August 6, 2018

Via Electronic Filing

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

Re: Regulation Best Interest (SEC Rel. No. 34-83062; File No. S7-07-18);

Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles (SEC Rel. No. 34-83063; File No. S7-08-18); and

Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation (SEC Rel. No. IA-4889; File No. S7-09-18)

Dear Mr. Fields:

The Investment Adviser Association[1] appreciates the opportunity to comment on the Commission's package of proposals regarding the standards of conduct for broker-dealers and investment advisers.[2] Our members are investment advisers registered with the SEC under the Investment Advisers Act of 1940 ("Advisers Act"), and as such are all fiduciaries to their clients. Investment advisers play a critically important role in helping more than 34 million individual and other investors meet their financial goals, including investing for retirement, education, and

[1] The IAA is a not-for-profit association dedicated to advancing the interests of SEC-registered investment advisers. The IAA's more than 650 member firms manage more than $20 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit our website: www.investmentadviser.org.

[2] *Regulation Best Interest*, SEC Rel. No. 34-83062 (Apr. 18, 2018) ("Reg BI Proposing Release"), available at https://www.sec.gov/rules/proposed/2018/34-83062.pdf; *Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles*, SEC Rel. Nos. 34-83063; IA- 4888 (Apr. 18, 2018) ("Form CRS Proposing Release"), available at https://www.sec.gov/rules/proposed/2018/34-83063.pdf; and *Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers* ("Proposed Interpretation"); *Request for Comment on Enhancing Investment Adviser Regulation* ("Request for Comment on Additional Adviser Regulation"), SEC Rel. No. IA-4889 at 27 (Apr. 18, 2018), available at https://www.sec.gov/rules/proposed/2018/ia-4889.pdf.

home ownership.[3] Investment advisers—more than 12,500 strong—are important contributors to our economy and the vibrancy of our capital markets.

The IAA has participated actively in the regulatory and legislative consideration of the appropriate standard of conduct for financial professionals for almost 20 years.[4] The fiduciary duty under the Advisers Act serves as a bedrock principle of investor protection and applies to all SEC-registered advisers, whether their advice is in-person or digital, retirement or non-retirement, or retail or institutional. We have long advocated that all financial professionals who provide advice about securities should be required to act pursuant to fiduciary principles in the best interest of their clients.[5] We share the Commission's goals of reducing investor confusion and aligning standards with reasonable investor expectations. Accordingly, we commend the Commission for taking steps to address these crucial investor protection issues.

The Advisers Act fiduciary duty includes both a duty of loyalty and a duty of care that applies throughout the entire relationship between an investment adviser and its client. The fiduciary duty requires investment advisers to act in their clients' best interest and not put their own interests ahead of those of their clients. Broker-dealers are excluded from the Advisers Act and its fiduciary duty if the investment advice they provide is "solely incidental" to the conduct of their business as a broker-dealer and they receive no "special compensation" for such services ("Solely Incidental exclusion").[6] Instead, broker-dealers that provide investment advice are subject to a separate regulatory framework under the Securities Exchange Act of 1934 ("Exchange Act") and rules of the Financial Industry Regulatory Authority ("FINRA"). Under this framework, broker-dealers providing investment advice must ensure that the advice they give is "suitable" for the customer based on the customer's investment profile and must "observe high standards of commercial honor and just and equitable principles of trade."[7]

Although historically a bright line separated traditional brokerage services from traditional investment advisory services, broker-dealers for years have been offering more traditional investment advisory services and often market themselves as offering investment advice. This has resulted in a blurring of the line between brokers and investment advisers and a

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[3] *See* our upcoming *2018 Evolution Revolution, A Profile of the Investment Adviser Profession by IAA and NRS*, available at https://www.investmentadviser.org/publications/evolution-revolution.

[4] For a history of our participation in this debate, please visit the Key Issues section of our website at https://www.investmentadviser.org/home/side-content/sec-standard.

[5] Since its founding in 1937, the IAA has been the leading voice in promoting high standards of ethical and fiduciary responsibility for the investment advisory profession. *See* IAA Standards of Practice, available at https://www.investmentadviser.org/about/standards-practice-duty.

[6] The Advisers Act provides an exception from the definition of investment adviser for "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." Section 202(a)(11)(C).

[7] FINRA Rules 2010 and 2111.

lack of clarity around what activities beyond specific securities-related recommendations are solely incidental to brokerage.

Not surprisingly, investors are confused about what type of financial professional they are dealing with, what services that professional provides, and what standard of conduct applies to the relationship between the investor and the financial professional. Investors have long expected that their financial professional is required to act in their best interest. That expectation has not been met by the reality of the legal standard currently applicable to broker-dealers. And investor confusion is exacerbated by financial professionals holding themselves out to investors in a manner that implies a "relationship of trust and confidence"[8] while disclaiming fiduciary responsibility to such clients.

In recognition of this evolving landscape and the resulting investor confusion, the Commission has been evaluating for some time the appropriate standard of conduct for broker-dealer investment advice and when broker-dealers should be able to rely on the Solely Incidental exclusion.[9] The Commission's package of proposals takes important steps towards strengthening the standard of conduct for broker-dealers and reducing investor confusion. We are pleased that the proposals are intended to require brokers to act in the best interests of their customers. Consumer advocates and industry participants alike agree that fiduciary principles are stronger than suitability rules alone and that investors should receive investment advice that is in their best interest.[10]

As we discuss below, however, we are concerned about the limited scope and applicability of the proposed standard of conduct for broker-dealers. Unless the standard is sufficiently robust to protect investors in connection with all investment advisory services they receive, the Commission should reconsider when broker-dealers should be able to rely on the

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[8] *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 54 and n. 244, available at https://www.sec.gov/news/studies/2011/913studyfinal.pdf (noting that courts have generally held that persons who have a "relationship of trust and confidence" with their customers owe those customers a fiduciary duty).

[9] *See* Reg BI Proposing Release at Section I.A. For the detailed history of the Commission's consideration of these issues over the past 20 years, *see* Letter from Gail C. Bernstein, General Counsel, Investment Adviser Association, to Jay Clayton, Chairman, SEC re: Standards of Conduct for Investment Advisers and Broker-Dealers (Aug. 31, 2017) ("2017 IAA Letter"), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/IAA%20Letter%20to%20Chairman%20Clayton%20SEC%20Fiduciary.pdf.

[10] *See* Letter from David G. Tittsworth, Executive Director, Investment Adviser Association, to Elizabeth M. Murphy, Secretary, SEC re: *Study Regarding Obligations of Brokers, Dealers, and Investment Advisers*, Rel. No. IA-3058 (Aug. 30, 2010), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/100830cmnt_BDIA.pdf.

Solely Incidental exclusion. In addition, while we strongly support efforts to increase transparency and reduce investor confusion, we have significant concerns that the Commission's proposed relationship summary for broker-dealers and investment advisers will not work as intended and may exacerbate the investor confusion it is meant to address. We make a number of recommendations that we believe would improve the relationship summary and make it easier for investors to understand key facts about their investment professional. Further, while we believe the proposed restrictions on the use of certain titles by broker-dealers could help reduce investor confusion, we encourage the Commission to take a broader view of how brokers market themselves as advisers.

We do not believe that it is necessary for the Commission to issue an interpretation on the Advisers Act fiduciary duty. If the Commission nevertheless determines that an interpretation is appropriate, we request that it clarify and refine the Proposed Interpretation in several respects to ensure that it conforms to well-established common law principles and advisers' long-held understandings of the contours of their fiduciary duty. Finally, it is important to recognize that, despite the migration of broker-dealers to advisory services, the core businesses of broker-dealers and advisers remain markedly different. We do not believe it is either necessary or appropriate to import Exchange Act or FINRA rules into the principles-based Advisers Act regulatory framework and have submitted a separate comment letter in response to the Commission's Request for Comment on Additional Adviser Regulation.[11]

I. Executive Summary

A. Proposed Regulation Best Interest

The IAA has long supported extending fiduciary principles to all financial professionals providing investment advice to retail investors and we are pleased that the Commission is proposing to enhance the standard of conduct for broker-dealers. To the extent the final rule is written and interpreted to require brokers to act in the best interests of their customers and to prevent conflicts from tainting their advice, the rule would benefit retail investors. However, we have the following specific comments:

- We are concerned about any potential gap in retail investor protection arising from the narrow scope and application of proposed Regulation Best Interest ("Reg BI"). All advisory activities that broker-dealers agree to provide (*e.g.*, ongoing monitoring for purposes of recommending changes in investments) should be covered by either Reg BI or the Advisers Act fiduciary standard.

[11] *See* Letter from Karen L. Barr, President and CEO, Investment Adviser Association, to Brent J. Fields, Secretary, SEC re: Request for Comment on Additional Adviser Regulation, available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/IAA_Comment_Letter_to_SEC_re_Request_for_Comment_on_Additional_Adviser_Regulation_8-2-18_v.pdf.

- The Commission should more appropriately define advice that is considered not to be solely incidental to brokerage activities. At a minimum, the Commission should confirm its prior position that discretionary investment advice is not solely incidental to brokerage services.

- We support the Commission's proposal to require more explicit broker-dealer disclosures and recommend that these disclosures should be integrated more closely with the proposed relationship summary.

B. Proposed Form CRS

The IAA supports transparency regarding investors' relationships with their financial professionals. We concur with the Commission's goal of helping investors understand the type of financial professional they are dealing with and what they should expect from their relationship. We have significant concerns, however, regarding the efficacy of Form CRS as proposed and believe that the form may exacerbate the investor confusion it is intended to address. We make the following comments and recommendations to better achieve the Commission's goals:

- *Investor Testing.* Investor testing of the proposed form and alternative approaches is critical to developing disclosure that is demonstrably effective. We urge the Commission to publish the findings of its testing in a way that facilitates further comment and recommendations by investors, financial professionals, and other interested market participants.

- *Educational Comparison.* The Commission should provide the educational comparison between investment advisers and broker-dealers—and other financial professionals—on its website, rather than requiring firms to include disclosures about other firms' services. Certain proposed language in the comparison may increase investor confusion, could be misleading, and may not reflect the likely relationship an investor may have with a specific firm.

- *Streamlining.* The relationship summary should be streamlined to focus on the key aspects of the relationships and services being offered by each firm to investors. The summary should eliminate technical language and industry jargon to the extent possible and work in tandem with other disclosures to ensure that investors fully understand material conflicts of interest.

- *Leveraging More Fulsome Disclosures.* We offer recommendations to integrate a focused relationship summary with more robust disclosure, including relating to conflicts of interest. Advisers provide fulsome disclosure of important investor information in their Form ADV brochures, and we recommend leveraging this disclosure.[12] We suggest a

[12] Investment advisers are required to prepare and deliver Part 2A of their Form ADV, a narrative "brochure" about the firm, as well as Part 2B, a "brochure supplement," which contains information about specific client-facing

similar approach for broker-dealers and dual-registrants.[13] We believe that this approach would be more effective and beneficial for retail investors.

- *Compliance Date.* The Commission should provide a longer compliance date for any new relationship summary to allow firms to consider investor-friendly formats and methods of delivery and make any necessary website or systems changes.

- *Improved Disclosures and Electronic Delivery.* We support the Commission's broader efforts to improve disclosures provided to investors generally, including as to content, format, and delivery, and offer suggestions in that regard.

C. Proposed Restrictions on the Use of Certain Names and Titles and Required Disclosures

The Commission's proposed restrictions on the use by certain broker-dealers of the titles "adviser" or "advisor" are a step in the right direction to reduce investor confusion, but we believe they will have limited impact by themselves.

- The Commission should address marketing practices that leave investors with a misimpression as to the services they are receiving and whether they are in a relationship of trust and confidence.

- Absent a robust standard of conduct designed to protect investors, the Commission should revisit the Solely Incidental exclusion in the Advisers Act.

D. Proposed Advisers Act Interpretation

While we do not believe that it is necessary for the Commission to issue an interpretation on the Advisers Act fiduciary duty, we are pleased that the Commission has reaffirmed the well-established, principles-based fiduciary duty under the Advisers Act, which has served as the bedrock principle of investor protection for clients of investment advisers for over 75 years. We also do not believe it is necessary or beneficial to codify the fiduciary duty in a rule. While we generally agree with the principles the Commission has set forth regarding the Advisers Act fiduciary duty, we believe the proposal would benefit from further refinement and clarification, including that:

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employees. Unless otherwise indicated, we use the term "adviser brochures" to refer to Parts 2A and 2B. Form ADV is the form used by investment advisers to register with the Commission and state regulators.

[13] A dual-registrant is a firm that is dually-registered as a broker-dealer and an investment adviser and offers services to retail investors as both a broker-dealer and investment adviser. Firms that are not dually-registered are referred to in this letter as standalone firms.

- Certain aspects of the Commission's duty of care discussion are retail-focused. We recommend a more principles-based approach so that the duty of care can be tailored based on different client types (*e.g.*, retail versus institutional). We also recommend clarifications to certain language in this section.

- Regarding the discussion of the duty of loyalty, we recommend that the Commission clarify certain of its statements relating to disclosure and informed consent and we request clarification on other specific issues.

We provide our specific comments on each of these topics below.

