What's in a Name? Regulation Best Interest v. Fiduciary

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Washington D.C.

Thank you for that kind introduction. I am excited to be with a group of people who play such a vital role in helping to provide peace of mind to workers planning for and heading into retirement. The Commission also has a role to play in helping to enhance retirement security for Americans. I want to focus today's remarks on our work in overseeing the broker-dealers and investment advisers that work with investors to secure their retirements. You will not be surprised to hear that my particular focus will be on the recently proposed standards for broker-dealers and investment advisers providing investment assistance to investors. Before proceeding, I must, as always, provide the standard disclaimer that the views I express today are my own, and do not necessarily reflect the views of the Commission or my fellow Commissioners.

I. Words –What do They Mean?

I am going to start with a little Latin, but it may not be what you are thinking; I am not going to start with the Latin etymology of the word "fiduciary."[1] Instead, the Latin lesson of the day is "Malo malo malo malo." I struggled through a lot of years of Latin in school, but for all that study, I still was stumped by "malo malo malo malo" when someone challenged me with that sentence recently. It is the same word four times in a row, so how hard could it be? I assumed it was "bad, bad, bad, bad" or "evil, evil, evil, evil," which might be a pretty good sentence to have handy in connection with a lot of financial regulatory policy debates.

In Latin, however, the same word can have a number of different meanings and word endings really matter. I have seen the sentence, "Malo malo malo malo" translated—perhaps a bit loosely—as "I prefer to be a bad man in an apple tree, rather than the mast of a ship"[2] or "I would rather be in an apple tree than a wicked man in adversity"[3] or some variant thereof.[4] Regardless of which translation one chooses, my point in sharing it with you today is that the same word seems to have a lot of different possible meanings.

It is not just in Latin that words can mean different things to different people and in different contexts. When a word has multiple meanings or no clear meaning, its use can confuse rather than shed light. For retirement investors, for example, confusion arises from the use of the word "adviser" (or "advisor") by

both investment advisers and broker-dealers and their representatives. Studies have shown that, as a result of loose language, investors are confused regarding the nature of the services offered by, and the standards of conduct applicable to, broker-dealers and investment advisers, and regarding whether their firm or financial professional is a broker-dealer or an investment adviser, or both.[5] The fact that investors are confused does not mean they are dissatisfied with the service they are getting.[6] To reduce investor confusion in the marketplace for firm services, the Commission recently proposed to limit the use of the word "adviser" (or "advisor") by certain broker-dealers and their registered representatives when communicating with a retail investor.[7]

Some commenters would have liked us to go further. According to these commenters, we should instead force broker-dealers to call themselves "salespeople."[8] Back in the day when brokers did call themselves salespeople, some were nevertheless able to cultivate trust and abuse it. In a 1963 speech, Allan Conwill, the director of the SEC's predecessor to the Division of Investment Management, described trust-building tactics then in vogue for mutual fund salesmen, including the garage trick—approach a young mechanic working in a repair shop and tell him that if he invests with you, he will be able to buy the place—and the young mother trick—identify a new mother through the birth announcements in the paper and tell her that she only has to invest with you to guarantee the funds for a fine education for her new infant.[9] The young mother being targeted in that instance worked at the SEC as a financial analyst, so no sale.[10]

In the end, it really is not the title someone uses, but the standard to which he is held that matters. In his 1963 speech, Mr. Conwill suggested a standard—back to Latin here—"caveat venditor"—seller beware: "the salesman must be scrupulously fair; he cannot be deceptive; he must consider his customer's need and financial capacity. His responsibility far exceeds that of salesmen of other wares."[11] We too, in our April proposal, tackled the question of what standards should apply to both investment advisers and broker-dealers.[12] Again, however, the words we are using need close consideration.

II. Are the Soothing Sounds of Legalese in Investors' Best Interest?

The word "fiduciary" hangs heavily over any discussion about standards for financial professionals. The word carries a lot of different meanings, and legal context matters. A fiduciary under the Employee Retirement Income Security Act ("ERISA"), for example, means something other than a fiduciary under the Investment Advisers Act of 1940. Even within the same legal context, the term "fiduciary" can change over time. The Department of Labor ("DOL"), for example, changed the definition of "fiduciary" for its purposes in its 2016 rulemaking.[13] Yet, that rule was marketed—quite effectively I might add—by appealing to a purported uniform understanding of "fiduciary" by the American population. Daring to call into question that such a uniform understanding of "fiduciary" actually existed was deemed as acting against the interest of investors.

