GROOM LAW GROUP

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[redacted]

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Via E-mail

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Email: *rule-comments@sec.gov*

**Re: Proposed Regulation Best Interest;
Proposed Form CRS Relationship Summary, Required Disclosures
and Name and Title Restrictions;
File Number S7-07-18**

Dear Secretary Fields:

With this letter we are submitting comments on the referenced rule proposals on behalf of a group of major providers of recordkeeping and related administrative services and investment fund offerings to 401(k) and other types of employer-sponsored defined contribution retirement plans, including plans that are subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

Our client plan record-keepers are vitally interested in the SEC's recent rulemaking proposals. Those proposals would affect the way plan recordkeepers do business and how plan recordkeepers would interact with clients both at the plan-sponsor level (*i.e.*, with respect to the fiduciary decision-makers responsible for the selection and monitoring of the plan investment options made available to participants) and at the individual participant level. Our clients' overriding policy interests are to preserve and enhance the already well-functioning marketplace that has developed to serve 401(k) and similar types of individually-directed defined contribution plans and to also preserve and enhance the ability of individual participants to exercise control over the management of their accumulated retirement savings. In this regard, we are supportive of new regulations that will protect plans and their participants from sharp practices or unfair dealing on the part of bad actors. At the same time, we are mindful of the risks of regulatory overreach, including the efforts by some to outlaw altogether the appropriately regulated financial incentives that foster and promote fair competition, technological innovation and development and other advancements in the services needed to support sound retirement savings and investment practices.

Proposed Regulation Best Interest ("Regulation B.I.") would establish a standard of conduct under the Securities Exchange Act of 1934 (the "Exchange Act") for broker-dealers and their associated persons when recommending a securities transaction or an investment strategy involving securities to a "retail customer." The Form CRS Relationship Summary proposal and related name and title restriction proposal would require the delivery of certain disclosures in connection with communications involving a "retail investor" and would place restrictions on the use of certain names or titles by broker-dealers and associated persons. The retirement plan service provider community is vitally interested in clarifying the extent to which the terms "retail customer" and "retail investor" would apply to plan-level and plan participant-level service provider interactions. Our comments below include a number of suggestions on how the terms "retail customer" and "retail investor" should be tailored to fit a defined contribution plan servicing environment.

Our clients interact on a daily basis with retirement plans of all types. These range from large, multi-billion dollar plans to small, newly-formed plans. At the plan-sponsor servicing level, our clients maintain platforms of investment options and furnish investment-related information to support plan fiduciaries in selecting and monitoring the funds that comprise the plans' investment option "menus." Under 401(k) and similar plans, participants and beneficiaries are typically empowered to invest their individual account balances within and among those investment options. In addition, some, but not all, plans make "brokerage window" investment features available to support the investment needs of participants who wish to explore a broader universe of investments than those available under the plan's menu of designated funds.

Our clients also assist participants and beneficiaries with plan investment-related activities by providing, among other things, internet and call center support, educational materials on general investment topics, and fund-specific information. Importantly, our clients provide information on the benefits of plan participation, support plan efforts to encourage plan enrollment and savings, and make distribution counseling services available to participants who may be nearing retirement and are considering how their accumulated retirement savings might optimally be deployed to support future retirement needs. Distribution counseling services may include the provision of information about the availability of rollover products, including proprietary products or third-party products that generate compensation when they are purchased.

Investments made available through our clients' plan recordkeeping platforms frequently include registered securities in the form of shares of investment companies registered under the Investment Company Act of 1940 (*i.e.*, mutual funds). Other investments made available through client investment platforms include collective investment trusts and insurance products which are securities subject to the anti-fraud protections of the Securities Exchange Act of 1934 but that are not subject to registration under the Securities Act of 1933 or the Investment Company Act of 1940 under the exemptions available under sections 3(a)(2) and 3(c)(11) of those respective Acts. Our clients may also make available various types of investment strategies available for adoption by client plans and their participants, including managed account strategies. These securities and investment strategies are typically offered to plans and plan participants through broker-dealer entities, including through record-keeper-affiliated broker-dealers.

Over the past several years, our client recordkeeper companies have commented extensively on the U.S. Department of Labor's rulemaking proposals to broaden the definition of "fiduciary" in connection with the provision of investment advice under ERISA, and the Internal Revenue Code of 1986 (the "Code"), including the Department's Best Interest Contract or "BIC" Exemption and related prohibited transaction exemption proposals. The DOL's rulemaking proposals, though unquestionably well-intentioned, clearly overreached by seeking to classify the vast majority of investment-related service provider interactions with plans and plan participants as fiduciary activity that would be subject to ERISA's strict anti-conflict rules. Similarly, the relief for conflicts that DOL sought to make available under the BIC Exemption was not only exceedingly complex and prescriptive but also overly narrow in light of the DOL's "best interest" formulation, which would have required that investment recommendations be furnished *without regard to* the financial or other interests of the recommendation provider.