II. Proposed Regulation Best Interest

As discussed above, we believe that broker-dealers should be subject to fiduciary principles when making investment recommendations to customers.[14] Reg BI is intended "to enhance existing broker-dealer conduct obligations."[15] It would require a broker-dealer, at the time that it makes a recommendation of a securities transaction or investment strategy to a retail customer, to act in the best interest of the customer, without placing the financial or other interest of the broker-dealer or its associated person ahead of the customer. The proposed rule specifically provides that the best interest obligation will be satisfied if the broker-dealer complies with: (i) a care obligation, which the Commission states is designed to incorporate and enhance current suitability obligations; (ii) a disclosure obligation, which would require written disclosures of material facts relating to the scope and terms of the relationship with retail customers, including conflicts of interest; and (iii) conflict of interest obligations. To the extent that the rule in its final form is written and interpreted to require a best interest standard and prevent a broker-dealer's conflicts from tainting its investment advice, it would benefit retail investors.[16]

Importantly, however, Reg BI "would not apply to the provision of services that do not involve or are distinct from [ ] a recommendation."[17] As we discuss below, we have concerns that the differences in the scope and application of the standards of conduct between broker-

[14] 2017 IAA Letter, *supra* n. 9.

[15] Reg BI Proposing Release at 40.

[16] We have concerns about language in the Reg BI Proposing Release that "a broker-dealer would violate proposed Regulation Best Interest's Care Obligation and Conflict of Interest Obligations, if any recommendation was *predominantly* motivated by the broker-dealer's self-interest (*e.g.*, self-enrichment, self-dealing, or self-promotion), and not the customer's best interest…[emphasis added]." Reg BI Proposing Release at 58. The use of "predominantly" is inconsistent with the rule text and appears to permit a broker-dealer to make a recommendation that is, to a certain extent, motivated by the broker-dealer's self-interest and not the customer's best interest. To truly enhance the standard of conduct for broker-dealers, a recommendation that is motivated by a broker-dealer's conflicts and not the customer's best interest should violate Reg BI.

[17] Reg BI Proposing Release at 41.

dealers providing investment advice and investment advisers providing investment advice represent a potential significant gap in investor protection. All advisory activities should be covered by either Reg BI or the Advisers Act fiduciary standard. We recommend that the Commission more appropriately define advice that is not solely incidental to brokerage activities. At a minimum, the Commission should confirm that broker-dealers that provide discretionary advice to clients are fiduciaries subject to the Advisers Act. Finally, with respect to a broker-dealer's disclosure of the key elements of its relationship with its retail customers, we believe that, to be effective, those disclosures required by Reg BI that are not recommendation-specific should be provided together with (or linked directly to) any relationship summary.

A. Scope and Applicability of Reg BI

Reg BI would apply to and at the time of each broker-dealer recommendation to a retail customer. Under Reg BI, "a broker-dealer would be required to act in the customer's best interest 'at the time the recommendation is made.'"[18] Reg BI would not "extend beyond a particular recommendation or generally require a broker-dealer to have a continuous duty to a retail customer or impose a duty to monitor the performance of the account."[19] By contrast, the Advisers Act fiduciary standard applies to the entire advisory relationship agreed to by the adviser and its client, even where that relationship is limited in scope or duration. The duty owed in the context of that agreed-upon relationship cannot be turned on and off and cannot be waived. The client may thus reasonably expect that its adviser is acting in its best interest throughout the relationship, and the adviser is under an obligation to do so. Retail investors should similarly be able to expect that all investment advice provided to them by a broker-dealer is subject to a standard of conduct that requires the broker-dealer to act in their best interest. If the Commission continues to permit broker-dealers to rely on the Solely Incidental exclusion from the Advisers Act for advisory services that go beyond specific recommendations, it is critically important for Reg BI to cover all aspects of a relationship with a retail customer that are advisory in nature.

To the extent that a broker-dealer agrees to provide advisory services such as overall portfolio or account monitoring or review in addition to specific recommendations, that conduct would not be subject to Reg BI as proposed. There would be no obligation under the federal securities laws to act in that customer's best interest with respect to these additional advisory services. This creates a significant gap in retail investor protection that should be addressed by the Commission.

Perhaps recognizing this potential gap, the Commission asks:

> Should Regulation Best Interest apply when broker-dealers agree to provide ongoing monitoring of the retail customer's investment for purposes of recommending changes in

[18] *Id. at* 78. (Citation omitted)

[19] *Id.* at 79.

investments? Why or why not? Alternatively, should broker-dealers who provide ongoing monitoring be considered investment advisers?[20]

We believe that broker-dealers that enter into agreements with retail customers to provide ongoing monitoring for purposes of recommending changes in investments should be considered investment advisers and subject to fiduciary obligations under the Advisers Act. Entering into an agreement to provide ongoing monitoring for purposes of recommending changes in investments goes beyond advice that is solely incidental to the conduct of business as a broker-dealer and should be regulated under the Advisers Act. In 2007, the Commission proposed reinstating an interpretive provision to clarify that a broker-dealer that "charges a separate fee, *or separately contracts*, for advisory services provides investment advice that is not 'solely incidental to' its business as a broker-dealer (emphasis added)."[21] Similarly, a broker-dealer that agrees to provide a retail customer ongoing monitoring for purposes of recommending changes in investments would not be providing services that are solely incidental to its business as a broker-dealer under the 2007 interpretation.

Providing this type of monitoring is a key advisory activity for many registered investment advisers. In fact, the instructions to Form ADV describing the calculation of an adviser's regulatory assets under management state that advisers should include securities portfolios for which the adviser provides "continuous and regular supervisory or management services."[22] The instructions go on to explain that advisers provide these services if they have "discretionary authority over and provide ongoing supervisory or management services with respect to the account,"[23] <u>or</u> non-discretionary authority but have "ongoing responsibility to select or make recommendations, based upon the needs of the client, as to specific securities or other investments the account may purchase or sell and, if such recommendations are accepted by the

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[20] *Id.* at 70.

[21] *Interpretive Rule Under the Advisers Act Affecting Broker-Dealers*, SEC Rel. No. IA-2652 (Sept. 24, 2007) at 1 (reinstating interpretations from 2005 rulemaking), available at https://www.sec.gov/rules/proposed/2007/ia-2652.pdf ("2007 Proposal"). In 2005, the Commission sought to address the scope of the Solely Incidental exclusion with a rulemaking that would have excluded certain broker-dealers offering fee-based brokerage accounts from the Advisers Act. *See Certain Broker-Dealers Deemed Not To Be Investment Advisers*, SEC Rel. No. IA-2376 (Apr. 12, 2005), available at https://www.sec.gov/rules/final/34-51523.pdf ("2005 Rule"). In 2007, the D.C. Circuit vacated the 2005 Rule on the grounds that the agency lacked the authority to except broker-dealers offering fee-based brokerage accounts from the definition of investment adviser. *Financial Planning Association v. SEC*, 482 F.3d 481 (D.C. Cir. 2007). The Commission stated in the 2007 Proposal that the Court "did not question the validity" of the Commission's interpretive positions. 2007 Proposal at 4.

[22] Form ADV Instructions for Part IA, Instruction 5.b.

[23] *Id.*, Instruction 5.b.(3)(a). (Emphasis omitted) "Discretionary Authority or Discretionary Basis" is defined in the Glossary to Form ADV as follows: "Your firm has discretionary authority or manages assets on a discretionary basis if it has the authority to decide which securities to purchase and sell for the client. Your firm also has discretionary authority if it has the authority to decide which investment advisers to retain on behalf of the client." (Emphasis omitted)

client, [the adviser is] responsible for arranging and effecting the purchase or sale."[24] As we discuss below, discretionary investment advice cannot logically be deemed solely incidental to brokerage services. As for nondiscretionary investment advice, where a broker-dealer agrees to provide ongoing monitoring for purposes of recommending changes in investments, that also should not be deemed solely incidental. Such services are analogous to an adviser agreeing to provide continuous and regular supervisory or management services and should thus be subject to the Advisers Act.[25]

If the Commission determines, however, that broker-dealers that agree to provide ongoing monitoring of retail customer accounts for purposes of recommending changes in investments should not be considered advisers, it should at a minimum apply Reg BI to these situations. We believe that if a retail investor enters into an agreement with a financial professional to receive investment advice about securities, including recommendations, portfolio and account monitoring, or other advisory services, the investment advice covered by that agreement should be subject to one of the two standards of conduct discussed in this rulemaking package—either the Advisers Act fiduciary duty or Reg BI. A retail investor should reasonably expect its financial professional to be subject to a standard of conduct designed to protect its interests with respect to all investment advisory services the financial professional has agreed to provide the investor.

Related to ongoing monitoring is whether there should be an ongoing duty to monitor if a particular account or program type continues to be in the best interest of a retail customer. In our view, the answer should depend on the nature of the relationship between the customer and the broker-dealer. If the broker-dealer enters into an agreement with the customer to provide ongoing monitoring of the customer's account, that monitoring should extend to whether the account or program continues to be in the customer's best interest.[26]

B. Reg BI Disclosure Obligation

In addition to the care obligation and conflict of interest obligations, Reg BI also contains a disclosure obligation, which would require broker-dealers and their associated persons, prior to or at the time of a recommendation, to reasonably disclose to a retail customer, in writing, the material facts relating to the scope and terms of the relationship with the retail customer, including all material conflicts of interest that are associated with the recommendation.[27] The

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[24] *Id.*, Instruction 5.b.(3)(b). (Emphasis omitted)

[25] We discuss our concerns with broker-dealers holding themselves out to retail investors as providing ongoing advisory services in Section IV. of this letter.

[26] We note that the Commission stated in the Proposed Interpretation that "[a]n adviser's duty to monitor extends to all personalized advice it provides the client, including an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest." Proposed Interpretation at 15.

[27] Proposed Rule 15*l*-1(a)(2)(i).

Commission acknowledges that "broker-dealers are not currently subject to an explicit and broad disclosure requirement under the Exchange Act"[28] and states that in order to "promote broker-dealer recommendations that are in the best interest of retail customers, [the Commission] believe[s] it is necessary to impose a more explicit disclosure obligation on broker-dealers than what currently exists under the federal securities laws and SRO rules."[29] The more explicit disclosure obligation would result in proposed Form CRS and the disclosure of regulatory status being "initial layers of disclosure,"[30] with the disclosure obligation in Reg BI "reflecting more specific and additional, detailed layers of disclosure."[31]

We agree with the Commission that there should be a more explicit disclosure obligation for broker-dealers. Any required disclosures in this area should work together to ensure that retail investors are provided with fulsome information about certain key issues regarding their relationship with their financial professional. As we discuss below in our comments on Form CRS, we believe this can be most effectively achieved if the Commission were to require that the broker-dealer relationship summary be accompanied by a more detailed plain English disclosure document or set of documents for broker-dealers that more fully describes the broker-dealer's relationship with its retail customers.[32]

C. Discretionary Advice

The Commission asks whether the exercise of investment discretion should be viewed as solely incidental to the business of a broker or dealer.[33] We strongly support the position previously taken by the Commission that discretionary investment advice should not be deemed solely incidental to brokerage services.

As described in the Reg BI Proposing Release, the Commission has considered this issue multiple times. When it adopted the 2005 Rule relating to the Solely Incidental exclusion in the Advisers Act, the Commission stated that "exercising investment discretion is not 'solely incidental to' (a) the business of a broker or dealer within the meaning of the Advisers Act or (b) brokerage services within the meaning of the rule."[34] The rule was later vacated in its entirety, but the Court did not question the validity of the Commission's interpretation on investment

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[28] Reg BI Proposing Release at 99-100.

[29] *Id*. at 100.

[30] *Id*. at 103.

[31] *Id.*

[32] *See* Section III.E.2. of this letter.

[33] Reg BI Proposing Release at 199.

[34] 2005 Rule, *supra* note 21 at 1.

discretion.[35] In 2007, the Commission thus proposed an interpretive rule to clarify that "a broker-dealer that exercises investment discretion with respect to an account … provides investment advice that is not 'solely incidental to' its business as a broker-dealer."[36] The Commission explained that "[w]hen a broker-dealer exercises investment discretion, it is not only the source of investment *advice*, it also has the authority to make the investment *decision* relating to the purchase or sale of securities on behalf of its client. This, in our view, warrants the protection of the Advisers Act because of the 'special trust and confidence inherent' in such a relationship."[37] We agree.

The IAA has consistently taken the position that discretionary investment management cannot be deemed to be solely incidental to brokerage services.[38] The Reg BI Proposing Release includes a number of requests for comment on this issue, including whether a broker-dealer's provision of limited or temporary discretionary advice should be considered solely incidental to the conduct of its business as a broker-dealer, and about the scope of temporary and limited investment discretion. Discretionary management over an account, whether it is for a short or long time period, should not be deemed solely incidental to brokerage services. As we have discussed in previous comment letters, a client's decision to grant discretionary management authority to a broker, even for a limited or temporary period, is indicative of the type of relationship of trust and confidence that covers the entire relationship and such client should be provided the fiduciary protections of the Advisers Act.[39] To eliminate any question on this important issue, the Commission should confirm its agreement with this view for the benefit of all discretionary account clients.

