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August 6, 2018

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

VIA ELECTRONIC MAIL: rule-comments@sec.gov

Re: File No. S7-07-18: Regulation Best Interest

Dear Mr. Fields:

We are grateful for the opportunity to comment on the Securities and Exchange Commission's proposal to establish a standard of conduct for broker-dealers and natural persons who are associated persons of a broker-dealer when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer in Securities Exchange Act Rel. No. 34-83062 (May 9, 2018) (the "Proposing Release").

We note that in the Proposing Release, the staff has stated that the Proposed Regulation Best Interest does not necessarily obligate the broker-dealer to recommend the "least expensive" or the "least remunerative" security or investment strategy, provided the rule's obligations are met. The staff noted that while cost associated with a recommendation generally would be an important factor, other factors, such as the product's or strategy's investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility and likely performance in a variety of market and economic conditions, also would be important and may outweigh the cost and financial incentive factors. Accordingly, these other factors may justify a recommendation for a more expensive security or investment strategy. The staff, however, noted that it preliminarily believed that under the Care Obligation (as defined in the Proposing Release), a broker-dealer could not have a reasonable basis to believe that a recommended security is in the best interest of a retail customer if it is more costly than a reasonably available alternative offered by the broker-dealer and "the characteristics of the securities are otherwise identical," including any special or unusual features, liquidity, risks and potential benefits, volatility and likely performance. See Proposing Release at 21588. The staff cited as an example of identical securities with different cost structures the multi-classes offered by mutual funds. Although the example involves classes from the same portfolio of a particular fund, a question arises as to the "identical" nature of securities offered by different fund or unit investment trust ("UIT") families.

Since the factors cited focused on characteristics of the security, the staff should clarify that the broker may take into account other qualitative factors that may be involved when

Chapman and Cutler LLP

Securities and Exchange Commission
August 6, 2018
Page 2 of 3

comparing securities offered by *different* fund families, such as exchange options, shareholder support services, redemption procedures, etc. that may also benefit investors when they are shareholders of those funds or UITs. Without this guidance, we are concerned that the broker may not be able to consider other quantitative or qualitative features when evaluating whether the securities offered by different fund families are “otherwise identical.” As an example, Fidelity Investments recently announced that it would be offering two new stock-index funds to investors without paying any fees. See Baer, Justin. “Fidelity Offers No-Fee Funds”, Wall Street Journal, August 2, 2018 at Section B1. The article noted that Fidelity “won’t make money on the no-fee funds themselves but hopes the investors who buy them will also put their money in other products that do bring in fees.” If another fund family offered a fund based on the same stock index that by economic necessity charged some fees, would the broker be forced to place his client in the loss leader of Fidelity without regard to other services or benefits the other fund family offered because they are otherwise “identical securities”? In addition to other qualitative services another fund complex may offer, the broker may also want to consider other relevant factors in making a securities recommendation including, among other things, (a) that an investor’s overall costs may be lower if his or her aggregate assets in a particular fund family reach certain breakpoints that may be offered to lower applicable sales loads; (b) that a fund which provides little or no fees to the adviser and does not garner assets to the respective fund or other more expensive funds in the fund family may be more likely to be liquidated or merged out of existence as the adviser and its affiliates may not be willing to continue to carry the costs of operating such funds indefinitely resulting in potentially negative tax consequences to the investors and a potentially unwanted interruption in their investment portfolio; (c) that certain so-called identical funds may actually have different tax profiles due to material unrealized gains of underlying securities; (d) that product sponsors (including, in particular, new sponsors of products) may have different financial viability prospects which may potentially impact fund fee structures and their ability to satisfy their obligations with respect to, among other things, fee caps, fee waivers and unitary fees; (e) that the applicable fee caps and waivers may only be temporary; and (f) that the qualifications, expertise and services of the investment adviser, sponsor or other service providers of a respective investment company may be different and/or more comprehensive than those of the fund with the lower cost alternative.

If a goal of the proposed Regulation Best Interest is to enhance investor protection while also preserving retail customer choice, the current guidance as written may inadvertently preclude the broker from considering funds that offer ostensibly “identical securities” with a higher fee but that also offer additional shareholder benefits or have other attributes that should be considered in formulating a recommendation when comparing securities offered by different fund families. We believe the references to “identical securities” or the characteristics of “securities are otherwise identical” in the guidance is somewhat confusing in the context of investment companies as certain investment companies may adopt the same investment objectives and strategies (such as funds tracking the same index) and therefore could be viewed as “identical securities” but differences in product features between the respective funds (particularly of funds of different complexes) as

Chapman and Cutler LLP

Securities and Exchange Commission

August 6, 2018

Page 3 of 3

outlined above may impact whether a particular *fund* is indeed in the best interest of the customer. We therefore believe the staff should clarify its guidance in this respect.

We thank the staff for the opportunity to comment on the Proposing Release.

Very truly yours,

CHAPMAN AND CUTLER LLP

By 

Felice R. Foundos