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June 6, 2018

Hon. Jay Clayton, Chairman
Hon. Kara M. Stein
Hon. Michael S. Piwowar
Hon. Robert Jackson
Hon. Hester M. Peirce
Securities and Exchange Commission
c/o Brent J. Fields, Secretary
100 F Street, NE
Washington, DC 20549-1090

RE: Regulation Best Interest; File Number S7-07-18

Dear Mr. Chairman and Commissioners:

Thank you for the opportunity to comment on the Commission's proposed Regulation Best Interest. The Commission is to be applauded for taking this important step toward fulfilling the goal of section 913 of the Dodd-Frank Act to clarify the standards applicable to broker-dealers when they give personalized investment advice to retail customers.

The proposal goes far toward a recognition that broker-dealers are fiduciaries when they give such advice. The "best interest" standard on its face is a fiduciary standard, and brokers operating under it will be fiduciaries under widely recognized common law fiduciary principles.

Yet, the Commission has failed to acknowledge that the proposed standard is a fiduciary standard. The proposal thus is incomplete. The failure to attach the label of "fiduciary" to brokers when they clearly act in a fiduciary capacity will undermine the Commission's intent to mitigate confusion by retail investors when they seek personalized investment advice. Brokers will not consider themselves fiduciaries, and investors still will not know the difference between a broker and an investment adviser.

The fact of the matter is that brokers already are "fiduciaries." They already operate subject to a fiduciary standard of care—namely, the standard in FINRA's Suitability Rule—which requires a broker to exercise reasonable diligence and act in the best interest of its customers when making investment recommendations. That standard is very similar to the standard of care in the Uniform Prudent Investor Act and indeed is more explicit than the standard of care applicable to investment advisers under the Investment Advisers Act of 1940. Despite disclaimers to the contrary, the Suitability Rule is a fiduciary standard and brokers operating subject to it are fiduciaries under long-standing common law fiduciary principles.[1]

By codifying and enhancing the Suitability Rule, Regulation Best Interest would codify and strengthen the fiduciary status of broker-dealers. There is no reason why the Commission should hesitate to acknowledge that what it is proposing is a fiduciary standard or refrain from calling brokers "fiduciaries" when they give investment advice in accordance with the standard.

What is a Fiduciary Standard?

A fiduciary standard is one that governs the fiduciary relationship that arises when one person agrees to act in the interests of another person who reasonably reposes trust and confidence that the first person will do so with a degree of care and without conflicting obligations or interests. The person who agrees to so act in the interests of another is called a "fiduciary." In fulfilling the fiduciary relationship, the fiduciary assumes duties based on standards of conduct designed to ensure that the purpose of the fiduciary relationship is served.

Two core fiduciary duties govern a fiduciary relationship—the duty of loyalty and the duty of care:

> The duty of loyalty requires a fiduciary to refrain from placing his own interests ahead of those to whom he is a fiduciary and to avoid unauthorized conflicts of interest.[2]
>
> The duty of care—also called "prudence"— requires a fiduciary to act with care, skill and diligence in fulfilling his designated functions.[3]

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[1] *See* Restatement 3d of Agency, § 8.01 General Fiduciary Principle, comment b ("The relationship between a principal and an agent is a fiduciary relationship.").

[2] *See* Restatement 3d of Agency, § 8.01 General Fiduciary Principle ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."); comment b ("…[T]he general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship."). The duty of loyalty generally is not breached if the principal is informed of a conflict of interest and consents to it, or if the conflict of interest is authorized by law or court order, and the action is fair and reasonable.

[3] *See* Restatement 3d of Agency, § 8.08 Duties of Care, Competence, and Diligence ("Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances. Special skills or knowledge possessed by an agent are circumstances to be

The duties of loyalty and care are the core fiduciary standards that apply across all fiduciary fields, including trust law, agency law, and employee benefits law.[4] Both of these duties are reflected in the existing regulation of broker-dealers and investment advisers when they give investment advice to retail customers.