III. Proposed Form CRS

The Commission proposes to require registered investment advisers, broker-dealers, and dual-registrants to deliver a standalone relationship summary—Form CRS—to retail investors. The Commission's proposal would require firms to provide short and concise information regarding certain aspects of their advisory or brokerage relationships. It would also require firms to provide a comparison of typical advisory and brokerage services and prompt retail investors to

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[35] *Id*.

[36] 2007 Proposal, *supra* n. 21 at 1.

[37] *Id*. at 8-9. (Citation omitted)

[38] *See, e.g.*, Letter from David G. Tittsworth, Executive Director, Investment Counsel Association of America, to Jonathan G. Katz, Secretary, SEC re *Certain Broker-Dealers Deemed Not To Be Investment Advisers*, Rel. Nos. 34-42009; IA-1845 (Jan. 12, 2000); Letter from David G. Tittsworth, Executive Director, Investment Counsel Association of America to Jonathan G. Katz, Secretary, SEC re *Certain Broker-Dealers Deemed Not To Be Investment Advisers*, Rel. No. IA-2340 (Feb. 7, 2005); and Letter from Karen L. Barr, General Counsel, Investment Adviser Association, to Nancy M. Morris, Secretary, SEC re *Interpretive Rule Under the Advisers Act Affecting Broker-Dealers*, Rel. No. IA-2652 (Nov. 2, 2007).

[39] *See, e.g.*, Feb. 7, 2005 Letter, *supra* n. 38; and Nov. 2, 2007 Letter, *supra* n. 38.

ask informed questions. For investment advisers, Form CRS would be a new Part 3 to Form ADV and would represent a separate disclosure that advisers would need to deliver to retail investors in addition to the adviser brochures in Part 2.[40] For broker-dealers, Form CRS is intended to work in tandem with new disclosure obligations under Reg BI and the proposed requirement that all firms and their investor-facing personnel disclose their registration status.

We strongly support the Commission's goals of improving transparency and addressing investor confusion. We have significant concerns, however, regarding the efficacy of Form CRS as proposed, including that the form may cause additional investor confusion. We offer the following comments along with recommendations that we believe would improve the effectiveness of the overall disclosures provided to retail investors: (i) investor testing and public comment on that testing are critical; (ii) the Commission should not require firms themselves to provide comparisons between different types of firms to retail investors, but should instead provide such educational comparisons on its website; (iii) the relationship summary should be streamlined and simplified; (iv) disclosure of conflicts of interest should be made clearly and adequately; and (v) the Commission should leverage rather than dilute the robust information in adviser brochures. We offer specific recommendations to leverage this information, as well as newly required broker-dealer disclosures, and to improve the specific information in the summary. In addition, we request sufficient time to enable firms to consider creative and user-friendly formats for the relationship summary. Finally, we support the Commission's broader efforts to improve disclosures for investors and offer suggestions in that regard as to content, format, and delivery.

A. Investor Testing is Critical and any Findings Should be Incorporated into the Public Comment Process

We commend the Commission for its commitment to conduct empirical testing on the effectiveness of proposed Form CRS and request again that the findings be published for public comment.[41] As noted above, we have serious questions as to whether Form CRS will work as intended, or whether it will cause more investor confusion or even be misleading in some

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[40] Firms would be required to deliver Form CRS to existing clients or customers before or at the time: (i) a new account is opened that is different from the retail investor's existing account(s); or (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.

[41] *See* Letter from Gail C. Bernstein, General Counsel, IAA, to Brent J. Fields, Secretary, SEC re: *Proposed Form CRS; Proposed Regulation Best Interest; Notice of Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers* (May 25, 2018), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/May_25__2018_-_IAA_Comment_Letter_to_SEC_re_Proposed_form_CRS__Proposed_Regulation_Best_Interest__Notice_of_Proposed_Commission_Interpretation_Regarding_Standard_of_Conduct_for_Investment_Advisers_-_Request_for_Investor_Testing.pdf.

respects. Thus, the importance of determining investor comprehension through evidence-based research cannot be overstated.[42]

Investor testing is critical for several reasons. First, it is essential to determining whether retail investors fully and accurately understand the information Form CRS is intended to convey. For example, will investors understand what a "fiduciary" is or what the difference is between fiduciary and best interest obligations? Second, investor testing is important for assessing any unintended consequences of a short-form standalone disclosure document, such as whether providing limited information in that format will give investors false comfort that they have been given all the key information they need to make an informed decision and deter them from reading the other critical disclosures given to them. Third, investor testing will help identify disclosure items that retail investors believe are critical to their decision making and those that are not. Finally, conducting investor testing presents the Commission with an opportunity to test and retest various approaches to the relationship summary, including language, design, and delivery changes, such as layering the relationship summary with existing or new required disclosures, as well as the viability of more creative and mobile-friendly means of conveying information to investors.

We also believe it is vital that commenters be given a fair opportunity to review the findings of the investor testing and incorporate those findings into their comments. The IAA had asked the Commission to extend the comment period on its package of proposals until the findings of the investor testing can be published and commenters can reasonably react to them.[43] Because our comments below on Form CRS have not had the benefit of assessing and integrating those findings, we will likely submit additional comments at a later date.

B. The Commission Should Not Require Firms Themselves to Provide Comparisons Between Investment Advisers and Broker-Dealers

The proposed relationship summary is intended, in part, to "facilitate comparisons across firms that offer the same or substantially similar services."[44] The Commission is thus proposing to require standalone investment advisers and standalone broker-dealers to provide retail investors, in a highly prescribed manner, comparisons regarding specified differences between them, including the fees, scope of services, standard of conduct, and incentives that are generally relevant to advisory and brokerage accounts. We are troubled by this aspect of the proposed

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[42] We also commend the Commission and its staff for its informal investor outreach efforts, including by providing a questionnaire to encourage investors to voice their initial reactions to Form CRS and through various informal town hall meetings and roundtable discussions. These efforts, however, will not provide the rigorous results we would expect from investor testing.

[43] *See* May 25, 2018 letter, *supra* n. 41. In this regard, we request that the Commission formally reopen the comment period for 30 days once the testing is published.

[44] Form CRS Proposing Release, at 16.

relationship summary. We strongly urge the Commission to eliminate it from the relationship summary and provide this important information to investors directly.

1. The Language and Content of the Relationship Summary Should Not Have the Effect of Favoring One Type of Financial Professional Over the Other

We question whether proposed Form CRS will, in fact, facilitate a comparison between investment advisers and broker-dealers in a manner that is accurate and fair. As drafted, the language in the comparisons appears to favor broker-dealers and we are concerned it will inappropriately influence retail investors to choose one type of financial professional over the other. For example, the language describes the obligations of investment advisers using the legal term "fiduciary," without further description, whereas broker-dealers are described as being required to act in the customer's best interest, a plain English phrase that would colloquially be understood to mean that the financial professional has a duty to do what's best for the customer. Broker-dealers are also described as not being allowed to place their own interest ahead of the customer's, which again is language that can be relatively easily understood.

It is unlikely that most retail investors would understand what it means to have a fiduciary duty. And they would then certainly not understand or appreciate that acting in the client's best interest and not putting one's own interest ahead of one's client's is at the very core of an adviser's fiduciary duty. As a result, in comparing "best interest" and not placing one's own interest ahead of one's customer's to "fiduciary duty," most retail investors would likely wrongly conclude that the broker-dealer standard is higher.[45] Contrary to providing clarity, this would result in a less accurate understanding and even greater confusion for investors.[46]

The content in this section also could be read to favor the broker-dealer model more generally. The boilerplate descriptions in the comparisons leave the impression that broker-dealers offer more cost-effective services than or the same services as advisers, when that may not be the case under the circumstances. And the required language associated with fees based on assets under management—"We . . . have an incentive to increase the assets in your account in order to increase our fees,"—while technically correct, misses an important point. The fact that an adviser earns more when the client's portfolio performs better and earns less when the portfolio performs less well aligns the adviser's interest with the client's interest, rather than the reverse.

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[45] We also believe that, to some extent, these disclosures would result in the co-opting of the best interest standard by broker-dealers for circumscribed responsibility when advisers have been required to act in their clients' best interest for decades. Indeed, advisers often use "acting in the best interest of clients" as a plain English translation for fiduciary duty.

[46] Moreover, we agree with commenters that the actual legal differences may be too nuanced for the typical investor to fully appreciate. Indeed, some legal experts reading the Commission's package of releases have stated they do not understand what, if any, distinctions the Commission intended to draw between the two standards. We also have similar concerns about the title "Regulation Best Interest" to describe the broker-dealer standard of conduct because it may exacerbate the confusion.

2. Firms Should Not be Required to Include Disclosures About the Services of Other Types of Financial Professionals

Commissioner Peirce stated during the Commission's open meeting that "[d]irecting firms to talk about what other firms do is unusual and not likely to produce accurate, meaningful information for investors."[47] We agree. In our view, it is not appropriate to require firms to include statements about business models other than their own. Such statements imply that advisers and broker-dealers are in a position to provide information about the types of relationships, services, fees, legal obligations, and conflicts of types of businesses in which they do not engage.

We also think that for standalone advisers (or broker-dealers), the comparison would confuse and distract an investor that plans to enter into an advisory account (or brokerage account) and is interested in comparing different advisers (or broker-dealers) offering similar services. Thus, to the extent the Commission seeks to facilitate comparisons across firms that offer the same or substantially similar services, the comparisons will not achieve that objective.

Even where an investor is not sure whether to hire an investment adviser or a broker-dealer, to the extent investors are prompted to ask questions after reading the proposed comparisons (as generally intended by the Commission), they may end up with an even more muddled understanding of the differences. The adviser (or broker-dealer) would have to engage in a conversation about the pros and cons of other types of financial professionals and about services that it may not provide and fees it may not charge. The nature and scope of these discussions would also inherently vary from person to person, and we are doubtful that this would be the best way for investors to obtain balanced comparative information.[48] In fact, we think investors would likely get the opposite of a clear, uniform, and consistent explanation of the differences between advisory and brokerage accounts.

3. The Comparisons Also Do Not Fairly Describe the Likely Relationship with a Particular Firm

While striving for simplicity, many of the required disclosures in the comparisons are too boilerplate and would prohibit firms from providing useful information about what their relationship would be like with a specific retail investor. Many firms would thus be compelled to explain to prospective clients how and why their business is different from the boilerplate descriptions and why the comparisons are not applicable. The boilerplate language may thus detract from a firm's ability to explain its own services and make it harder for investors to understand those services. We are concerned that investors will make suboptimal decisions based

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[47] *Statement at the Open Meeting on Standards of Conduct for Investment Professionals*, SEC Commissioner Hester M. Peirce (Apr. 18, 2018) ("Commissioner Peirce Statement"), available at https://www.sec.gov/news/public-statement/statement-peirce-041818.

[48] See n. 84 and related discussion.

on inaccurate or misleading information, and may even draw negative inferences against a firm whose profile does not fit that described in the comparisons.

4. The Information in the Comparisons is Educational and Should be Provided by the Commission

In our view, it would be more appropriate for the Commission to provide neutral comparative information about financial professionals to investors. The Commission is better suited to do this than are the firms themselves. The very fact that the Commission proposed boilerplate language in this section to reduce investor confusion argues in favor of having the Commission present comparative information directly to investors as part of its investor education program.

We believe that the Commission should play a central role in educating the investing public about the significant differences in business models and practices between investment advisers and broker-dealers—and other financial professionals—irrespective of the applicable standards of conduct and notwithstanding any disclosures firms are required to make. We strongly support the substantial role the Commission already plays in investor education through its Office of Investor Education and Advocacy. That office's website is an excellent resource for all investors and already includes information that is useful in comparing financial professionals. We suggest that the Commission further make use of the www.investor.gov website to help investors understand the landscape of retail financial services by providing information on all aspects of selecting and using a financial professional. For example, it could include a page dedicated to information on the various types of financial professionals and the typical services they offer, including the scope, expenses, and conflicts associated with those services. The website could also discuss the differing legal standards of conduct applicable to those financial professionals and include examples of the types of questions that investors should be asking.

There are many advantages to having the Commission provide this information directly to investors. It would give investors the ability to read and assess the information at an earlier point in their decision making. It could also provide comparative information on a broader range of services and financial professionals (*e.g.*, insurance agents, bank trust officers, and financial planners), and not just investment advisers and broker-dealers. Investors are more likely to trust information on the Commission's website. Further, maintaining the website gives the Commission flexibility to reassess and change disclosures as necessary or as the market evolves, and to use website analytics to continuously assess the effectiveness of the information being provided. Having this information in one central location would give investors comprehensive, up-to-date, independent, and easily accessible information to help guide their decisions on which investment professionals to hire. To increase the likelihood that investors will access the website, the Commission should require firms to include a link to this website prominently in their disclosures.[49]

[49] We would be pleased to work with the Commission staff to help update and develop new educational materials for the website.

C. The Relationship Summary Should be Streamlined and Focus on the Key Aspects of the Relationships and Services Being Offered by the Firm to Retail Investors

Form CRS contains sections covering: (i) an introduction; (ii) the relationships and services the firm offers to retail investors; (iii) the standard of conduct applicable to those services; (iv) the fees and costs that retail investors will pay; (v) a comparison of typical brokerage and investment advisory services; (vi) conflicts of interest; (vii) where to find additional information, including regarding any disciplinary history; and (viii) key questions for retail investors to ask the firm's financial professional. The instructions specify the permitted content, which would be adjusted for investment advisers, broker-dealers, and dual-registrants. For certain disclosure items, firms will have some flexibility in how they include the required information. For other items, only the specified wording would be permitted. Under Form CRS, retail investors would be defined broadly to include any individual, regardless of his or her net worth or financial sophistication.[50]

The content, presentation, and wording of any disclosure will determine whether investors will read and understand it and take away the information that is most critical to their decision making. We are concerned that Form CRS as currently contemplated will not achieve these objectives.