Never mind that it took many pages of regulation and lots of interpretation to explain what "fiduciary" meant in the new DOL iteration. Never mind that even lawyers and financial professionals do not have a universal understanding of what the term means. Never mind that the Commission felt it necessary, at the same time it proposed Regulation Best Interest, to propose an interpretive release "to address in one release and reaffirm – and in some cases clarify – certain aspects of the fiduciary duty that an investment adviser owes to its clients under section 206 of the Advisers Act."[14] We may not have even gotten the interpretation right yet. In fact, I take issue with one important aspect of the proposed interpretation of an adviser's fiduciary duty. The Commission states that the duty of loyalty component of an adviser's fiduciary duty requires the adviser to acquire "informed consent" from its clients to any material conflict of interest that could affect the advisory relationship.[15] However, as authority for this position the

Commission cites, not a court decision or other weighty legal precedent, but an Instruction to Form ADV. [16] An early commenter raised other issues with the proposed interpretation.[17] In short, the term fiduciary duty is not easy to define even within the advisory context.

The term "fiduciary" has become such an oft-repeated mantra that I worry it will have the perverse effect of harming investors. Investors are told repeatedly that all they need to ask is one simple question about their financial professional: Are you a fiduciary? Suggesting that a single word assures you that the person with whom you are dealing will serve you well dissuades investors from asking the questions they should ask before choosing a financial professional. It provides a false sense of reassurance to retail investors.

The word "fiduciary" is so powerful that some people seem to be assessing our proposed Regulation Best Interest solely based on the absence of the word in the new standard. If we are not calling the standard fiduciary, it must not be good, in the minds of some. Instead, we used another term, but one that also gives me pause—"best interest."

The term "best interest" may not be as old as "fiduciary," but it is not new either. It has been bandied about Washington over the last decade as if it were an incantation that could cure all that is wrong in the retail investor space.[18] Just as the word "fiduciary" seems to carry with it mystical medicinal powers, so too—in some quarters—the term "best interest" is apparently imbued with special healing abilities.

As with the fiduciary standard, however, one has to ask: regardless of how nice it sounds, what does "best interest" actually mean? The Commission spent hundreds of pages describing the new "best interest" standard, but it is not clear that people understand it. We have yet to receive many letters in our comment file, but some of the most vocal critics are the same people who said that the current "suitability" standard is insufficient because it allows broker-dealers to place their own financial interests ahead of those of their customers.[19] The Commission now has proposed to require that a broker-dealer

> when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer . . . ahead of the interest of the retail customer.[20]

The critics remain unsatisfied, but the basis for their dissatisfaction seems to be that we have not used the favored "fiduciary" terminology.

A bigger concern for me is that the best interest standard suffers from the same problem the fiduciary standard does—a term that is wonderful for marketing purposes, but potentially misleading for investors. Just as "fiduciary" has been used to lull investors into not asking questions about their financial professional, so "best interest" runs the risk of becoming a term that encourages investors simply to rely on the fact that their best interest is being taken care of. If we retain the term, we—as regulators—and you—as advisers and brokers—ought to make an effort to encourage investors to look beyond nice terms to the substance of what their financial professional is doing—or not doing—for them and how much she is charging.

III. "Best Interest" or "Fiduciary Duty" Standard – Is there a Practical Difference?

In that vein, I am going to move beyond words to the substance of what we proposed in Regulation Best Interest. In light of the continued claims that the best interest standard is inferior to the hallowed "fiduciary duty," it is interesting to look at the proposed best interest standard alongside the Commission's proposed interpretation of an adviser's fiduciary duty to its clients. They are very similar. In fact, I only see two

major differences between the standards. One of these differences makes the fiduciary standard seem stronger, and the other makes it seem weaker than Regulation Best Interest.