In addition to the classic duties of loyalty and care, an overarching "best interest" standard has been articulated in recent years under which a fiduciary owes a duty to act in the "best interest" of the customer. This duty is expressed as a duty to act in the customer's best interest without regard to conflicting interests. Thus stated, the best interest standard represents a combination of the duty of loyalty and the duty of care.

The "best interest" standard appears in section 913 of the Dodd-Frank Act, which authorizes the Commission to adopt a uniform fiduciary standard of care under which the standard of conduct for all broker-dealers and investment advisers when providing personalized investment advice to retail customers shall be:

> to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.[5]

The best interest standard also is reflected in the best interest contract (BIC) exemption adopted by the Department of Labor in 2016 based on the general fiduciary duties embedded in the Employee Retirement Income Security Act of 1974 ("ERISA").[6] The best interest standard also is reflected in FINRA's Suitability Rule, which governs brokers when they make investment recommendations to retail investors.[7]

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taken into account in determining whether the agent acted with due care and diligence. If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge.").

[4] *See* Restatement 3d of Trusts, § 77 Duty of Prudence; § 78, Duty of Loyalty. *See also* Uniform Prudent Investor Act.

[5] Dodd-Frank Wall Street Reform and Consumer Protection Act § 913(g).

[6] *See* Definition of the Term "Fiduciary" Conflict of Interest Rule – Retirement Investment Advice, 81 Federal Register 20945, 20958-59 (Apr. 8, 2016); Best Interest Contract Exemption, 81 Federal Register 21002, 21089 (Apr. 8, 2016). The DOL's rule was vacated by an appellate court in 2018. *See Chamber of Commerce of the U.S.A., et al. v. U.S. Dep't of Labor, et. al.*, No. 17-10238 (5th Cir.) (Mar. 15, 2018). The general fiduciary principles upon which the DOL's rule was based, however, remain in effect under ERISA.

[7] FINRA Rule 2111, Suitability.

Brokers Already Are "Fiduciaries"

FINRA's Suitability Rule imposes a fiduciary standard of conduct on brokers who make investment recommendations. Although the Suitability Rule is not called a "fiduciary" rule, it incorporates fiduciary principles derived from agency and trust law, including standards of care and loyalty. The Rule articulates these standards using language similar to that in the Uniform Prudent Investor Act.[8]

FINRA's Suitability Rule, in substance and effect, is a fiduciary rule. Brokers who give investment advice subject to the Rule are acting in a fiduciary capacity and thus are "fiduciaries." The Rule provides, in pertinent part:

> A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.[9]

The Supplementary Material to the Rule states that the Suitability Rule "is fundamental to fair dealing and is intended to promote ethical sales practices and high standards of professional conduct."[10]

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[8] *See* Uniform Prudent Investor Act ("UPIA"), a uniform codification of trust law that applies to trustees when they invest trust assets. The Act was approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws in 1994. The Act has been adopted in substantially uniform form in nearly all of the states.

[9] FINRA Rule 2111.

[10] FINRA Rule 2111 Supplementary Material, .01 General Principles. The Supplementary Material further states:

"A member or associated person shall make a recommendation covered by this Rule only if, among other things, the member or associated person has sufficient information about the customer to have a reasonable basis to believe that the recommendation is suitable for that customer....A member or associated person shall use reasonable diligence to obtain and analyze all of the factors delineated in Rule 2111(a) unless the member or

FINRA has stated "it is well-settled" that a broker's recommendations "must be consistent with his customer's best interests."[11] In recommending best practices to broker-dealers, FINRA has said broker-dealers should adopt a "best interests of the customer" standard in the firm's code of conduct and make "only those recommendations that are consistent with the customer's best interests."[12]

The Suitability Rule requires a broker-dealer to act in a customer's "best interest":

> In interpreting FINRA's suitability rule, numerous cases explicitly state that "a broker's recommendations must be consistent with his customers' best interests." The suitability requirement that a broker make only those recommendations that are consistent with the customer's best interests prohibits a broker from placing his or her interests ahead of the customer's interests.[13]

This is a classic articulation of fiduciary duty, incorporating both the duty of care and the duty of loyalty.