First, the proposed form uses some technical terms and industry jargon. For example, as noted above, "fiduciary" is a legal term that is likely not well understood by most retail investors. Similarly, we question whether retail investors with little investment experience will understand terms like "portfolio," "sponsor," and "asset-based fee."

Second, although it may be counter-intuitive, we believe that proposed Form CRS is too long while not capturing all of the important information an investor should know. We agree with the Commission that the utility and effectiveness of any relationship summary will lie in its brevity and conciseness, but we do not think it is either brief or concise enough to be effective as a summary. Yet, because it is only four pages, firms would be asked to squeeze too much information into a relatively small space. Instead of being straightforward, the relationship summary would end up being dense and confusing, and we fear it would leave the troubling impression that there is no more to be said on the topics it addresses.

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[50] The Form CRS Proposing Release defines "retail investor" as a client or customer or prospective client or customer who is a natural person (an individual). The proposed definition of retail investor also includes "a trust or other similar entity that represents natural persons, even if another person is a trustee or managing agent of the trust." The IAA supports the definition's focus on natural persons. We believe it is important that the Form CRS guidance include a provision limiting the application of the term "another person [who] is trustee or managing agent of the trust" to individual agents who are acting primarily for personal, family, or household purposes on behalf of the retail investor. Institutional trusts such as employee benefit or pension plans and agents such as registered investment advisers, broker-dealers, or other financial institutions acting on behalf of natural persons would not benefit from a Form CRS and should be explicitly excluded from the definition of retail investor.

While we agree that the proposed disclosure items are useful for investors, as we discuss below, some items are more critical than others, and, even those that are more critical should be simplified. In our view, it will be substantially more effective to adopt a truly layered approach so that the investor can readily find additional information. Each key point should be made as simply and succinctly as possible, and the investor should then be pointed clearly and directly to specific additional plain English[51] disclosure explaining the point. This would allow investors to dive more easily into each key area and decrease the likelihood that they would view the relationship summary as everything they need to know to make an informed decision.

This approach would also provide firms with the flexibility they need to use innovative design and delivery techniques. This includes facilitating disclosures that are presented in electronic, including mobile, formats that are inherently easier to navigate and use in a layered approach.[52] By contract, the requirements for proposed Form CRS would limit innovative use of design-oriented techniques, such as providing disclosure in the form of tables or bullet point lists to provide greater structure, using more white space, and using visuals like icons or images. Conveying information to investors in ways that are visually dynamic and engaging would make the relationship summary more effective and likely to be read. As Commissioner Stein noted, the hypothetical Form CRS templates used few such design techniques and yet were close to the four page limit.[53] As proposed, Form CRS also would limit use of technology, and we fully agree with Commissioner Peirce's assessment that "investors would be more likely to take in and think about the information [the Commission] want[s] them to understand"[54] if the Commission "encouraged firms to be creative in their use of videos, interactive computer-based disclosure, mobile apps, and so forth."[55]

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[51] We note that the Form CRS instructions regarding using plain English permit firms to consider a retail investor's level of financial experience. Given that the proposed definition of retail investor is extremely broad to cover even very sophisticated investors, it is unclear what type of retail investor this contemplates.

[52] As discussed below, we also believe that the Commission should take additional measures to facilitate electronic delivery of required disclosure. Promoting the use of electronic delivery for Form CRS would encourage substantially more firms to prepare and use innovative technology and design techniques only possible in electronic format (*e.g.*, embedded hyperlinks, rollover boxes to define certain terms used, etc.).

[53] *Statement on Proposals Relating to Regulation Best Interest, Form CRS, Restrictions on the Use of Certain Names or Titles, and Commission Interpretation Regarding the Standard of Conduct for Investment Advisers*, SEC Commissioner Kara M. Stein (Apr. 18, 2018) ("Commissioner Stein Statement"), available at https://www.sec.gov/news/public-statement/stein-statement-open-meeting-041818.

[54] Commissioner Peirce Statement, *supra* n. 47.

[55] *Id*.

D. The Proposed Disclosures Relating to Conflicts of Interest will Potentially Mislead Retail Investors

We agree that disclosure of the existence of conflicts is an essential item in any relationship summary provided to retail investors. We also agree that it is important to include the three specific types of conflicts identified by the Commission relating to: (i) financial incentives to recommend certain investments; (ii) financial incentives relating to revenue sharing arrangements; or (iii) the firm buying investments from and selling investments to a retail investor for the firm's own account (*i.e.*, principal trading). Because they are directly linked to a recommendation, each of these types of conflicts could have a direct negative impact on an investor, such as incentives arising from sales quotas and contests.

We are concerned, however, that providing disclosures regarding these specified conflicts in isolation and on a standalone basis may result in retail investors concluding either that these are the only types of conflicts that may affect their relationship with a firm or financial professional, or that other conflicts are unimportant. They may thus not be in a position to make informed decisions. If a firm does not have any of the three specified conflicts—and many investment advisers do not—Form CRS would appear not to permit the firm to disclose that it has conflicts at all other than to say that the firm "benefits from" the services it provides the investor. This result could mislead retail investors into thinking the investment adviser has no conflicts of interest even though virtually every adviser has at least some conflicts.[56]

For retail investors to fully appreciate the importance of conflicts and their potential impact, any relationship summary should state that the firm has interests that may conflict with the investor's interests and point the investor to a clear and specific description of the firm's conflicts and how they might affect the investor. In addition, the relationship summary should not attempt to provide partial or incomplete disclosures regarding these conflicts. Specifically, we do not believe that firms should be asked to pick a single example of a conflict relating to certain investments, as proposed. Rather, investors should be encouraged to read about all such conflicts. We discuss this recommendation further below.

E. The Commission Should Leverage Rather than Dilute the Robust Disclosure Framework Already in Place for Registered Investment Advisers and Require Similar Layered Disclosure for Broker-Dealers

We are disappointed that the Commission did not propose to leverage the robust disclosure framework already in place for investment advisers by integrating it directly with the proposed relationship summary. Form CRS, in many respects, truncates the more complete disclosures that are already required to be provided by investment advisers to clients or potential clients. In particular, as noted above, investment advisers are required to prepare and deliver Part 2A of their Form ADV, a comprehensive narrative document that provides plain English

[56] We are also concerned that the insufficiency of disclosure on the Form CRS could result in increased liability for firms.

disclosures regarding, among other things, the adviser's business practices and services, fees and expenses, conflicts of interest, and disciplinary history, as well as Part 2B of their Form ADV, which contains information about the employees that will provide advisory services to a particular client—including their education and business background, compensation, and disciplinary history.

In fact, in 2010, the Commission made extensive improvements to the adviser brochures, including requiring that their content be organized in a consistent and uniform manner to facilitate comparisons of different advisers' disclosure. With respect to conflicts, specifically, the adviser brochures were improved to require clear and concise narrative descriptions that enhance the ability of clients to evaluate and understand relevant conflicts of interest that firms and their personnel face, the effect of those conflicts on services being provided, and any steps taken to address those conflicts.

The Commission further expanded the content of the adviser brochures to include, for example, information relating to the types of advisory services that are offered, enhanced information regarding how an adviser is compensated (including a fee schedule), the existence of performance-based fees, disciplinary information, and how an adviser selects or recommends broker-dealers for client securities transactions. With these improvements and taken together, the adviser brochures provide important information necessary to inform the decisions made by clients or potential clients.

Although proposed Form CRS includes some information that is already in the adviser brochures, as we discuss above, its requirements would result in language that is incomplete, potentially inaccurate, and likely to confuse or even mislead investors. An example that highlights our point relates to conflicts. As we discussed above, virtually all financial professionals and their firms have conflicts and it is important that investors have a reasonable understanding of how these conflicts could affect them. These conflicts are required to be disclosed and explained fully and fairly in an adviser's brochures and, we believe, any relationship summary should inform investors of this fact and clearly point them to where they can find these disclosures. We agree with the Commission that requiring an exhaustive discussion of all conflicts in Form CRS would make the relationship summary too long for its intended purpose and duplicative of the conflicts disclosures in advisers' brochures. But, we are concerned that the form as proposed would not adequately alert investors to important conflicts. In fact, we think it would have the dual effects of not providing key information to investors and weakening the overall effectiveness of the conflicts disclosure in the brochures. A truly layered approach would ensure investors have adequate disclosures by flagging in the summary the fact that conflicts of interest exist, describing clearly and concisely what that means, and directing investors to the explanations in the brochure that accompanies the relationship summary.

We urge the Commission to leverage the disclosures that investors are already asked to read by integrating a more streamlined relationship summary with the adviser brochures. We recognize that broker-dealers do not have a disclosure framework similar to Form ADV for

advisers, so suggest an alternative layered approach below that we believe could work for broker-dealers.

1. Leveraging the Adviser Brochures

The relationship summary should be designed to lead retail investors directly to critical disclosures. To do this, the relationship summary should highlight the essential information in a clear and easily digestible way and provide a clear roadmap to a more fulsome explanation of each item. The relationship summary should thus be designed to make it easier for retail investors to navigate the more comprehensive information provided in the adviser brochures.

Specifically, for investment advisers, we recommend that the relationship summary be provided prominently and contemporaneously with the adviser brochures. It should be placed at the front of or attached (*e.g.*, stapled) to any adviser brochures that are delivered to retail clients.[57] The relationship summary also should include specific cross-references (through pages numbers and/or hyperlinks) for each disclosure item to the corresponding sections in the adviser brochures to ensure that retail investors can easily access key information in a more complete way. Thus, for example, if a retail investor was interested in learning more about fees and expenses, he or she would be given the exact page number or a link to the relevant information in the attached or accompanying brochure.

2. Leveraging Broker-Dealer Disclosures

Unlike investment advisers, broker-dealers "are not currently subject to an explicit and broad disclosure requirement under the Exchange Act."[58] The Commission cites current industry practice, however, whereby broker-dealers typically provide information about some or all of the categories of disclosure included in the proposed relationship summary on their firm websites and in their account opening agreements.[59] And Reg BI would require broker-dealers to disclose, in writing, the material facts relating to the scope and terms of the relationship with retail customers. The Commission's proposed titling restrictions, discussed below, would also require broker-dealers and their associated persons to disclose their registration status. Because the Commission does not propose that these disclosures be provided together to retail investors, we are concerned that retail investors would have more difficulty directly accessing the information needed to explain the disclosures in the broker-dealer's relationship summary. Just as the investment adviser relationship summary should be provided with the adviser brochures, so

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[57] Although the Commission proposes to permit delivery of the relationship summary either on a standalone basis or prominently with other documents, we believe that, to be effective, the adviser brochures must be provided with (or linked directly in) a short and concise relationship summary.

[58] Reg BI Proposing Release at 99-100.

[59] *Id.* at 98.

should the broker-dealer relationship summary accompany or directly link to a single document or set of documents to help retail investors navigate directly to the relevant information.

Ideally, the Commission would require broker-dealers to create a plain English narrative document, similar to the adviser brochures, that would contain the material facts relating to the relationship called for by Reg BI,[60] the registration status called for by the proposal on titling restrictions,[61] and other disclosures required to make the relationship summary disclosures complete and accurate, such as information relating to conflicts and fees and expenses. This document would need to accompany or be attached or linked to the broker-dealer's relationship summary.[62] Alternatively, so as to leverage disclosures many broker-dealers already provide, broker-dealers could attach or link their relationship summary to a set of documents that together contain the required disclosures. Either way, as with the adviser relationship summary, the broker-dealer summary would need to include specific references (page numbers and/or hyperlinks) to more substantive plain English narrative disclosures that would cover the specified disclosure elements on a more comprehensive basis.

We recognize that our recommended approach may represent an additional cost for broker-dealers but believe it is critical to provide full and clear information to investors—and a clear path to get to that information—that explains each of the items in the relationship summary.[63]

3. Treatment of Dual-Registrants

We recommend that the Commission require dually-registered firms to prepare and deliver different relationship summaries to investors depending on whether the investors enter into an advisory or brokerage relationship. As discussed below, each relationship summary should include an additional disclosure item intended to highlight the availability of both advisory and brokerage accounts. The advisory relationship summary would be tied to the adviser brochures and the brokerage relationship summary would be tied to the broker-dealer

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[60] The "material facts relating to the scope and terms of the relationship with the retail customer" described in the Reg BI Proposing Release include: (i) the capacity in which the broker-dealer is acting; (ii) the fees and charges that apply to the retail customer's transactions, holdings, and accounts; (iii) the type and scope of services provided by the broker-dealer, including, for example, monitoring the performance of the retail customer's account, and (iv) "other material facts relating to the scope and terms of the relationship with the retail customer that would need to be disclosed." Reg BI Proposing Release at 103-04.

[61] *See* Proposed Rules 15*l*-3 and 211h-1.