Our consideration of the DOL's fiduciary proposals and our efforts to comply with the DOL's recently vacated rules inform our comments, which follow below.

A. <u>Comments on Proposed Regulation Best Interest</u>

1. <u>The Proposed Wording of the Best Interest Obligation</u>

We strongly support the Commission's proposed "best interest" standard of conduct for broker-dealers and associated persons. While support for a retail customer "best interest" standard of care clearly enjoys widespread public support in concept, the details of how to most appropriately express the concept have been the subject of much disagreement and debate.

The Commission's proposed wording provides that securities recommendations by broker-dealers and associated persons may satisfy the best interest standard of care only when the interests of the client are prioritized and placed ahead of the broker-dealer's own financial or other interests in the transaction. That construction of the best interest standard of care is entirely consistent with the longstanding principles of fair dealing that govern the conduct of broker-dealer retail client relationships. Most importantly, the proposed wording provides a very much needed and helpful clarification that a broker-dealer's own financial interests in a recommended transaction are permissible so long as that self-interest is properly tempered by and subordinated to the interests of the client; the client's interests must remain paramount at all times.

We strongly agree with the Commission's observation that the DOL's best interest formulation, which would have required recommendations to be furnished "without regard to the financial or other interests" of an advice provider, could have been interpreted in such a manner as to require conflict-free recommendations and to contravene basic business necessities. In order to remain in business, a broker-dealer entity must generate sufficient income to cover its operating expenses, to compensate its personnel and to provide a reasonable return on capital. Interpreted literally, the language of the "without regard to" formulation of a "best interest" standard of conduct would seem to have required broker-dealers and their representatives to utterly disregard those most fundamental financial interests; over the long-term, adherence to such a standard would have contravened basic business necessities, ultimately leading to business failures, declines in the availability of services that plans rely upon to operate and reduced retirement savings opportunities for working Americans.

To be clear, in supporting the notion that broker-dealers and associated persons should be permitted to pursue their own financial interests when furnishing securities and investment strategy recommendations, we do not mean to suggest that the unconstrained pursuit of financial self-interest to the detriment of the investing public is either laudable or permissible. On the contrary our view is that financial self-interest in a securities or investment strategy recommendation is appropriate only to the extent that the client's investment needs are primarily the ones that are being served. That important limitation is captured precisely and appropriately by the Commission's proposal.

Our clients are encouraged that the Commission's best interest proposal is not a departure from prior law but rather marks a logical extension of the Exchange Act's anti-fraud provisions. Those anti-fraud rules prohibit the use by broker-dealers of any "manipulative or deceptive device or contrivance" to induce a client to buy or sell any security and have been interpreted to impose a duty of fair dealing on broker-dealers. Exchange Act §10(b). By engaging in the brokerage profession, a broker-dealer implicitly represents to the public that it will deal fairly with its clients, in accordance with the standards of the profession. *See*, e.g., *Charles Hughes & Co. v. S.E.C.*, 139 F.2d 434 (2d Cir. 1943). The Commission's best interest standard of conduct represents a refinement to and an enhancement of those professional standards by stating with crystal clarity that a retail customer's interests will take precedence over the broker-dealer's own interests when a securities recommendation is furnished and we support it for that reason.

2. The Proposed "Retail Customer" Definition

Proposed Regulation B.I. would apply in circumstances where a broker-dealer or an associated person makes a securities recommendation to a "retail customer." The term "retail customer" is defined to mean "a person, or the *legal representative of such person*" who receives a securities or investment strategy transaction recommendation from a broker-dealer or associated person and who "[u]ses the recommendation *primarily for personal, family or household purposes.*" (emphasis added).

As noted above, our client recordkeepers may provide recommendations of securities or investment strategies in connection with the investment of retirement plan assets at the plan sponsor-level (*e.g.,* to the 401(k) plan investment fiduciaries who are responsible for selecting and monitoring the investment options made available to individual participants and beneficiaries under those plans) as well as to individual plan participants and beneficiaries seeking to invest their accumulated plan savings within and among the plan's available investment options. We are vitally interested, therefore, in clarifying the status of plan sponsor-representatives as "retail customers" or as "non-retail customers" and also in further clarifying the application of the proposed regulation to plan participants and beneficiaries.