FINRA has given the following as examples of violations of the Suitability Rule by brokers who placed their interests ahead of their customers' interests:

> A broker whose motivation for recommending one product over another was to receive larger commissions.
>
> A broker whose mutual fund recommendations were "designed 'to maximize his commissions rather than to establish an appropriate portfolio' for his customers."[14]

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associated person has a reasonable basis to believe, documented with specificity, that one or more of the factors are not relevant components of a customer's investment profile in light of the facts and circumstances of the particular case." FINRA Rule 2111 Supplementary Material, .04 Customer's Investment Profile.

[11] Regulatory Notice 11-02, Know Your Customer and Suitability (Jan. 2011).

[12] FINRA Conflicts of Interest Report (Oct. 2013) at 5, 9.

[13] FINRA FAQ 7.1, http://www.finra.org/industry/faq-finra-rule-2111-suitability-faq.

[14] *Id*. The Commission states that it is "not an explicit requirement of the Suitability Rule" that brokers make only recommendations that are consistent with the customer's best interests. Release No. 34-83062, Regulation Best Interest ("Proposing Release") at fn. 6. However, a fiduciary requirement need not be written in order to create a fiduciary obligation. For example, the fiduciary obligation of an investment adviser to make

These examples reflect the fiduciary duty of loyalty. As part of the "best interest" obligation, they give substance to the Suitability Rule as a <u>fiduciary</u> rule, prescribing a <u>fiduciary</u> standard of conduct for brokers.

The existing standard of care in the Suitability Rule is similar to that required of trustees under the Uniform Prudent Investor Act. The UPIA requires a trustee to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust, and by exercising reasonable care, skill, and caution. The UPIA uses similar "suitability" language and in essence imposes a "suitability" standard of care. For example, the UPIA standard of care requires that a trustee's decisions be evaluated as part of an overall investment strategy having risk and return objectives "reasonably suited" to the trust. It is the trustee's responsibility to invest at a risk level that is "suitable" to the purposes of the trust. A trustee has a duty to exercise oversight of the "suitability" of investments and to dispose of "unsuitable" assets within a reasonable time.[15]

The Proposal Codifies an Existing Fiduciary Standard

The Commission's Regulation Best Interest would essentially codify FINRA's Suitability Rule and make more explicit the best interest standard. The proposed regulation borrows language from both the Suitability Rule and the Uniform Prudent Investor Act. By making the best interest standard the centerpiece of Regulation Best Interest, the Commission is proposing nothing less than a fiduciary standard.

However, in its proposing release, the Commission refrains from calling the best interest standard a "fiduciary" standard. Indeed, it states, "we are <u>not</u> proposing a fiduciary duty that includes a duty of care for broker-dealers."[16] This statement is confusing given the content of Regulation Best Interest, which uses language that clearly is fiduciary in nature. The regulation clearly establishes an obligation of care that serves a fiduciary purpose and that would be considered a fiduciary duty under common law fiduciary principles.

The Commission readily acknowledges that a broker is a fiduciary when customers repose "trust and confidence" in the broker's advice.[17] The Commission states that a broker-dealer's duty to exercise "reasonable diligence,

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recommendations that are consistent with the customer's best interests is not a written rule requirement.

[15] *See* Uniform Prudent Investor Act § 2 comments and § 4.

[16] Regulation Best Interest Proposing Release at p. 160-61 (emphasis added).