[62] For example, the Commission could amend Form BD for broker-dealers to function in a manner similar to Part 1 (registration) and Part 2 (brochure) of Form ADV for investment advisers.

[63] We note that the information referenced and linked to in the broker-dealer relationship summary would be incorporated by reference and deemed to be filed with the Commission along with the relationship summary. This would be consistent with the fact that the adviser brochures are also filed with the Commission.

narrative disclosures, but it would be clear to retail investors how to access relevant information on both types of relationships.

F. The IAA's Specific Recommendations for the Relationship Summary

1. Recommended Presentation and Format

For the reasons discussed above, the relationship summary should be as concise as possible. It should also use "plain language" principles for organization, wording, and design, as is required for the adviser brochures. We do not recommend any formatting (*e.g.*, paper size, font etc.) or page number restrictions in order to give firms the flexibility they need to convey information to retail investors in a manner that is most likely to be read. We recommend, however, that the headings, sequence, and content of the relationship summary be standardized to ensure that each firm's summary contains the key disclosure items in the same order. This should enhance the ability of retail investors to compare firms in a more meaningful way. Further, clearly linking each summary item to additional information on that item in a firm's fuller disclosures should also make it easier for investors to find and compare key information about different financial service providers.

As discussed above, the Commission should eliminate the comparison section of the relationship summary. We also recommend that it remove the "Key Questions to Ask" from the summary and instead include those questions on the www.investor.gov website together with comparison information. We agree with the Commission that framing questions for retail investors can be helpful but think it would be more effective if the entire relationship summary were in a Q&A format to focus the reader's attention on the import of each disclosure. A Q&A format will help keep the relationship summary short and should also remove the onus of the retail investor having to ask questions. This format would encourage further conversation, particularly if the Commission requires firms to point investors to additional information—including comparison information and other key questions—on the SEC's website.

We have prepared mock-up relationship summaries that reflect each of our recommendations in order to assist the Commission in its efforts to craft an effective relationship summary.[64] The four mock-ups, at Appendix A to this letter, are designed to be used respectively by an investment adviser, a broker-dealer, a dual-registrant acting as an adviser, and a dual-registrant acting as a broker-dealer.[65] We discuss each of the specific recommended disclosure items below.

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[64] The mock-ups represent just one potential example of hypothetical firm disclosure. For purposes of the mock-ups, we assumed both the hypothetical broker-dealer and adviser had the three specified conflicts relating to financial incentives.

[65] Appendix A also contains an explanation of when language in our mock-ups would be boilerplate and when firms would have the flexibility to craft their own language.

2. Recommended Disclosure Items in the IAA Mock-Ups

We believe that the critical questions a retail investor would want answered are:[66]

- *What services will you provide me?*
- *What fees will I pay you?*
- *What else will I pay for?*
- *What are your responsibilities to me when it comes to investment advice?*
- *What conflicts of interest do you have?*
- *Do you have any disciplinary history?*
- *What else should I consider?*

Limiting the information in the relationship summary to answers to these seven questions in our view would strike an appropriate balance between useful and readable disclosure and too much disclosure that would make the summary less likely to be read by retail investors. Thus, for example, we do not think that the relationship summary should include the proposed introductory paragraph intended to prompt retail investors to think about which type of account is right for them (*i.e.*, advisory, brokerage, or both). Instead, investors should be directed to www.investor.gov for guidance on the range of account types. As shown in our mock-ups, however, we do recommend that dual-registrants be required to alert investors that they offer both advisory and brokerage accounts.

- ***What services will you provide me?***

Form CRS would require firms to discuss all of their services relating to investment advice in the four-page summary, including the associated types of fees. Yet, firms may offer several services along a broad spectrum, including variations that would make the services virtually impossible to disclose in the space allowed.[67] We suggest making this disclosure item considerably shorter and more to the point by telling investors the core advisory service a firm is offering to provide (*i.e.*, ongoing investment management as an investment adviser, episodic securities recommendations as a broker-dealer, or both as a dual-registrant) and where investors can get more information regarding other services that are offered.

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[66] The Commission's investor testing should provide guidance on whether these are in fact the correct questions.

[67] For instance, investment advisers may offer several advisory services or variations thereof, including, for example, discretionary or non-discretionary advisory services through separately managed or unified managed accounts. And firms that provide advice to retail investors about investing in a wrap fee program would be required to include additional disclosures in their Form CRS. With respect to the wrap free program disclosures, we recommend that the Commission only require sponsors of wrap fee programs to include the proposed wrap fee disclosures in the relationship summary, similar to the Form ADV wrap fee brochure delivery requirement, which requires only investment advisers that sponsor wrap fee programs to deliver to their wrap fee clients the Form ADV wrap fee program brochure.

We recommend that the response to this question include a mix of specified wording and short narrative statements, depending on the services provided. If a prescribed statement is not applicable to the firm's business, the firm should be given flexibility to omit or modify that statement. For example, to the extent applicable, investment advisers would be required to state:

> *We will manage investments for you. We will make investments on your behalf based on your goals and financial circumstances and will follow any investment restrictions you request.*
>
> *If you hire us, you will give us discretionary authority to buy and sell investments in your account without having to get your prior approval for each transaction. We will manage your investments on an ongoing basis.*

By contrast, broker-dealers, to the extent applicable, would be required to state:

> *We will provide you with an account for you to make investments in and may recommend specific investments for you.*
>
> *You will decide your overall investment strategy and make all final decisions about whether to buy or sell.*

Firms would also disclose, if applicable, that a limited selection of investments is available.

These statements could be followed by additional flexible disclosures regarding the nature of the principal services being offered by the firm. This disclosure item should be intended to provide retail investors with basic but meaningful information about the primary services they would receive from a firm.[68] However, given the broad spectrum of services a firm may offer, we would recommend that firms be permitted the flexibility to prepare a separate relationship summary for different business lines, programs, or the types of accounts and/or services that a broker-dealer or investment adviser offers.[69]

- ***What fees will I pay you?***

This disclosure item should include a description of the principal type of fees that the firm will charge. Firms would be required to state how they calculate fees (*e.g.*, based on assets under management or transaction-based), incentives associated with the fee structure, and any relevant factors that could cause the amount charged to change. Our recommendation here is generally consistent with the Commission's proposal, but our suggested specified language is clearer and more concise.

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[68] For investment advisers, this information would be derived from Item 4 of Part 2A of Form ADV.

[69] We also recommend that firms be permitted to prepare separate relationship summaries if they are in an affiliated group or firm complex.

- ***What else will I pay for?***

Our recommendation for this disclosure item is consistent with the Commission's proposal. Firms should be required to disclose expenses, such as commissions for transactions in advisory accounts and certain third-party fees. For example, investment advisers would be required to disclose, if applicable:

> *In addition to our fees, you will pay commissions and other charges to other companies in connection with buying and selling investments (e.g., broker commissions).*

Broker-Dealers would be required to disclose, if applicable:

> *In addition to our transaction-based fees, you will pay us other fees, such as custodian fees, account maintenance fees, and account inactivity fees.*

- ***What are your responsibilities to me when it comes to investment advice?***

We recommend that the firm be required to include a brief prescribed description of the standard of conduct applicable to its advice. Investment advisers would thus be required to state:

> *We are fiduciaries. That means we are required to act in your best interest for our entire advisory relationship with you.*

Broker-dealers would be required to include statements that would be required under Reg BI:

> *We must act in your best interest when we recommend a specific investment or an investment strategy. Unless we agree otherwise, we are not required to review or make recommendations for your account on an ongoing basis.*

We believe that our recommended language accurately and fairly describes the standard of conduct currently applicable to investment advisers and that would be applicable to broker-dealers under Reg BI.[70]

- ***What conflicts of interest do you have?***

It is critically important that investment advisers, broker-dealers, and dual-registrants be required to alert investors to the existence of conflicts of interests, by stating:

> *Our interests can conflict with your interests at times.*

[70] As we discuss above in Section II., any final Reg BI standard should cover advice that a broker-dealer agrees to provide a retail customer beyond a specific recommendation, and a broker-dealer's relationship summary disclosure would need to be tailored to reflect that broader Reg BI standard.

They would also need to make brief and concise statements regarding the financial conflicts specified in the Commission's proposed disclosures to the extent applicable. For example, firms could state:

> *We have business relationships with other firms that result in us getting paid additional money for buying or selling certain investments. In addition, our employees have financial incentives relating to the purchase or sale of certain investment products.*

Firms engaging in principal trading could state:

> *We can buy investments from you, and sell investments to you, from our own account. We can earn a profit on these trades, so we have an incentive to encourage you to trade with us.*

Investment advisers would add "*We must get your prior consent each time we do these trades.*"

We believe this language conveys in plain English the types of financial conflicts that the Commission proposes be addressed in Form CRS.[71] This disclosure item would also highlight the existence of other revenue streams for the firm and would direct retail investors to the exact location in the accompanying disclosures for more information.

For the reasons discussed above, however, the relationship summary should not single out a specific example of the types of investments or arrangements associated with each of these conflicts. Instead, it should be required to refer retail investors directly to more fulsome information regarding these and other conflicts in the adviser brochures and broker-dealer disclosures.

- ***Do you have any disciplinary history?***

Under this heading, firms would be required to state clearly "yes" or "no" to whether or not they have disciplinary history required to be reported and provide links to the relevant disclosure sections accompanying the relationship summary.

- ***What else should I consider?***

The relationship summary would end with specified language intended to encourage retail investors to read the accompanying disclosures and ask questions.[72] As discussed above,

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[71] We do not recommend specified language for this disclosure but suggest that firms be given flexibility to draft their own statement relating to the specified conflict, provided it is as concise as our suggested language.

[72] As proposed, Form CRS ends with the section "Additional Information" that in our view includes information that is unnecessary. If the Commission decides to retain this section, however, we recommend that the Commission, with regard to the website address of the Form ADV brochure, confirm that an embedded hyperlink would be permissible if the relationship summary is delivered electronically. We also suggest permitting firms to include a general link to their main website when Form CRS is delivered on paper. We note that the instructions regarding contact

firms would be required to point retail investors directly to www.investor.gov to find information regarding other types of financial professionals and suggestions for additional questions.

We believe the modifications to the relationship summary that we recommend, integrated with the plain English fulsome disclosure in the adviser brochures and broker-dealer disclosures, would better achieve the Commission's goals of providing a short, accurate, readable, and understandable document that would serve retail investors well.

G. Compliance Date

The Commission is proposing to require new applicants for registration as investment advisers to file relationship summaries six months after the effective date of the proposed new rules and rule amendments. For investment advisers that are already registered as of the effective date, the Commission is proposing to require them to file the relationship summaries as part of the firm's next annual updating amendment to Form ADV that is required after six months from the effective date. A firm would be required to deliver its relationship summary to all of its existing clients who are retail investors on an initial one-time basis within 30 days after the date the firm is first required to file its relationship summary with the Commission.

We request that the Commission provide more time for advisers to comply with these requirements. We believe that an implementation period of 12 months after the effective date would be appropriate. Thus, registered investment advisers would be required to file the relationship summaries as part of their next annual updating amendment to Form ADV that is required after 12 months from the effective date. The longer period would not only give advisers more time to craft the new relationship summary (or summaries) and link them to their brochures, but they would also have more time to consider and apply innovative technology and designs, which we hope the Commission will permit, as we discuss.

H. Disclosure Simplification and Modernization

We strongly support the Commission undertaking a broader and more comprehensive initiative to review, simplify, and modernize disclosures provided by financial professionals to all investors. Specifically, we encourage the Commission to seek public comment on ways to streamline the adviser brochure. The Commission should continue to assess ways to strike the appropriate balance between meaningful disclosure and too much disclosure, so that unnecessary disclosure does not obscure information that is important to investors.

We also strongly urge the Commission to expand and clarify the electronic delivery guidance for required adviser disclosures, such as the adviser brochure and, if adopted, Form CRS. Specifically, we encourage the Commission to: (i) adopt a "notice plus access equals delivery" model with respect to the delivery requirements; and (ii) issue updated electronic

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information would only permit disclosure of the primary address. We recommend permitting an email address or telephone number as an option for contact information.

delivery guidance.[73] Under current guidance, an investment adviser may satisfy its ongoing disclosure delivery obligations by providing notice that the information is available electronically, ensuring effective access to such information, and either evidencing actual delivery or obtaining informed consent from clients. In practice, many advisers have been reluctant to use electronic delivery due to the costs involved, implementation issues, and lack of clarity associated with the current consent requirements.

The Commission should make electronic delivery of required disclosures the default option for investment advisers. An overwhelming majority of investors now have access to the Internet, and for many of them, going online or using social media is the primary way they access and share information, in many cases through their smartphones. The Commission recently cited its investor testing efforts and other empirical research concerning investors' preferences for the use of the Internet as the primary medium for receiving required disclosures.[74]

Under a notice and access approach, an adviser would satisfy its delivery obligation by posting required disclosures on its website and providing clients either a paper or electronic notice that includes a link to the location of the disclosures on the adviser's website. This notice would inform the client that the information is available and explain how to access it. Thus, clients would not have to affirmatively choose electronic delivery. Clients would still have the option of receiving paper copies of the disclosures at anytime.

