our relationship for this brokerage account. For a more detailed explanation, please go to [LINK].

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- You may invest on your own in this account without any advice from us.
- Even when we give you investment advice, you make the final decisions.
- If we recommend to you an investment or investing strategy, we will act in your best interest and will not place our interests ahead of yours.
- We will not manage or monitor this or other brokerage accounts. We offer investment advisory accounts, which include management of your investments for an ongoing fee. To inquire whether that type of account is right for you, talk to a firm representative or go to [link] to see a summary like this one for advisory accounts.

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- For further details on how we pay representatives, go to [link].

**What are the fees and costs I will pay for investment advice?**

- If you decide to buy or sell a stock, certain exchange-traded funds, mutual funds, or bonds, you will pay a commission or transaction fee. For other investments, the price of the investment includes compensation for our firm.
- You pay the same amount whether we recommend an investment to you or not.
- For details on fees and pricing, go to [link].

**How does your firm make money and what conflicts of interest do you have?**

- Our firm makes more money from some investments you may select compared to others, whether or not a firm representative recommends the investment to you.
- For example, our firm and its affiliates earn more if you purchase a firm-affiliated mutual fund or exchange-traded fund than if you purchase one managed by another company.
- For a detailed explanation about how our firm makes money depending on the investments you choose and our related conflicts of interest, go to [link].

**What additional information should I consider?**

- For more information about different types of investing account relationships and services that may be available to you at our firm, go to [link].
- For free and simple tools to research our firm, our representatives, and other firms, including disciplinary events, go to investor.gov and brokercheck.finra.org.

## Which is right for you?

You choose how you want to invest.

### APPENDIX 2.b.

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, you can work with a financial advisor, use our digital platform, or both.

Our Investment Options Fall into These Categories. [\[link\]](#)



#### WORKING WITH A FINANCIAL ADVISOR

Brokerage Accounts	Advisory Accounts	Annuities
We will recommend investments for you, based on information that you provide to us, or you can pick them yourself. You have the final say on all trades.  We are not required to monitor your account or investments on an ongoing basis.	We will discuss your investment goals with you, pick a strategy aimed at those goals, and regularly monitor your account.  You can pick an account where we carry out the strategy through buying and selling investments or one where we advise you but you approve all trades in advance.  We will provide advice on an ongoing basis.	We will recommend an annuity for you, based on information that you provide to us and your goals for the investment.  We are not required to monitor your annuity on an ongoing basis.



#### DIGITAL ACCOUNTS AND SERVICES

Digital Trade Accounts	Digital Portfolio Accounts
You pick the investments yourself. You control the trades on your own.  We are not required to monitor your investments on an ongoing basis.	You answer questions to create a risk profile and then you select your strategy.  We carry out the strategy through buying and selling of your investments.  We regularly monitor your account and will keep the account aligned to the strategy.



#### WORKING WITH A FINANCIAL ADVISOR

Brokerage Accounts	Advisory Accounts	Annuities
Your Financial Advisor may be compensated based on the money from your transactions and holdings; please review the fees and costs that you will pay.		
You will pay us a fee when you trade. This fee is based on the specific transaction and not the value of your account as a whole.  Different products have different costs to buy, hold or sell. These costs are explained in product-specific materials. Some products impose fees that will reduce the value of your investment over time.  From a cost perspective, you may prefer this type of brokerage account if you want recommendations but plan to buy and hold investments for longer periods of time.	You will pay an ongoing fee at the end of each month based on the value of your advisory account.  The amount you pay to our firm and your financial professional generally does not vary based on the type of investments selected.  The asset-based fee reduces the value of your account and will be deducted from your account.  Our advisory account programs are wrap fee programs and that fee includes most transaction costs and custodial fees.  Some products impose fees that will reduce the value of your investment over time.	Annuities generally have different costs to hold or sell. These costs are explained in product-specific materials.  Annuities generally impose surrender charges if you want to sell them before a set number of years.  Annuities, whether variable or fixed, have different cost structures that are explained in product-specific materials.  Variable annuities generally have sub account options that impose fees that will reduce the value of your investment over time.