[17] Proposing Release at fns. 143 and 441.

care, skill and prudence" under the proposed regulation "is designed to be similar to the standard of conduct that has been imposed on broker-dealers found to be acting in a fiduciary capacity."[18] The proposed regulation is premised on a recognition that retail customers do in fact repose trust and confidence in a broker's recommendations.[19] Otherwise, there would be no need for the regulation. Yet, the Commission maintains the fiction that brokers operating under the proposed regulation would not be fiduciaries.

The Commission states that the proposed regulation "draws upon the duties of loyalty and care as interpreted under…[the] Advisers Act."[20] The Commission also states that the proposed best interest obligation "would generally track key elements of both the language of Section 913 of the Dodd-Frank Act and the 913 Study recommendation for the wording of a uniform fiduciary standard" and "would reflect the principles underlying the 913 Study recommendations related to a uniform fiduciary standard of conduct."[21] Further, the Commission says the best interest standard would "resemble" the standard of conduct applicable to brokers found to be acting as fiduciaries under state common law.[22] Yet the Commission disclaims that its proposed regulation articulates a fiduciary standard.

What is preventing the Commission from openly declaring that brokers, like investment advisers, are fiduciaries when they give personalized investment advice to retail investors? What is preventing the Commission from acknowledging that Regulation Best Interest would establish a fiduciary standard

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[18] Proposing Release at fn. 222.

[19] *See* Proposing Release at 20 ("many retail customers generally and reasonably expect that their investment firms and professionals, including broker-dealers, will—and rely on them to—provide advice that is in their best interest by placing investors' interest before their own.").

[20] Proposing Release at 63. Notably, under the Advisers Act, an adviser is a fiduciary regardless of whether the customer reposes "trust and confidence" in the adviser.

[21] *Id*. at 64. The Commission also stated that its proposed rule "is not intended to supersede the body of case law holding that broker-dealers that exercise discretion or control over customer assets, or have a relationship of trust and confidence with their customers, owe customers a fiduciary duty, or the scope of obligations that attach by virtue of that duty." Regulation Best Interest Proposing Release at fn. 143.

[22] Proposing Release at p. 249. "Under proposed Regulation Best Interest, a broker-dealer's duty to exercise reasonable diligence, care, skill, and prudence would resemble the standard of conduct that has been imposed on broker-dealers found to be acting in a fiduciary capacity under state common law. Similarly, a broker-dealer's Disclosure Obligation (along with the Conflict of Interest Obligations) under proposed Regulation Best Interest would resemble the duty to disclose material conflicts imposed on broker-dealers found to be acting as fiduciaries under state common law."

for brokers that is similar if not identical to, and arguably stronger than, the fiduciary standard for investment advisers?

The Traditional Broker Model Has Changed

The Commission's stated reason for not proposing a "fiduciary" standard for brokers is to preserve the existing broker-dealer business model and the regulatory guidance and interpretations relating to that model.[23] While acknowledging public support for a uniform fiduciary standard of conduct for brokers and investment advisers,[24] the Commission said its preliminary view is that the benefits of a uniform fiduciary standard are outweighed by the need to preserve the separate business model for brokers.[25]

However, as the Commission well knows, the traditional broker business model has substantially changed in the past two decades. Only a small number of broker-dealers who deal with retail customers currently limit their services to order-taking. Investment advice has become a mainstay of the modern broker business model. This change in the business model is, after all, why Congress enacted section 913 of the Dodd-Frank Act, and why the DOL initiated its fiduciary rulemaking.

The Commission stated that one possible consequence of its proposal is that brokers who are dually registered as investment advisers might seek to avoid

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[23] *See* Proposing Release at p. 160-61.

[24] Proposing Release at pp. 25 and 33-34 ("Most commenters expressed support for a uniform fiduciary standard of conduct requiring firms to 'act in the best interest" of the investor…'").