Proposed Regulation Best Interest requires a broker-dealer when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer, to act in the best interest of the retail customer at the time the recommendation is made without placing the financial or other interest of the broker-dealer ahead of the interest of the retail customer. The proposed rule does not define best interest but provides that the best interest obligation shall be satisfied if: (i) the broker-dealer reasonably discloses to the retail customer, in writing, the material facts relating to the scope and terms of the relationship with the retail customer and all material conflicts of interest that are associated with the recommendation; (ii) the broker-dealer, in making the recommendation, exercises reasonable diligence, care, skill, and prudence;[21] (iii) the broker-dealer establishes, maintains, and enforces written policies and procedures reasonably designed to identify and at a minimum disclose, or eliminate, all material conflicts of interest that are associated with such recommendations; and (iv) the broker-dealer establishes, maintains, and enforces written policies and procedures reasonably designed to identify and disclose ***and mitigate, or eliminate***, material conflicts of interest arising from financial incentives associated with such recommendations.[22] Regulation Best Interest would supplement broker-dealers' existing specific obligations, including suitability, best execution, and fair and reasonable compensation.[23] Broker-dealers would comply with the new Regulation Best Interest obligations under the watchful eye of FINRA.

The fiduciary duty standard that investment advisers owe to their clients, at least as described in the Commission's proposed interpretive release, includes a duty of care and a duty of loyalty. The duty of care includes, among other things: (i) the duty to act and to provide advice that is in the best interest of the client; (ii) the 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) the duty to provide advice and monitoring over the course of the relationship.[24] The duty to act in the best interest of the client is the same as proposed in Regulation Best Interest and includes that any advice given be suitable for the client.[25] The duty to seek best execution is the same as a broker-dealer's obligation to seek best execution. The only difference between the duty of care an investment adviser owes to a client and a broker-dealer's duty to its clients is that an adviser generally must provide continuous advice and monitoring at a frequency that is both in the best interest of the client and consistent with the scope of advisory services agreed upon between the investment adviser and the client.[26] By contrast, a broker-dealer, absent a contractual agreement to the contrary, is not required to monitor a retail customer's account.[27]

The proposed adviser's duty of loyalty requires the adviser to put its client's interests first, prohibits the adviser from favoring itself or another client, requires disclosure of material facts about the advisory relationship, and requires avoidance or, at a minimum, disclosure of material conflicts of interest.[28] Although proposed Regulation Best Interest does not include an explicit "duty of loyalty" component, as we just discussed, a broker-dealer would be required to have procedures in place to ensure disclosure of all material conflicts of interest and mitigation or elimination of any material financial conflicts of interests.

In comparing the proposed Regulation Best Interest standard as well as a broker-dealer's other requirements under the securities laws to an adviser's fiduciary duty as described in the proposed interpretive release, only two differences stand out. First, an adviser generally has an ongoing duty to monitor over the course of its relationship with its client, while a broker-dealer generally does not. Second, a broker-dealer must either mitigate or eliminate any material financial conflict of interest it may have with its client. An adviser is required only to disclose such a conflict. Rhetoric aside, arguably proposed Regulation Best Interest would subject broker-dealers to an even more stringent standard than the fiduciary standard outlined in the Commission's proposed interpretation.

The Commission acknowledged concerns that the imposition of a new higher standard of conduct on broker-dealers could result in retail customers losing access to advice they receive through recommendations from broker-dealers, and customers that do not have the option of moving to fee-based accounts would in effect be unable to obtain investment assistance.[29] At a minimum, their costs of obtaining such assistance might rise markedly. Although we tried to be cognizant of these access concerns, given the relative balance of the two standards, I fear that more and more broker-dealers will decide to become advisers that offer only fee-based accounts resulting in many Americans being shut out from receiving any investment advice.[30]

We are already seeing this dynamic at work. Brokers are taking a hard look at the existing regulatory framework coupled with FINRA arbitrations in which sometimes a fiduciary standard is applied.[31] Then they look over the fence to the adviser world with its principles-based fiduciary standard, less frequent exams, absence of arbitration, and predictable revenue streams. Having engaged in this comparative exercise, many firms and individual financial professionals say farewell to FINRA, hop on the fiduciary bandwagon, and never look back. Regulation Best Interest could exacerbate this trend.

IV. What Would a Simpler Standard of Conduct Look Like?

I would have preferred a simpler approach. First, I would not refer to the standard as, or include within the standard, the term "best interest." Proposed Regulation Best Interest does not attempt to define best interest because nobody can explain what it means.[32] More importantly, we are sending investors a message that they need not ask questions—precisely the opposite of the message investors need to hear.

Second, despite what critics have said, the suitability standard applicable to broker-dealers has teeth and has been effective. Therefore, I would have preferred that the new standard had included suitability as one component while adding as a second component that a broker-dealer cannot put its interest ahead of the interest of the retail customer. This simplified approach would be clear and concise with the suitability component being well established within the financial community and with the additional piece giving the Commission the ability to reach practices that harm retail investors. Together with the proposed customer relationship summary, prohibiting a broker from putting its own interest ahead of its clients should sufficiently address conflict of interest concerns.