The Commission already adopted a notice and access approach with respect to the delivery of proxy materials.[75] More recently, the Commission adopted a new rule that will permit mutual funds to transmit shareholder reports to their shareholders by making the reports accessible on a website and satisfying certain other conditions, including providing a notice with a specified location.[76] The Commission thus has already recognized the "vital role of the Internet

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[73] Current guidance relating to electronic delivery dates back to a series of releases issued between 1995 and 2000. *See Use of Electronic Media for Delivery Purposes*, SEC Rel. No. 33-7233 (Oct. 6, 1995), available at https://www.sec.gov/rules/interp/33-7233.txt; *Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples Under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940*, SEC Rel. No. 33-7288 (May 9, 1996), available at https://www.sec.gov/rules/interp/33-7288.txt; *Use of Electronic Media*, SEC Rel. No. 33-7856 (Apr. 28, 2000), available at https://www.sec.gov/rules/interp/34-42728.htm.

[74] Moreover, the Commission has cited studies showing that 85% of American adults ages 18 and older use the Internet or email and that 94% of U.S. households owning mutual funds have Internet access. *See Investment Company Reporting Modernization*, SEC Rel. No. 33-9776 at 153 (May 20, 2015), available at https://www.sec.gov/rules/proposed/2015/33-9776.pdf.

[75] *Internet Availability of Proxy Materials*, SEC Rel. No. 34-55146 (Jan. 22, 2007), available at https://www.sec.gov/rules/final/2007/34-55146.pdf.

[76] *Optional Internet Availability of Investment Company Shareholder Reports*, SEC Rel. No. 33-10506 (June 5, 2018), available at https://www.sec.gov/rules/final/2018/33-10506.pdf.

and electronic communications in modernizing the disclosure system under the federal securities laws…."[77]

At a minimum, the Commission could provide additional instructions to Form ADV regarding electronic delivery. Specifically, the Commission should permit negative consent or consent implied through course of business as acceptable forms of consent. For example, consent to electronic delivery could be implied from a client's use of electronic communication with his or her adviser via e-mail or the adviser's website. Simplifying the consent requirements, as a preliminary matter, would better enable investment advisers and their clients to benefit from electronic delivery.[78]

IV. Proposed Restrictions on the Use of Certain Names and Titles and Required Disclosures

As discussed above, a fundamental objective of the Commission's package of proposals is to address the considerable investor confusion that persists today regarding the different standards of conduct that apply to investment advisers and broker-dealers. In our view, permitting certain financial professionals to market themselves to clients in a manner that implies a "relationship of trust and confidence" while disclaiming fiduciary responsibility to such clients greatly exacerbates this confusion.

As noted in the Form CRS Proposing Release, in 2008, the Commission released the results of a study that examined how investment advisers and broker-dealers market products and services to investors, and how investors understand the differences between investment advisers and broker-dealers. The study concluded, among other things, that investors generally do not understand the key distinctions between broker-dealers and investment advisers, nor do they understand the varying legal duties of and standards imposed on broker-dealers and investment advisers. This and other studies noted the role that titles play in investor confusion.[79]

To address this confusion, the Commission is proposing restrictions on the use by certain broker-dealers of the titles "adviser" or "advisor."[80] The Commission acknowledges that there may be titles other than "adviser" or "advisor" used by financial professionals that might confuse

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[77] *See Commission Guidance on the Use of Company Web Sites*, SEC Rel. No. 34-58288 at 6 (Aug. 1, 2008), available at https://www.sec.gov/rules/interp/2008/34-58288.pdf.

[78] Moreover, we recommend that the Commission also provide additional clarity with respect to E-SIGN (Electronic Signatures in Global and National Commerce Act). Under the Commission guidance, consent to electronic delivery must be in writing. Under E-SIGN, advisers are required to obtain or confirm the consent electronically.

[79] Form CRS Proposing Release at 166.

[80] Proposed Rule 15*l*-2. The Commission is also proposing to require broker-dealers, investment advisers, and their associated persons to prominently disclose their registration status. *See* Proposed Rules 15*l*-3 and 211h-1. We support these proposals.

and thus potentially mislead investors, but believes that these terms in particular have contributed to investor confusion.[81] Specifically, the proposed rule would restrict a broker-dealer's or its associated natural persons' use of these terms as part of a name or title when communicating with a retail investor.[82] While the proposal is a good first step, we believe it will have limited impact.

A. The Commission Should Address Misleading Marketing Practices

The Commission's proposed restriction on the use of certain titles, in combination with newly required disclosures, are a good start, but will not adequately address the widespread confusion over the ways that financial professionals hold themselves out to the public. While names or titles are contributing factors to investor confusion and the potential for investors to be misled, we believe that other factors should be considered as well.

In particular, previous studies noted the confusion arising from "we do it all" advertisements and "marketing efforts which depicted an 'ongoing relationship between the broker-dealer and the investor.'"[83] Firms' websites, for example, typically highlight the trusted long-term relationship that they seek to have with investors through their whole lives as they pursue their financial goals. Much of the verbiage on these websites and in marketing material would leave the impression with a reasonable investor that the firm and its financial professionals are providing ongoing investment advice pursuant to a relationship of trust and confidence.

The Commission has expressed concern regarding these marketing issues. For example, the Commission expressed concern that the education and information that Form CRS is intended to provide to retail investors could "potentially be overwhelmed by the way in which financial professionals present themselves to potential or current retail investors, including through advertising and other communications."[84] As the Commission noted, this could "particularly be the case where the presentation could be misleading in nature, or where advertising and communications precede the delivery of Form CRS and may have a disproportionate impact on shaping or influencing retail investor perceptions."[85]

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[81] We agree with Commissioner Stein that restricting the use of only two words would seem to present an obvious "whack-a-mole" problem. *See* Commissioner Stein Statement, *supra* note 53**.**

[82] The prohibition would not apply to either: (i) a dually-registered firm or (ii) an individual who is both an associated person of a broker-dealer (a registered representative) and a supervised person of a registered investment adviser if that individual provides investment advice on behalf of the adviser. As most retail-facing financial professionals fall into the second category, the proposed rule may have limited impact. As the Commission notes, approximately 61% of registered financial professionals are employed by dual-registrants. Form CRS Proposing Release at 224.

[83] Form CRS Proposing Release at 166 and n. 384.

[84] *Id*. at 163.

[85] *Id*.

Indeed, the Commission should address this broader concern. For example, we believe that setting clear expectations between an investor and a financial professional is critical to addressing investor confusion. The firm and its associated persons must clearly delineate the services they are offering and avoid creating the impression that additional services or obligations are included or forthcoming. Broker-dealers should avoid implying that a best interest standard will apply to their entire relationship with an investor rather than solely to their specific securities recommendations at specific points in time. There should also be clear disclosures to clients of the capacity a dual-hatted professional is acting in and why it matters and how a client with multiple accounts will be handled.[86]

B. Absent a Robust Standard of Conduct Designed to Protect Investors, the Commission Should Revisit the Solely Incidental Exclusion in the Advisers Act

The Commission notes that it and many commenters have over the years expressed concern about broker-dealer marketing efforts, including through the use of titles, and whether these efforts are consistent with a broker-dealer's reliance on the Solely Incidental exclusion under the Advisers Act. The Commission has asked for comment on an alternative approach to title restrictions that could cover a broker-dealer and its individual associated persons who represent or imply "through any communication or other sales practice (including through the use of names or titles) that [they are] offering investment advice to retail investors subject to a fiduciary relationship with an investment adviser."[87]

It is vital that the Commission get this package of proposals right. Any final rulemaking package must (i) create a robust standard of conduct that covers all advisory activities such that there will be no gaps in investor protection, and (ii) ensure that there is no mismatch between investors' reasonable expectations of the services they are getting from a financial professional and associated legal standards and the reality.

In the absence of a strong investor protective standard of conduct that would apply to all of a broker-dealer's investment advisory activities, and requirements for clear and accurate communications by broker-dealers with retail investors as to the services they provide, broker-dealers should not be able to rely on the Solely Incidental exclusion for activities that would reasonably be understood by a retail investor as offering investment advice subject to a fiduciary standard.

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[86] In its discussion of Reg BI, the Commission expresses concern that retail customers of dually-registered firms may be more susceptible to confusion regarding the capacity in which their firms or financial professionals are acting and provides guidance on appropriate disclosure for dual-registrants. Reg BI Proposing Release at 105-106.

[87] Form CRS Proposing Release at 182.

V. Proposed Advisers Act Interpretation

The well-established fiduciary duty is at the core of the investment adviser-client relationship. We agree with the Commission that the fiduciary duty "is fundamental to advisers' relationships with their clients under the Advisers Act,"[88] and that, as a fiduciary, an adviser "must act in the best interest of its client."[89] We also agree that an adviser's fiduciary obligation, which includes both a duty of care and a duty of loyalty, "includes an affirmative duty of utmost good faith and full and fair disclosure of all material facts,"[90] that it "is established under federal law,"[91] and that it "is important to the Commission's investor protection efforts."[92] We believe that investment advisers understand the contours of this fiduciary duty well and, therefore, that a Commission interpretation is unnecessary.

Nevertheless, we appreciate that it may be helpful for the Commission to gather and synthesize its views on what the fiduciary duty entails and address those views in one release. While we generally agree with the principles the Commission has set forth in the Proposed Interpretation, we recommend several refinements and clarifications to address concerns we have with the Proposed Interpretation as drafted. We also believe that it would be helpful for the Commission to confirm that the statements in the Proposed Interpretation (with the modifications discussed in this letter) need to be read together in context.

A. Scope and Nature of the Fiduciary Duty

The Proposed Interpretation appropriately recognizes that the adviser and its client—whether retail or institutional—may shape their relationship through agreement and that the fiduciary duty "would be commensurate with the scope of the relationship."[93] Within the scope of that relationship, advisers are required to make full and fair disclosure to their clients of their conflicts, act in the best interest of their clients, and not put their own interests ahead of their clients' interests.

The fiduciary duty is principles-based. It is an overarching standard the contours of which will differ depending on the particular facts and circumstances. The Commission asks whether it would be beneficial to codify any portion of the Proposed Interpretation under section 206 of the

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[88] Proposed Interpretation at 6.

[89] *Id.* at 3. *See also,* Arthur B. Laby, *Selling Advice and Creating Expectations: Why Brokers Should be Fiduciaries,* 87 Washington L.Rev. 707 at 725 (2012) ("A fiduciary standard is a 'best interest' standard.").

[90] Proposed Interpretation at 3-4.

[91] *Id*. at 4.

[92] *Id*.

[93] *Id.* at n. 37 (quoting Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 Villanova Law Review 701 at 728).

Advisers Act.[94] We appreciate that the Commission has not proposed to do so. We do not believe that the fiduciary duty is easily reduced to prescriptive rule text, nor do we think a rule is necessary. Codification of the fiduciary duty also may undermine the significant body of case law that has developed in this area, including, for example, the seminal case of *SEC v. Capital Gains Research Bureau, Inc*.[95] As stated in the Proposed Interpretation, the fiduciary duty "follows the contours of the relationship between the adviser and its client."[96] Advisers provide a range of services—from a single financial plan to ongoing portfolio management—to a large variety of client types—from "Mr. and Ms. 401k" to the most sophisticated institutions—and through different advice platforms—from traditional in-person conversations to digital (robo) advice. The facts and circumstances principles-based approach of the Advisers Act has resulted in an effective and flexible standard of conduct over many decades for advisers serving a broad spectrum of clients across an expansive range of investment approaches and platforms. We believe that codifying this standard will necessarily limit its adaptability and potentially weaken its reach at a time when the investment adviser industry is undergoing rapid evolution and expansion.

B. Duty of Care

We agree with the Commission that the fiduciary duty includes a duty of care.[97] The Proposed Interpretation highlights three components of this duty: (i) a duty to provide advice that is in the client's best interest; (ii) a duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades; and (iii) a duty to provide advice and monitoring over the course of the relationship.[98] Our comments focus primarily on the Commission's discussion of the first element of the duty of care, *i.e.*, the duty to provide advice that is in the client's best interest.

1. Investment Profile

In discussing the duty to provide advice that is in the client's best interest, the Commission states that the duty of care includes: "a duty to make a reasonable inquiry into a client's financial situation, level of financial sophistication, investment experience, and investment objectives (which [the Commission] refer[s] to collectively as the client's

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[94] *Id.* at 20.

[95] 375 U.S. 180 (1963).

[96] Proposed Interpretation at 8.

[97] We agree with the Commission that the duty of care may extend to areas not covered in the Proposed Interpretation. *See* Proposed Interpretation at n. 25.

[98] Proposed Interpretation at 9. As the Commission recognizes, the duty to provide ongoing advice and monitoring "is particularly important for an adviser that has an ongoing relationship with a client" and "[c]onversely, the steps needed to fulfill this duty may be relatively circumscribed" in situations such as a one-time financial plan. Proposed Interpretation at 15.