[25] Proposing Release at pp. 330-31. The Commission explained: "We preliminarily believe that a uniform fiduciary standard that would attempt to fit a single approach to retail customer protection to two different business models is unlikely to provide a tailored solution to the conflicts that uniquely arise for either broker-dealers or investment advisers. Moreover, such an alternative would likely undermine efforts to preserve the ability of broker-dealers to employ business models that are distinct from investment advisers', and could thereby limit retail customer choice with respect to investment advice. This differentiated approach to customer protection is more likely to provide more appropriate investor protection commensurate with the risks inherent in each of those business models. The nature of retail investors' relationships with providers of financial advice is likely to differ between broker-dealers and investment advisers (e.g., broker-dealers are more likely to provide advice on an episodic basis), which has led to the emergence of different regulatory regimes, each designed to address conflicts of interest that may arise as a result of a given business model. Therefore, the Commission preliminarily believes that it is appropriate to maintain separate regulatory standards for broker-dealers and investment advisers."

the compliance costs of Regulation Best Interest by providing advice only in their capacity as investment advisers while using their broker-dealer hat only to execute transactions.[26] This logic suggests that Regulation Best Interest imposes a stricter fiduciary standard on broker-dealers than applies to investment advisers. It also suggests that, contrary to the Commission's goal of preserving the traditional broker-dealer business model, the proposal might further narrow the model and undermine its utility to retail investors.

If the regulatory distinction between investment advisers and brokers with respect to investment advice made sense at one time, it has ceased to have meaning now. It has become a distinction without a difference and is confusing to investors as well as investment professionals.

A Distinction Without a Difference

The Commission has not convincingly explained how the fiduciary duty of an investment adviser differs substantively from the best interest standard of a broker under its proposal. Its explanation that consumers will benefit from preservation of the separate broker business model does not explain why brokers cannot be called "fiduciaries" when they give investment advice and is inadequate to justify maintaining two separate and duplicative fiduciary frameworks.

The current regulatory bifurcation between investment advisers and brokers is based on an outmoded 80-year old regulatory framework that separates brokers and investment advisers—brokers are regulated under the Securities Exchange Act of 1934 whereas investment advisers are regulated under the Investment Advisers Act of 1940. The former imposes prescriptive rules and regulations on brokers whereas the latter relies on principles. Brokers are regulated by the Commission's Division of Trading and Markets and FINRA while advisers are regulated by the Division of Investment Management.

Both regimes aim to protect investors and do so through similar requirements, written and unwritten, that seek to minimize harm from conflicts of

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[26] The proposed rule thus could give dual-registrants a competitive advantage over standalone broker-dealers, according to the Commission. *See* Proposing Release at p. 318: "If a dual-registrant would incur a larger cost of complying with the new requirements of the best interest obligation compared to the cost of complying with the requirements of the investment advisers' fiduciary standard of care and the concurrent proposed interpretation for investment advisers with respect to providing advice, the dual-registrant may have an incentive to bypass the requirements of the proposed rule by providing advice in the capacity of investment adviser, while executing transactions in the capacity of broker-dealer."

interest, self-dealing, fraud, and deceptive practices. The need for two separate regimes regulating the same functional activity—or indeed two separate government bureaucracies—is questionable.

The Commission's proposed "best interest" standard for brokers is not substantively different from the fiduciary standard that currently applies to investment advisers. Investment advisers—like brokers—are required to act in the best interest of their customers, make only suitable recommendations, and refrain from self-dealing and unauthorized conflicts of interest. However, because the proposed standard for broker-dealers is codified in regulatory language—unlike the fiduciary standard for investment advisers—the proposal creates a misleading appearance of dissimilarity between the two standards.