Finally, I will add a concern that was highlighted in a comment letter—obligations should be imposed through the rule text, not through language in the rulemaking release.[33] Especially in an area like this in which investors and registered representatives need to know what the rules are, a lengthy rulemaking release that supplements the rule text can breed confusion.

Speaking of breeding confusion, I will close with a few comments on the proposed relationship summary.

V. Will Four More Pages of Legalese Speak to Investors?

Investor friendly disclosure should be the focus of the Commission's disclosure regime. Our public disclosure requirements should focus on information that investors find useful and important in making their investment decisions presented in a format that draws them in, rather than repels them. I think everyone here can agree that the current disclosure regime is not investor friendly. It is geared toward avoiding legal liability and satisfying regulators. The result is lengthy documents with an overabundance of information of limited interest and use to investors presented in an unwelcoming format. Frankly, we might as well require that disclosures be presented in Latin.

A very important piece of our standards of conduct rulemaking is the investor disclosure component. New Form CRS—which stands for Customer or Client Relationship Summary—is a four-page (at most) document to be delivered in addition to—not in place of—any of the current disclosure documents that broker-dealers and advisers currently provide.[34] I like the idea of encouraging investors to think carefully about the nature of the relationship they have with their financial professional. I support the objective of encouraging investors to ask questions about the services their financial professionals provide, the products they offer, and the fees and commissions they pay. I remain concerned, however, that the approach we have proposed ties your hands when it comes to communicating with investors.

I look forward to feedback on Form CRS from investors and others with experience in communicating with retail customers. I am particularly interested in hearing from commenters on a number of issues. First, taking a step back from this particular proposal, should we engage in a comprehensive review—including investor-testing—of the disclosures already provided to investors to identify information that is not material to most investors? Second, is Form CRS enough, or do we also need the disclosures mandated in Regulation Best Interest? Third, how can we modify the rule to allow for experimentation with more multi-media based approaches as opposed to the paper-based Form CRS? To engage investors firms should be encouraged to experiment with the use of videos, mobile apps, interactive web-based disclosure, and social media to find out how investors prefer to receive information. Fourth, as modeled in the proposal, Form CRS is chock full of legalese and technical terms. Is this approach, which seeks to familiarize investors with terms they might encounter in their interactions with financial firms, appropriate?

Finally, I am interested in hearing comments on the nature of the items contained in Form CRS. Form CRS is structured as a comparative form—setting broker-dealer and advisory services side-by-side. Is it appropriate to require firms to disclose information about services they do not provide or that are otherwise not available to the investor receiving the form? Does the form work for all types of firms? Content-wise, I would posit that the information most important to investors and upon which they would be most likely to base their investment decisions is the total fees they will pay. While Form CRS contains information on fees, the information does not appear until Item 4 and does not provide the total fee a particular investor will pay. Form CRS may not be the place for investor-specific cost disclosure, but, as technology improves, offering investors a clear picture of the costs they have incurred during the previous year is a possibility. Former SEC Chief Economist Mark Flannery offered a suggested sample report designed to "collect[] all fees and costs associated with assembling or maintaining an investor's portfolio into a single place."[35] I hope that commenters on Form CRS will shed light on the current ability to provide personalized total fee information to investors.

VI. Conclusion

The appropriate standard of care for those who provide investment advice to retail investors has been a hotly debated issue over at least the last decade. As former Commissioner Michael Piwowar said almost four years ago when addressing this same conference, "this question is not just really hard to answer. It is really, really, really hard – with three 'reallys'."[36] The exercise is "malo malo malo malo," I might say—meaning "evil, evil, evil, evil," given the hours so many have poured into it. That said and despite the concerns I laid out today, I think the outcome of this exercise can be good. Chairman Clayton, to his credit, made it a priority to address this difficult set of issues in a carefully considered proposed rulemaking. I am committed to working with the Chairman to get this rule finalized. Now we need feedback from you, the investors you serve, and others to get the final version right.

Thank you for the opportunity to share my thoughts. I am happy to take questions, although I know you have a busy schedule for the rest of the afternoon and tomorrow.