'investment profile') and a duty to provide personalized advice that is suitable for and in the best interest of the client based on the client's investment profile."[99]

This discussion of the client's investment profile appears to contemplate retail clients only and does not appear to take into account an adviser's relationships with other types of clients, such as institutional clients, including very sophisticated individuals or funds or other types of investment vehicles. The term "investment profile" as crafted by the Commission does not accurately capture how advisers make—or should make—suitability determinations across the spectrum of client types because it contains specified elements that do not fit all types of clients and client relationships. The term also does not include other factors that may be key issues for the adviser to consider in determining potential investments or strategies for a client. For example, an adviser that is hired by an institutional client to manage a pension plan will need to consider the nature of the plan and the plan's participants. If an adviser is hired to manage a portfolio for a client that includes foreign securities, the adviser may have to consider tax issues. Funds and many other institutional clients specify investment guidelines and strategies in their investment management agreements. Ultimately, what is in the best interest of a particular client depends on the nature of the client and the scope of the client's agreed-upon relationship with the adviser. Although the factors specified in the Proposed Interpretation likely will be appropriate factors in the retail client context, one or more are not likely to be the appropriate factors for non-retail client relationships. We suggest that the Commission take a more principles-based approach and modify the language above as follows:

> a duty to make a reasonable inquiry into a client's ~~financial situation, level of financial sophistication, investment experience, and investment objectives (which we refer to collectively as the client's~~ investment profile~~)~~

Rather than specifically define "investment profile," the Commission could provide non-exclusive examples of factors advisers may consider in fulfilling their duty of care. In this regard, we agree with the Commission's statement that "[t]he nature and extent of the inquiry turn on what is reasonable under the circumstances, including the nature and extent of the agreed-upon advisory services, the nature and complexity of the anticipated investment advice, and the investment profile of the client."[100] We believe this approach is consistent with how advisers currently assess whether advice is in a client's best interest for retail and non-retail clients alike, and appropriately reflects what clients expect from their advisers.

2. Need for Clarification

We note two areas in the duty of care section of the Proposed Interpretation where clarification would be useful. First, we note that the Commission states that the suitability obligation "when combined with an adviser's fiduciary duty to act in the best interest of its

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[99] *Id*. at 9-10.

[100] *Id*. at 10.

client, requires an adviser to provide investment advice that is suitable for *and in the best interest of* its client" (italics in original).[101] We assume that the Commission describes investment advice as "suitable for and in the best interest" of a client to emphasize that an adviser "must act in the best interest of its client."[102] Acting in a client's best interest is at the core of the fiduciary duty and it incorporates a suitability obligation. If advice is not suitable, we do not believe it would be in a client's best interest. Second, we recommend that the Commission use the terms "duty to provide advice that is in the best interest of the client" and "duty to provide advice and monitoring over the course of the relationship" to describe the first and third elements of the duty of care consistently throughout the Proposed Interpretation. The Proposed Interpretation as written variously describes the first element as the "duty to provide advice," and the "duty to act and to provide advice" and the third element as the "duty to provide advice and monitoring" and the "duty to act and to provide advice and monitoring."

C. Duty of Loyalty

The Commission recognizes that conflicts of interest are inherent in the provision of investment advice. We agree with the Commission that, "[b]ecause an adviser must serve the best interests of its clients, it has an obligation not to subordinate its clients' interests to its own."[103] The Commission correctly recognizes that the adviser and its client may shape their relationship,[104] and that the client may consent to an adviser's conflicts as long as there has been full and fair disclosure.[105] Our comments relate to the scope and nature of the required disclosure, the concept of client consent, and other more specific issues. Because the Proposed Interpretation has drawn together threads from various statements by the Commission and others over the years, it includes some ambiguities and internal inconsistencies, and we urge the Commission to refine and clarify the Interpretation so that statements are consistent, unambiguous, and do not break new ground.

1. Full and Fair Disclosure of Conflicts

The Proposed Interpretation states that, in seeking to meet its duty of loyalty, an adviser:

> must seek to avoid conflicts of interest with its clients, and, at a minimum, make full and fair disclosure to its clients of all material conflicts of interest that could affect the advisory relationship. Disclosure of a conflict alone is not always sufficient to satisfy the adviser's duty of loyalty and section 206 of the Advisers Act. Any disclosure must be

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[101] *Id*. at n. 26.

[102] *Id*. at 3.

[103] *Id*. at 16.

[104] *Id. at 8.*

[105] *Id*. at n. 40.

> 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.[106]

We believe that an adviser will have satisfied its duty of loyalty, as the Proposed Interpretation suggests, if it has attempted to avoid or mitigate its conflicts and has fully and fairly disclosed those conflicts to its clients. We agree with the Proposed Interpretation that, whether disclosure is full and fair will depend on whether it is clear and specific enough to put an investor in a position to be "able to understand the adviser's conflicts . . . well enough to make an informed decision."[107]

We ask the Commission to make three points clear in this regard. First, the Commission should confirm that whether the disclosure is full and fair will depend on many factors, including, for example, the type of client, the scope and nature of the relationship, and the nature of the conflict. Full and fair disclosure for an institutional client, including the specificity, level of detail, and explanation of terminology, likely will differ substantially from full and fair disclosure for a retail client, or a different type of institutional client.[108] Similarly, full and fair disclosure may differ depending on the scope of the agreed-upon relationship or the complexity of the investments and conflicts.

Second, the Commission should confirm that advisers are not expected to—nor would it be reasonable to expect them to—"see inside the heads" of their clients. Disclosure should be designed to put a reasonable investor of a certain type in a position to be able to understand and provide informed consent to engage in a relationship with the adviser, including related conflicts. Thus, unless an adviser knows or has reason to know that a client does not or will not understand a disclosure, the adviser should not be obligated—or later faulted for failing—to test the understanding of any particular client.

Third, the Commission should make clear that advisers are not required to obtain express consent but may infer consent from the facts and circumstances. Although the Proposed Interpretation states that a client's informed consent "can be explicit or, depending on the facts and circumstances, implicit,"[109] there are several statements that suggest that an adviser could be required to *obtain* consent. [110] We agree with those statements in the Proposed Interpretation that

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[106] *Id.* at 17-18. (Citations omitted)

[107] *Id*.

[108] Many institutional clients are also informed through their own due diligence processes and responses they receive from advisers in requests for proposals (RFPs).

[109] Proposed Interpretation at 18.

[110] *Id*. at 12, 18.

focus on an adviser's obligation to provide full and fair disclosure so that the client is in a position to make an informed decision to consent to or reject the disclosed conflicts.[111] Thus, to the extent that an adviser has provided full and fair disclosure to a client in the brochure or other disclosures and the client has entered into or continued a relationship with the adviser following the disclosure, the adviser should be able to infer that the client has made an informed decision and has consented to the related conflicts, unless the facts and circumstances or the agreement between the adviser and the client require otherwise. We ask the Commission to confirm this principle, which is consistent with current expectations of advisers and their clients.

2. Adequacy of Disclosure

In its discussion of the duty of loyalty, the Commission describes situations where, in its view, "it would not be consistent with an adviser's fiduciary duty to infer or accept client consent to a conflict."[112] These situations are (i) where the facts and circumstances indicate that the client did not understand the nature and import of the conflict or (ii) the material facts concerning the conflict could not be fully and fairly disclosed.[113] The Proposed Interpretation goes on to say that "in some cases, conflicts may be of a nature and extent that it would be difficult to provide disclosure that adequately conveys the material facts or the nature, magnitude and potential effect of the conflict necessary to obtain informed consent and satisfy an adviser's fiduciary duty. In other cases, disclosure may not be specific enough for clients to understand whether and how the conflict will affect the advice they receive. With some complex or extensive conflicts, it may be difficult to provide disclosure that is sufficiently specific, but also understandable, to the adviser's clients."[114]

First, where an adviser has reason to believe that a client did not understand the nature and import of a conflict, we question whether the adviser in fact provided full and fair disclosure of the conflict to the client. There may also be a separate question as to whether the investment advice was in the best interest of that client.

As for the second example and the statements that follow it, we are unable to identify situations where material facts concerning a conflict cannot be fully and fairly disclosed, including the nature, extent, magnitude, and potential effects of the conflict. If an adviser believes that its advice is in its client's best interest, the adviser should be able to explain any conflicts in a way that the investor can reasonably be expected to understand their impact on the

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[111] *See, e.g.,* "disclosure should be sufficiently specific so that a client is able to decide whether to provide informed consent to the conflict of interest"; "[a]ny 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"; and "[a]n 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." *Id.* at 16, 17, 17-18.

[112] *Id*. at 18.

[113] *Id.*

[114] *Id*. at 18-19.

advice. We thus are not persuaded that there would be cases where, assuming advice is in a client's best interest, full and fair disclosure of any conflicts could not be made. As the Proposed Interpretation makes clear, the Advisers Act fiduciary duty encompasses both the duty of loyalty and the duty of care. Even after disclosing conflicts to a client, the advice must still be in the client's best interest, and the adviser may not let the conflicts taint its advice. Rather than assuming that certain conflicts cannot be fully and fairly disclosed, or identifying situations where it would not be appropriate for advisers to infer or accept client consent, we believe that the Commission should instead emphasize that, in addition to full and fair disclosure of conflicts, the adviser must also provide advice that is in the client's best interest, and a failure to do so is a failure of the adviser to fulfill its fiduciary duty.[115]

3. Use of the Word "May"

In discussing the duty of loyalty, the Proposed Interpretation provides that "an adviser disclosing that it 'may' have a conflict is not adequate disclosure when the conflict actually exists."[116] We understand the Commission's position that the use of "may" is not appropriate in disclosures to a client in connection with conflicts that in fact exist related to the services provided to that client. However, we believe that it would be helpful for the Commission to confirm that the word "may" could continue to be used in situations in a way that is not misleading, for example, in disclosures to prospective clients where the nature and scope of the relationship have not yet been determined.

4. Allocation of Investments and Other Actions Within the Scope of the Advisory Relationship

The Proposed Interpretation states that the duty of loyalty "requires an investment adviser to put its client's interests first"[117] and that an adviser "must not favor its own interests over those of a client or unfairly favor one client over another."[118] As the Proposed Interpretation notes, advisers may have conflicts related to allocation of investment opportunities where a limited opportunity may be in the best interest of more clients than could be satisfied by the adviser's fill. We agree that an adviser must have an allocation policy that addresses these situations and that the policy need not provide a *pro rata* allocation. As the Proposed

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[115] *See U.S. v. Mark D. Lay*, 568 F.Supp.2d 791 at 812 (N.D. Ohio 2008) ("SEC-registered investment advisers and their officers and directors have fiduciary obligations of good faith, loyalty, and fair dealing to the clients who entrust their money to the investment advisers." A registered investment adviser is "required at all times: (a) to act in good faith and in the best interests of its client…; (b) to make full and fair disclosure of all material facts bearing on the investment adviser relationship…; and (c) to employ reasonable care to avoid misleading its client....").

[116] Proposed Interpretation at 18.

[117] *Id*. at 15.

[118] *Id*.

Interpretation notes, the policy "must be fair and, if [it] present[s] a conflict, the adviser must fully and fairly disclose the conflict"[119] such that a client is able to consent.

We ask that the Commission clarify two points related to allocation. First, the Commission should make clear that it would not be inconsistent with an adviser's duty of loyalty for the adviser to allocate investment opportunities across client and proprietary or affiliate accounts as long as the adviser allocates pursuant to a policy designed to treat clients fairly and has fully and fairly disclosed the conflict. Second, the Commission should confirm that an adviser may shape by agreement the scope of investment opportunities provided to each client.

We also believe that it would be beneficial for the Commission to confirm that an adviser does not violate its duty of loyalty to its client when it acts consistent with its agreement with its client, but does not satisfy a client's request that is outside the scope of the advisory agreement. For example, an adviser may decline a request from a client for special services, reporting, or information that are outside the scope of the agreement between the adviser and the client. As another example, an adviser may decide to terminate an agreement with a client and, as long as the adviser acts consistent with the advisory agreement and with the adviser's other disclosures to the client, the adviser would not be violating its fiduciary duty to its client.

In conclusion, we appreciate that the Commission has preserved the principles-based fiduciary duty under the Advisers Act. Our comments in large part are designed to help the Commission articulate the various aspects of fiduciary duty in guidance that reflects legal interpretations and industry norms that have served clients well for many years.

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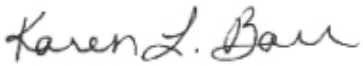
[119] *Id*. at 17.

We appreciate the Commission's consideration of our comments on this important set of proposals and would be happy to provide any additional information that may be helpful. Please contact the undersigned or Gail C. Bernstein, General Counsel, at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,



Karen L. Barr
President and CEO

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

Appendix A
Mock-Up Relationship Summaries

Explanation

- ✓ Below are the following hypothetical relationship summaries:
  - Laysan Investment Management LLC (registered investment adviser)
  - Molokini Securities, Inc. (registered broker-dealer)
  - Kohala Wealth Management, Inc. (dual-registrant acting as adviser)
  - Kohala Wealth Management, Inc. (dual-registrant acting as broker-dealer)

- ✓ The mock-ups are presented as questions and answers in narrative and graphical format with no page limit. Each relationship summary would be required to include every question, exactly as specified and in the specified order. Certain items would include required language, as specified below. No additional topics would be permitted.

- ✓ Each item other than Item 4 would include a cross-reference to specific information in accompanying, attached, or linked disclosures.

- ✓ Dual-registrants would be required to prepare separate adviser and broker-dealer relationship summaries.

Content Requirements

Document Header

- Relationship Summary, name of firm, and date
- Registration status (make prominent)

Item 1: What services will you provide me?