Simultaneously with issuing proposed Regulation Best Interest, the Commission issued a "Fiduciary Duty Interpretive Release" setting forth a proposed interpretation of the fiduciary standard for investment advisers under the Investment Advisers Act of 1940.[27] The release begins with the statement that "An investment adviser is a fiduciary, and as such is held to the highest standard of conduct and must act in the best interest of its client."[28] The release states that an adviser's fiduciary obligation includes an "affirmative duty of utmost good faith and full and fair disclosure of all material facts." Although the Commission acknowledges that the fiduciary duty "is not specifically defined in the Advisers Act or in Commission rules," it states that the fiduciary duty "is fundamental to advisers' relationships with their clients" and "is important to the Commission's investor protection efforts."[29]

The same can be said for brokers who give investment advice to retail customers. Indeed, the Commission admits that its proposed duty of care for brokers is "generally consistent with" the underlying principles of an investment adviser's duty of care.[30]

The irony is, despite the status of investment advisers as "fiduciaries," they are subject to far fewer regulatory obligations under the current "principles-based" Advisers Act regime than brokers are under the "rules-based" broker-dealer regime. This would be true under the proposed regime as well. Among other things, investment advisers are not now, and will not be, subject to an

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[27] Release No. IA-4889, Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers, April 18, 2018, referred to in the Regulation Best Interest Proposing Release as the "Fiduciary Duty Interpretive Release."

[28] Fiduciary Duty Interpretive Release at p. 3.

[29] *Id*. at 6.

[30] Regulation Best Interest Proposing Release at p. 160-61.

explicit suitability rule or SRO rules of conduct. They are not now, and will not be, required to undergo examinations or meet licensing, training or continuing education requirements.

The clear fact is that Regulation Best Interest will impose on brokers a more explicit best interest duty—an equivalent, if not, higher fiduciary standard—than applies to investment advisers. Yet, the Commission's Fiduciary Duty Interpretive Release does not pertain to brokers (unless they are dual-registrants) and the Commission specifically denies that Regulation Best Interest would establish a fiduciary duty for brokers.

Brokers instead would be subject to the "non-fiduciary" best interest standard in Regulation Best Interest. The Commission stated that Regulation Best Interest "would be separate and distinct from the fiduciary duty that has developed under the Advisers Act"[31] and, conversely, would not have any impact on an investment adviser's fiduciary obligations.[32]

Both the current bifurcated regime and the Commission's proposal are counterintuitive and will be confusing to retail investors.

Confusing Disclosures

The Commission's proposed "customer relationship summary" (Form CRS) is likely to exacerbate the existing confusion rather than cure it. Among other things, it will not be readily apparent to the average investor why a broker charges transaction-based fees and an investment adviser charges asset-based fees[33] or which fee structure will be less expensive overall or in the customer's best interest.

The sample disclosures are self-contradictory and confusing. For example, the "mock-up" disclosure for broker-dealers states, "We are a broker-dealer and provide brokerage accounts and services rather than advisory accounts and services."[34] Yet, it goes on to state that the broker also provides advisory accounts

[31] *Id*. at 43.

[32] *Id*. ("we do not intend that Regulation Best Interest, including the associated obligations, have any impact on the Commission's or its staff's interpretations of the scope or nature of an investment adviser's fiduciary obligations.").

[33] The reason appears to be based on the exemption from investment adviser registration for brokers who provide advice that is "solely incidental" to executing securities transactions.

[34] Proposed Form CRS, Appendix D (emphasis added).

and services.[35] Similarly, the sample disclosure for investment advisers states, in attempting to describe the differences between an advisory account and a brokerage account, "You can receive advice in either type of account."[36]

The disclosure for investment advisers also states that a customer may prefer paying an asset-based fee as opposed to a transaction-based fee, suggesting that the customer will not pay a transaction fee if it opens an investment advisory account. Yet, the disclosure elsewhere states, "You will pay a transaction fee when we buy and sell an investment for you."[37]

These contradictions will confuse retail investors. The sample disclosures also include the following confusing side-by-side disclosures for "our obligations to you":