[1] “Fiduciary,” which means “of, relating to, or involving a confidence or trust: such as a: held or founded in trust or confidence a fiduciary relationship a bank's fiduciary obligations b : holding in trust c : depending on public confidence for value or currency,” is derived from the Latin word “fiducia,” which, in turn, means “confidence, trust.” Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/fiduciary (last visited July 20, 2018).

[2] *Malo: A Sentence in Itself*, Latin Reference (Apr. 16, 2011 7:47 AM), *available at* https://latinreference.wordpress.com/2011/04/16/malo-a-sentence-in-itself/ .

[3] Henry Thomas Riley, ed., A Dictionary of Latin and Greek Quotations, Proverbs, Maxims, and Mottos 217 (1909).

[4] A friend of mine, who is a far better Latin scholar than I, suggests that I am treading on shaky ground by suggesting that anyone would ever use “malo malo malo malo” in everyday conversation to convey anything of this sort, but since most of us do not use Latin in everyday conversation, I am willing to go out on a limb (of an apple tree) for the sake of the argument.

[5] *See, e.g.,* Angela A. Hung et al., *RAND Institute for Civil Justice, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers* (2008) (“RAND Report”), *available at* http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf. The Rand Study examined broker-dealers’ and investment advisers’ practices in marketing and providing financial products and services to individual investors and investors’ understanding of the differences between broker-dealers’ and investment advisers’ financial products and services and their duties and obligations. Participants in the study “commented that the interchangeable titles and ‘we do it all’ advertisements [by broker-dealers] made it difficult to discern broker-dealers from investment advisers.” *Id.* at xix.

[6] *See, e.g.*, *id*. at 118 (“[d]espite their apparent confusion about titles, duties, and fees, investors expressed high levels of satisfaction with the services they receive from their own financial service providers”).

[7] *See* Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles, Investment Advisers Act Release No. 4888 (Apr. 18, 2018) [83 FR 21416 (May 9, 2018)] (“Form CRS Proposing Release”) at Summary, *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08583.pdf.

[8] *See, e.g.*, Letter from The Committee for the Fiduciary Standard to Jay Clayton (Jan. 12, 2018), *available at* https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2902376-161829.pdf (“Specifically, we recommend that the Commission require that any title they use clearly denote their role as salespersons. Titles can range from ‘salesperson’ to ‘broker’ but may not include terms that suggest a level of advice beyond that of stimulating the sale of product.”). *See also* Comment Letter from Jacob D. Kuebler (July 2, 2018), *available at* https://www.sec.gov/comments/s7-07-18/s70718-167198.htm (“Consumers are ok with commission transactions; car buying, house buying, etc. However, they know that those professionals are commissioned and in a sales role. We can keep the same simple distinction for true planning and advice vs. sales in our industry.”).

[9] Allan F. Conwill, Director, Division of Corporate Regulation, Securities and Exchange Commission, The Minority Menace to Mutual Fund Selling 1-2, 4 (Apr. 23, 1963).

[10] *Id*. at 4.

[11] *Id*. at 5.

[12] Regulation Best Interest, Exchange Act Release No. 83062 (Apr. 18, 2018), [83 FR 21574 (May 9, 2018)] ("Regulation Best Interest"), *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08582.pdf;

Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, Investment Advisers Act Release No. 4889 (Apr. 18, 2018) [83 FR 21208 (May 9, 2018)] ("Interpretive Release") *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-05-09/pdf/2018-08679.pdf.

[13] Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 FR 20945, 20946 (Apr. 8, 2016) ("With this regulatory action, the Department will replace the 1975 regulations with a definition of fiduciary investment advice that better reflects the broad scope of the statutory text and its purposes and better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty.").

[14] *See* Interpretive Release, supra note 12, at notes 7-8 and accompanying text.

[15] *See id.* at notes 39-40 and accompanying text, note 46 and accompanying text.

[16] *See* General Instruction 3 to Part 2 of Form ADV (stating that an adviser's disclosure obligation "requires that [the adviser] provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest [the adviser has] and the business practices in which [the adviser] engage[s], and can give informed consent to such conflicts or practices or reject them").