#### DIGITAL ACCOUNTS AND SERVICES

Digital Trade Accounts	Digital Portfolio Accounts
Please review the fees and costs that you will pay.	
You may pay us a fee when you trade. This fee is based on the specific transaction and not the value of your account as a whole.  Different products have different costs to buy, hold or sell. These costs are explained in product-specific materials.  Investing on your own in a digital trading account generally is the lowest cost brokerage option.	You will pay an ongoing fee at the end of each month based on the value of your advisory account.  The amount you pay to our firm generally does not vary based on the type of investments we select.  The asset-based fee reduces the value of your account and will be deducted from your account.  Our digital advisory account program is a wrap fee program and that fee includes most transaction costs and custodial fees.  Some products impose fees that will reduce the value of your investment over time.

## Conflicts of Interests: How Our Services Could Benefit Us. [\[link\]](#)



### WORKING WITH A FINANCIAL ADVISOR

Brokerage Accounts	Advisory Accounts	Annuities
<p>Our interests can conflict with your interests. We must tell you about the main conflicts or reduce or eliminate them.</p> <p>Many products we offer can be purchased at a lower cost in our digital brokerage account.</p> <p>Our firm and its affiliates can make extra money by selling you certain investments, such as mutual funds, because someone related to our firm is involved in creating those products.</p> <p>We can trade with you from our own accounts when we act as principal. We can earn a profit on these trades.</p>	<p>Our interests can conflict with your interests. We must eliminate these conflicts or tell you about them so that you can decide whether or not to agree to them.</p> <p>You can obtain digital advisory services at a lower cost in our digital advisory account.</p> <p>Our firm and its affiliates can make extra money by advising you to invest in certain investments, such as mutual funds, because someone related to our firm is involved in creating those products.</p>	<p>Our interests can conflict with your interests. For annuities that are securities we must tell you about the main conflicts or reduce or eliminate them.</p> <p>Different types of annuities can pay different amounts to our firm. We may earn more if you buy certain types of annuities.</p>



### DIGITAL ACCOUNTS AND SERVICES

Digital Trade Accounts	Digital Portfolio Accounts
<p>Our interests can conflict with your interests. We are not obligated to disclose conflicts or reduce or eliminate them.</p>	<p>Our interests can conflict with your interests. We must eliminate these conflicts or tell you about them so that you can decide whether or not to agree to them.</p> <p>Our firm and its affiliates can make extra money by advising you to invest in certain investments, such as mutual funds, because someone related to our firm is involved in creating those products.</p>

## Our Legal and Regulatory Obligations to You. [\[link\]](#)

When we recommend investments we must act in your best interest and not place our interests ahead of yours.	We are a fiduciary in our investment advisory relationship with you.	When we recommend annuities that are securities we must act in your best interest and not place our interests ahead of yours.	We do not have an obligation to act in your best interest.	We are a fiduciary in our investment advisory relationship with you.
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Additional information on cost, conflicts and other important matters could be found at [firm.com/disclosures](http://firm.com/disclosures).

We have legal and disciplinary events. Visit [Investor.gov](http://Investor.gov) for a free and simple search tool to research our firm and our financial professionals.

For additional information about our brokers and services, visit [Investor.gov](http://Investor.gov) or [BrokerCheck](http://BrokerCheck) ([BrokerCheck.Finra.org](http://BrokerCheck.Finra.org)), our [website](http://website) ([SampleFirm.com](http://SampleFirm.com)). For additional information on advisory services, see our Form ADV brochure on IAPD, on [Investor.gov](http://Investor.gov), or on our [website](http://website) ([SAMPLEFirm.com/FormADV](http://SAMPLEFirm.com/FormADV)) and any brochure supplement your financial professional provides. To report a problem to the SEC, visit [Investor.gov](http://Investor.gov) or call the SEC's toll-free investor assistance line at (800) 732-0330. To report a problem to FINRA, [ ].

Suggested questions to ask us can be found here ([link](#)).