Broker-Dealer Services Brokerage Accounts	Investment Adviser Services Advisory Accounts
Our Obligations to You. We must abide by certain laws and regulations in our interactions with you.	
• We must act in your best interest and not place our interests ahead of yours when we recommend an investment or an investment strategy involving securities. When we provide any service to you, we must treat you fairly and comply with a number of specific obligations. Unless we agree otherwise, we are not required to monitor your portfolio or investments on an ongoing basis. • Our interests can conflict with your interests. When we provide recommendations, we must eliminate	• We are held to a fiduciary standard that covers our entire investment advisory relationship with you. For example, we are required to monitor your portfolio, investment strategy and investments on an ongoing basis. • Our interests can conflict with your interests. We must eliminate these conflicts or tell you about them in a way you can understand, so that you can decide whether or not to agree to them.

[35] *Id.* ("You may select investments or we may recommend investments for your account….We can offer you additional services to assist you in developing and executing your investment strategy and monitoring the performance of your account….").

[36] Proposed Form CRS, Appendix E.

[37] *Id.*

these conflicts or tell you about them and in some cases reduce them.	

Does the average retail investor know what a "fiduciary standard" is as opposed to a "best interest" standard? Will the customer believe his interests are better protected with a "best interest" account or a "fiduciary" account? Could an investment professional explain the difference between a brokerage account and investment advisory account based on this language? Average investors should not be subjected to this kind of confusing verbiage when trying to intelligently invest their life savings.

As reflected in the sample disclosure, the Commission is attempting to draw a distinction between investment advisers and brokers based on a purported duty of the former to monitor a client's investments on an ongoing basis.[38] However, this is a false distinction inasmuch as both advisers and brokers may contractually specify the extent to which they will monitor a client's account. The sample disclosures are misleading in this regard.[39] The (now defunct) DOL fiduciary rule did not impose a duty on brokers or investment advisers to monitor but required a fiduciary to disclose whether it would monitor and, if so, the frequency of monitoring.[40]

Accordingly, it remains unclear what factual or functional basis exists for the Commission to maintain the position that investment advisers are fiduciaries but brokers performing the same function are not. The label "fiduciary" would not impose any material additional obligation on a broker that is not already imposed

[38] *See also* SEC, Proposed Interpretation of Standards of Conduct for Investment Advisers, April 18, 2018, at 14 ("An investment adviser's duty of care also encompasses the duty to provide advice and monitoring over the course of a relationship with a client."). See also id. at 15 ("An 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.").

[39] Proposed Form CRS includes a sample disclosure for investment advisers that: "We are held to a fiduciary standard that covers our entire investment advisory relationship with you. For example, we are required to monitor your portfolio, investment strategy, and investments on an ongoing basis." In contrast, in comparing a broker's duty, the sample form states: "Unless you and the broker-dealer agree otherwise, the broker-dealer is not required to monitor your portfolio or investments on an ongoing basis." Form CRS, Appendix E.

[40] The Best Interest Contract (BIC) exemption to the DOL rule provided that the contract between an investment adviser and its retirement customer must only describe whether and to what extent the adviser would monitor the customer's investments. 81 Federal Register 21002, 21046, 21019 (April 8, 2018).

under FINRA rules. But the label “fiduciary” might make brokers more conscious of the nature of their obligations to retail investors, and might eliminate some of the confusion investors experience when seeking investment advice.

The Commission Should Adopt a Uniform Fiduciary Rule

In its proposing release for Regulation Best Interest, the Commission discussed the benefits of a uniform fiduciary standard for brokers and investment advisers:

> A fiduciary standard for broker-dealers could produce greater uniformity between broker-dealers’ and investment advisers’ standards. A uniform fiduciary standard for broker-dealers and investment advisers could bring more uniformity to the professional standards of conduct regarding advice provided to retail customers. A uniform standard could potentially reduce certain conflicts and increase disclosure of others, thereby enhancing the quality of such advice, lowering the possibility of harm to investors, and potentially reducing retail customer confusion with respect to investment advice.[41]