[17] *See* Comment Letter of the Committee on Investment Management Regulation, New York City Bar Association (June 26, 2018), *available at* https://www.sec.gov/comments/s7-09-18/s70918-3937033-167034.pdf (raising concerns about the proposed interpretation's suggestion that disclosure alone is not sufficient for some conflicts and the subjectivity of the informed consent concept under the proposal)

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

[19] *See, e.g.*, Letter from Barbara Roper, Director for Investor Protection, Consumer Federation of America to Chairman Jay Clayton, SEC (Sept. 14, 2017) at 2 ("The problem is that investors are being misled into relying on biased sales recommendations as if they were objective, best interest advice and are suffering significant financial harm as a result."); at 12 ("At the most basic level, investors who go into the market seeking investment advice are harmed when they are misled into instead hiring a mere 'salesperson.' Instead of getting the best interest advice they expect and need, they receive what industry trade associations have described as arm's length commercial sales recommendations. Because investment advice and sales recommendations are often indistinguishable, investors are misled into relying on those sales recommendations as if they were best interest advice.").

[20] Proposed rule 240.15*l*-1(a).

[21] The broker-dealer must exercise reasonable diligence, care, skill and prudence to: (1) understand the potential risks and rewards associated with the recommendation, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers; (2) have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks and rewards associated with the recommendation; and (3) have a reasonable basis to believe that a series of recommended transactions,

even if in the retail customer's best interest when viewed in isolation, is not excessive and is in the retail customer's best interest when taken together in light of the retail customer's investment profile. Proposed Rule 240.15*l*-1(a)(2)(ii).

[22] Proposed rule 15*l*-1 under the Securities Exchange Act of 1934 (17 CFR 240.15*L*-1) (emphasis added).

[23] As noted in the proposing release, the Commission did not propose "to amend or eliminate existing broker-dealer obligations, and compliance with Regulation Best Interest would not alter a broker-dealer's obligations under the general antifraud provisions of the federal securities laws. Regulation Best Interest applies in addition to any obligations under the Exchange Act, along with any rules the Commission may adopt thereunder, and any other applicable provisions of the federal securities laws and related rules and regulations." Regulation Best Interest, *supra* note 12, at text accompanying note 87. *See also* Form CRS Proposing Release, *supra* note 7, at note 33 and accompanying text ("the relationship summary would be in addition to, and not in lieu of, current disclosure and reporting requirements for broker-dealers and investment advisers").

[24] Interpretive Release, *supra* note 12, at section II.A.

[25] *Id.* at section II.A.i.

[26] *Id.* at section II.A.iii.

[27] Regulation Best Interest, supra note 12, at text accompanying note 144.

[28] Interpretive Release, *supra* note 12, at notes 38-40 and accompanying text.

[29] Regulation Best Interest, *supra* note 12, at text accompanying note 84.

[30] In 2013, the United Kingdom ("UK") introduced the Retail Distribution Review ("RDR"), which was designed to promote transparency in the financial advice industry. The RDR bans advisers from taking a commission for selling products and requires that all fees, paid only by clients, had to be agreed upon in advance. Prior to the RDR, advisers did not charge clients for advice, but instead earned commissions from asset managers for selling their products. Researchers found substantial negative effects on competition, with a reduction of more than 44% in bank advisers and 20% in independent financial advisers after the RDR was implemented. *See* Deloitte, *Recognising RDR Reality -- The Need to Challenge Planning Assumptions* (July 2013), *available at* http://www.deloitte.com/view/en_GB/uk/industries/financial-services/issues-trends/retail-distribution-review/794d59a825daf310VgnVCM3000003456f70aRCRD.htm .

[31] *See Gochnauer v. A.G. Edwards & Sons,* 810 F.2d 1042, 1050 (11th Cir. 1987).

[32] Commissioner Hester Peirce, Statement at Open Meeting on Standards of Conduct for Investment Professionals (Apr. 18, 2018).

[33] *See* Comment Letter of Kent A. Mason (July 20, 2018) (noting that "critical 'rules' are buried in the preamble, not in the regulation").

[34] Form CRS envisions a brief relationship summary (no more than four pages) that informs investors about the relationships and services the firm offers, the standard of conduct and the fees and costs associated with those services, specified conflicts of interest, a comparison of brokerage and investment advisory services (for standalone broker-dealers and investment advisers), and whether the firm and its financial professionals currently have reportable legal or disciplinary events. Form CRS Proposing Release, *supra* note 7.

[35] Comment Letter of Mark Flannery (July 27, 2017), *available* at https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2145300-157724.pdf.

[36] *See* Commissioner Michael S. Piwowar, Remarks at the National Association of Plan Advisors D.C. Fly-In Forum, Washington, D.C. (Sept. 30, 2014), *available at* https://www.sec.gov/news/speech/2014-spch093014msp.