<u>Investment Advisers</u>

- Briefly describe the principal advisory services offered by the firm to retail investors
- If applicable, and as shown in the Laysan and Kohala adviser mockups, state:
  - ***We will manage investments for you****. We will make investments on your behalf based on your goals and financial circumstances and will follow any investment restriction you request.*
  - *If you hire us, you will give us* ***discretionary authority*** *to buy and sell investments in your account without having to get your prior approval for each transaction. We will manage your investments on an* ***ongoing basis****.*
- If applicable, state that a limited selection of investments is available

<u>Broker-Dealers</u>

- For broker-dealers that offer recommendations to retail customers, briefly describe the services offered by the firm to retail investors

- If applicable, and as shown in the Molokini and Kohala broker-dealer mockups, state:
    - *We will provide you with an account for you to make investments in and* ***may recommend specific investments for you****.*
    - ***You will decide*** *your overall investment strategy and make all final decisions about whether to buy or sell.*
- If applicable, state that a limited selection of investments is available

<u>Dual-Registrants</u>

- Include an additional disclosure item intended to highlight the availability of both advisory and brokerage accounts and provide a cross-reference to additional information to allow the investor to compare the firm's offerings

Item 2: What fees will I pay you?

- Generally describe fees charged by the firm and how fees are calculated (*e.g.*, based on assets under management or transaction-based), incentives associated with the fee structure (*e.g.*, whether fees or charges vary), and any relevant factors that could cause the amount charged to change

Item 3: What else will I pay for?

- Describe other fees and expenses
- Investment advisers state, if applicable:
    - *In addition to our fees, you will pay commissions and other charges to other companies in connection with buying and selling investments (e.g., broker commissions).*
- Broker-dealers state, if applicable:
    - *In addition to our transaction-based fees, you will pay us other fees, such as custodian fees, account maintenance fees, and account inactivity fees.*

Item 4: What are your responsibilities to me when it comes to investment advice?

- Investment advisers state:
    - *We are fiduciaries. That means we are required to* ***act in your best interest*** *for our* ***entire advisory relationship*** *with you.*
- Broker-dealers state:
    - *We must act in your* ***best interest when we recommend*** *a specific investment or investment strategy. Unless we agree otherwise, we are* ***not required to review or make recommendations*** *for your account on an ongoing basis.*

Item 5: What conflicts of interest do you have?

- Investment advisers and broker-dealers state:
    - ***Our interests can conflict with your interests*** *at times.*

- Disclose, if applicable, the existence of conflicts relating to: (i) financial incentives relating to revenue sharing arrangements; (ii) financial incentives to recommend certain investments; or (iii) principal trading
- The mockups include the following descriptions of conflicts:
  - Revenue sharing: *We have business relationships with other firms that result in us getting paid additional money for buying or selling certain investments.*
  - Investment-related: *In addition, our employees have financial incentives relating to the purchase or sale of certain investment products.*
  - Principal trading: *We can buy investments from you, and sell investments to you, from our own account. We can earn a profit on these trades, so we have an* ***incentive to encourage you to trade with us****.*
    - Investment advisers to add**:**

      We must get your ***prior consent each time*** *we do these trades.*
- Link underlined language to more fulsome disclosure
- Other language may be used to describe conflicts, as long as it is as least as concise as the language used in the mockups

Item 6: Do you have any disciplinary history?

- Answer "yes" or "no" as to whether firm or relevant employees have disciplinary history

Item 7: What else should I consider?

- Advisers and broker-dealers state:
  - *Read the attached Brochure* [for advisers]/*Account Documentation* [or insert other name of document(s)][for broker-dealers] *before you invest with us. It contains* ***important information****.*
  - *There are other* ***types of financial services professionals*** *with differing legal obligations and types of services who can help you with financial and investment decisions. The SEC provides free information that allows you to* ***research and compare these financial professionals*** *and suggests the types of* ***questions you should be asking at*** www.investor.gov.

Relationship Summary

Laysan Investment Management, LLC

August 7, 2018

*Registered with the Securities and Exchange Commission as an **Investment Adviser***

HYPOTHETICAL RELATIONSHIP SUMMARY PREPARED BY THE INVESTMENT ADVISER ASSOCIATION. FOR ILLUSTRATIVE PURPOSES ONLY.

What services will you provide me?

- **We will manage investments for you.** We will make investments on your behalf based on your goals and financial circumstances and will follow any investment restrictions you request.
- If you hire us, you will give us **discretionary authority** to buy and sell investments in your account without having to get your prior approval for each transaction. We will manage your investments on an **ongoing basis**.

For more information regarding all of our services, read the attached Brochure starting on page 5.

What fees will I pay you?

- Our fees are based on a **percentage of your assets under management** with us. This means that if your assets grow we get paid more.
- Our fees will not change based on the type of investment we select for you or the number of times we buy or sell investments for you.

Read more about our fees on page 8 of the Brochure. Your specific fee schedule will be in your Advisory Agreement.

What else will I pay for?

- In addition to our fees, you will pay commissions and other charges to other companies in connection with buying and selling investments (*e.g.,* broker commissions).

Read more about other fees and expenses you will pay on page 9 of our Brochure.

What are your responsibilities to me when it comes to investment advice?

- We are fiduciaries. That means we are required to **act in your best interest** for our **entire advisory relationship** with you.

What conflicts of interest do you have?

- **Our interests can conflict with your interests** at times.
- We have **business relationships** with other firms that result in us getting paid additional money for buying or selling certain investments. In addition, our employees have **financial incentives** relating to the purchase or sale of certain investment products.
- We can buy investments from you, and sell investments to you, **from our own account**. We can earn a profit on these trades, so we have an **incentive to encourage you to trade with us**. We must get your **prior consent each time** we do these trades.

Read more about our conflicts of interest and how we manage them in our Brochure.

Do you have any disciplinary history?

- Yes. Read about our disciplinary history on page 17 of our Brochure.

What else should I consider?

- Read the attached Brochure before you invest with us. It contains **important information**.
- There are other **types of financial services professionals** with differing legal obligations and types of services who can help you with financial and investment decisions. The SEC provides free information that allows you to **research and compare these financial professionals** and suggests the types of **questions you should be asking at** www.investor.gov.

Relationship Summary

Molokini Securities, Inc.

August 7, 2018

*Registered with the Securities and Exchange Commission as a **Broker-Dealer***

HYPOTHETICAL RELATIONSHIP SUMMARY PREPARED BY THE INVESTMENT ADVISER ASSOCIATION. FOR ILLUSTRATIVE PURPOSES ONLY.

What services will you provide me?

- We will provide you with an account for you to make investments in and **may recommend specific investments for you**.
- **You will decide** your overall investment strategy and make all final decisions about whether to buy or sell.
- We offer a **limited selection** of investments.

Read about our other services and types of accounts in the attached Account Documentation on page 5.

What fees will I pay you?

- Our fees are **transaction-based**, which means that every time you buy or sell you pay us a commission.
- The **amount you pay us varies** based on the type of investment, how much of it you buy or sell, and what kind of account you have with us.

Read more about our fees on page 8 of the Account Documentation.

What else will I pay for?

- In addition to our transaction-based fees, you will pay us other fees, such as custodian fees, account maintenance fees, and account inactivity fees.

Read more about other fees and expenses you will pay on page 9 of the Account Documentation.

What are your responsibilities to me when it comes to investment advice?

- We must act in your **best interest when we recommend** a specific investment or investment strategy. Unless we agree otherwise, we are **not required to review or make recommendations** for your account on an ongoing basis.

What conflicts of interest do you have?

- **Our interests can conflict with your interests** at times.
- We have **business relationships** with other firms that result in us getting paid additional money for buying or selling certain investments. In addition, our employees have **financial incentives** relating to the purchase or sale of certain investment products.
- We can buy investments from you, and sell investments to you, **from our own account**. We can earn a profit on these trades, so we have an **incentive to encourage you to trade with us**.

Read more about our conflicts of interest and how we manage them in the Account Documentation.

Do you have any disciplinary history?

- Yes. Read about our disciplinary history on page 17 of the Account Documentation.

What else should I consider?

- Read the attached Account Documentation before you invest with us. It contains **important information**.
- There are other **types of financial services professionals** with differing legal obligations and types of services who can help you with financial and investment decisions. The SEC provides free information that allows you to **research and compare these financial professionals** and suggests the types of **questions you should be asking** at www.investor.gov.

Relationship Summary for Advisory Account

Kohala Wealth Management, Inc.

August 7, 2018

*Registered with the Securities and Exchange Commission as an **Investment Adviser** and a **Broker-Dealer***

HYPOTHETICAL RELATIONSHIP SUMMARY PREPARED BY THE INVESTMENT ADVISER ASSOCIATION. FOR ILLUSTRATIVE PURPOSES ONLY.

What services will you provide me?

- **We will manage your investments for you.** We will make investments on your behalf based on your goals and financial circumstances and will follow any investment restrictions you request.
- If you hire us, you will give us **discretionary authority** to buy and sell investments in your account without having to get your prior approval for each transaction. We will manage your investments on an **ongoing basis**.
- Depending on your needs and investment objectives, we can also provide you with services in a **brokerage** account. For more information, please go to www.kohala.com/brokerage to see a summary like this one for brokerage accounts.

For more information regarding all of our services, read the attached Brochure starting on page 5.

What fees will I pay you?

- Our advisory fees are based on a **percentage of your assets under management** with us. This means that if your assets grow we get paid more.
- Our fees will not change based on the type of investment we select for you or the number of times we buy or sell investments for you.

Read more about our fees on page 8 of the Brochure. Your specific fee schedule will be in your Advisory Agreement.

What else will I pay for?

- In addition to our fees, you will pay commissions and other charges to other companies in connection with buying and selling investments (*e.g.,* broker commissions).

Read more about other fees and expenses you will pay on page 9 of our Brochure.

What are your responsibilities to me when it comes to investment advice?

- When we act as your investment adviser, we are fiduciaries. That means we are required to **act in your best interest** for our **entire advisory relationship** with you.

What conflicts of interest do you have?

- **Our interests can conflict with your interests** at times.
- We have **business relationships** with other firms that result in us getting paid additional money for buying or selling certain investments. In addition, our employees have **financial incentives** relating to the purchase or sale of certain investment products.
- We can buy investments from you, and sell investments to you, **from our own account**. We can earn a profit on these trades, so we have an **incentive to encourage you to trade with us**. We must get your prior consent each time we do these trades.

Read more about our conflicts of interest and how we manage them in our Brochure.

Do you have any disciplinary history?

- Yes. Read about our disciplinary history on page 17 of our Brochure.

What else should I consider?

- Read the attached Brochure before you invest with us. It contains **important information**.
- There are other **types of financial services professionals** with differing legal obligations and types of services who can help you with financial and investment decisions. The SEC provides free information that allows you to **research and compare these financial professionals** and suggests the types of **questions you should be asking** at www.investor.gov.

Relationship Summary for Brokerage Account

Kohala Wealth Management, Inc.

August 7, 2018

*Registered with the Securities and Exchange Commission as a **Broker-Dealer** and an **Investment Adviser***

HYPOTHETICAL RELATIONSHIP SUMMARY PREPARED BY THE INVESTMENT ADVISER ASSOCIATION. FOR ILLUSTRATIVE PURPOSES ONLY.

What services will you provide me?

- We will provide you with an account for you to make investments in and **may recommend specific investments for you**.
- **You will decide** your overall investment strategy and make all final decisions about whether to buy or sell.
- We offer a **limited selection** of investments.
- Depending on your needs and investment objectives, we can also provide you with services in an **investment advisory** account. For more information, please go to www.kohala.com/investmentadvisory to see a summary like this one for advisory accounts.

Read about our other services and types of accounts in the attached Account Documentation on page 5.

What fees will I pay you?

- Our brokerage account fees are **transaction-based**, which means that every time you buy or sell you pay us a commission.
- The **amount you pay us varies** based on the type of investment, how much of it you buy or sell, and what kind of account you have with us.

Read more about our fees on page 8 of the Account Documentation.

What else will I pay for?

- In addition to our transaction-based fees, you will pay us other fees, such as custodian fees, account maintenance fees, and account inactivity fees.

Read more about other fees and expenses you will pay on page 9 of the Account Documentation.

What are your responsibilities to me when it comes to investment advice?

- When we act as your broker-dealer, we must act in your **best interest when we recommend** a specific investment or investment strategy. Unless we agree otherwise, we are **not required to review or make recommendations** for your account on an ongoing basis.

What conflicts of interest do you have?

- **Our interests can conflict with your interests** at times.
- We have **business relationships** with other firms that result in us getting paid additional money for buying or selling certain investments. In addition, our employees have **financial incentives** relating to the purchase or sale of certain investment products.
- We can buy investments from you, and sell investments to you, **from our own account**. We can earn a profit on these trades, so we have an **incentive to encourage you to trade with us**.

Read more about our conflicts of interest and how we manage them in the Account Documentation.

Do you have any disciplinary history?

- Yes. Read about our disciplinary history on page 17 of the Account Documentation.

What else should I consider?

- Read the attached Account Documentation before you invest with us. It contains **important information**.
- There are other **types of financial services professionals** with differing legal obligations and types of services who can help you with financial and investment decisions. The SEC provides free information that allows you to **research and compare these financial professionals** and suggests the types of **questions you should be asking** at www.investor.gov.