These benefits are substantial and should lead the Commission to adopt a uniform fiduciary rule consistent with the Dodd-Frank Act. Section 913(g) of the Act, entitled “Authority to Establish a <u>Fiduciary</u> Duty for Brokers and Dealers,” authorizes the Commission to adopt a rule providing that the standard of conduct for a broker-dealer, when providing advice about securities to a retail customer, “<u>shall be the same as</u> the standard of conduct applicable to an investment adviser” under the Investment Advisers Act of 1940. (emphasis added)

Further, section 913(g) of the Dodd-Frank Act specifically authorizes the Commission to adopt rules providing that the standard of conduct for “<u>**all** brokers, dealers, and investment advisers</u>, when providing personalized investment advice about securities to retail customers…shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.” Moreover, section 913(g) further provides that such rules “shall provide that such standard of conduct <u>shall be no less stringent than the standard applicable to investment advisers</u>….” (emphasis added)

[41] Regulation Best Interest Proposing Release at pp. 330-31.

Section 913 also directed the Commission to conduct a study addressing, among other things, whether retail customers understand the difference between brokers and investment advisers and whether the existence of different standards of care for each is a source of confusion. The Commission's staff conducted the study required by the Dodd-Frank Act and issued a report in 2011.[42] The study concluded, not surprisingly, that customers do not understand the difference between brokers and investment advisers and are confused. The staff report recommended that the Commission adopt a uniform fiduciary standard for brokers and investment advisers as authorized by the Dodd-Frank Act.

However, contrary to the Dodd-Frank Act's intent and the staff report, Regulation Best Interest does not establish a standard of conduct that is "<u>the same</u>" for brokers and investment advisers. The regulation establishes a <u>different</u> standard for brokers than for investment advisers, and one that the Commission claims is a not even fiduciary standard.

The Commission's refusal to acknowledge the fiduciary status of brokers when they make personalized investment recommendations to retail customers is inconsistent with section 913 of the Dodd-Frank Act. The agency's failure to articulate a uniform fiduciary standard for brokers and investment advisers perpetuates the myth that brokers are not fiduciaries and compounds the customer confusion that Congress empowered the agency to remove.

Conclusion

The Commission's proposed "best interest" standard is a fiduciary standard in the classic sense of the term, no less so than the existing standard in FINRA's Suitability Rule or the fiduciary standard applicable to investment advisers under the Investment Advisers Act of 1940, or indeed the Uniform Prudent Investor Act. Brokers that make investment recommendations in accordance with the Commission's proposed best interest standard will be acting as fiduciaries just as brokers currently acting in accordance with FINRA's Suitability Rule are fiduciaries.

It thus is misleading for the Commission to disavow that brokers are "fiduciaries" when they give investment advice to retail investors and that Regulation Best Interest does not embody a fiduciary standard.

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[42] Staff of the U.S. Securities and Exchange Commission, Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Jan. 2011).

The traditional broker business model can be preserved without denying that brokers are fiduciaries when they give investment advice. While it may be true that brokers are not fiduciaries when they merely execute unsolicited trades, it is fictitious to assert that they are not fiduciaries when they perform the same function as an investment adviser.

The distinction between a "fiduciary" duty and the proposed "best interest" duty is a distinction without a difference and will add unnecessary regulatory complexity that can only further confuse retail investors. If brokers are not called "fiduciaries," their customers will believe they are not fiduciaries, unlike investment advisers, and brokers themselves will not think of themselves as "fiduciaries." The irony is that Regulation Best Interest imposes a far more explicit and robust fiduciary standard on brokers than applies to investment advisers.

The Commission should acknowledge that brokers are fiduciaries when they provide personalized investment advice to retail investors and should adopt a uniform fiduciary standard for both brokers and investment advisers in accordance with the Dodd-Frank Act.

. Sincerely,

Melanie L. Fein

Melanie L. Fein