With respect to plan sponsors (*i.e.,* the employers or employers' representatives responsible for the selection and monitoring of plan investment options), we believe the Commission should clarify that the retail customer definition does not extend to the plan sponsor-level. Although the plan's fiduciaries are generally responsible for identifying and monitoring the plan's investment options, it is ultimately the plan's participants and beneficiaries who make investment decisions about the allocation of their individual account balances within and among those account balances; on that basis the "use" of the recommendation primarily for personal, family or household purposes occurs exclusively at the participant level. Retirement plan sponsors and their representatives select and monitor plan investment options for business purposes (namely, the business of the plan) and not for their own personal, family or household purposes.

We urge that this clarification be made out of concern that the duties owed by a broker-dealer with respect to a retail customer, which largely relate to satisfying the proposed Care Obligation (as further discussed in item A.4 below) in light of a retail customer's particular "investment profile" (defined to mean, without limitation, the retail customer's age, other investments, tax status, investment objectives, investment experience, investment time horizon, liquidity needs and risk tolerance) are not capable of implementation at the plan-sponsor level. A typical 401(k) or other participant-directed defined contribution plan does not itself have an investment profile; any plan-related investment profiles pertain exclusively to individual participants and beneficiaries and would typically reflect the considerable variations in risk tolerances and investment objectives likely to be present in any population of diverse investors. Attempting to apply investment profiles at the plan sponsor-level would make little sense; consistent with section 404(c) of ERISA and the Department of Labor's implementing regulations, plan sponsors typically endeavor to select a sufficiently broad range of investment options to allow plan participants to construct an individual account portfolio consistent with their return objectives and tolerances for risk.

For the same reasons, we believe that defined contribution plan participants and beneficiaries (including participants in governmental 457(b) and 403(b) plans) should be classified as retail customers for purposes of Proposed Regulation B.I. Having said that, we would note that the securities available to be recommended to non-distribution eligible plan participants (*i.e.,* plan participants who are actively employed by the plan's employer-sponsor and who have not yet attained the age when distributions are available) are typically limited to the investment options made available under the plan. Accordingly, within the construct of a defined contribution plan arrangement, Regulation B.I. should appropriately recognize to that the relevant investment universe pertaining to a non-distribution eligible participant is not the broker-dealer's full shelf of products available for recommendation generally, but the narrower universe of investment options made available under the plan itself.

3. The Proposed Disclosure Obligation

We support both the spirit and the letter of the disclosure obligation set forth in paragraph (a)(2)(ii) of Proposed Regulation B.I. (the "Disclosure Obligation"). That obligation would require, as a condition of a broker-dealer's or associated person's satisfaction of the best interest standard with respect to a recommendation, that a retail customer receive a written communication reasonably disclosing the material facts relating to the scope and terms of the broker-dealer's relationship with that customer, including all material conflicts of interest.

As defined contribution plan service providers, we are involved in the delivery of myriad types and forms of disclosure to plan participants, including disclosures required under ERISA and the Code. We are therefore particularly supportive of the Commission's statements relating to allowances for flexibility with respect to the form, specific timing and manner of delivery of disclosure materials to retail customers for purposes of satisfying the Disclosure Obligation. As service providers to ERISA plans, our client companies are subject to the extensive and detailed disclosure obligations required by DOL regulations.

Importantly, although we furnish services at both the plan-sponsor level and at the individual participant level, it is the plan sponsor that engages us to provide participant-level support. When a participant calls into one of our call centers with a plan-related issue or question, our representatives pick up the phone and are ready to provide support because it is included within the package of services that has been contracted for at the plan sponsor-level. In this regard, it is the plan sponsor, for example, that is obligated under ERISA to consider the nature and scope of the broker-dealer's service offerings, whether the fees proposed to be charged for those services are reasonable, and to engage and monitor the broker-dealer as a plan service provider.

To inform the plan sponsor's service provider selection and retention considerations, our clients are required to provide detailed disclosures under section 408(b)(2) of ERISA at the inception of our service provider relationship with a client plan, and to timely update plan officials in the event of changes to the content of those disclosures. Similarly, we are generally required to furnish detailed disclosures with respect to our plan-related compensation, both direct and indirect, annually for purposes of assisting plan administrators with their service provider reporting obligations on Schedule C to the Form 5500.

Given the nature of plan service provider hiring dynamics, our client companies are interested in further exploring the parameters for appropriate methods of furnishing Disclosure Obligated materials to plan participants and beneficiaries. We identify and offer some suggestions on those points below.

a. Recommendations of Securities or Investment Strategies to Plan Participants and Beneficiaries With Respect to Their In-plan Holdings

Broker-dealers and their associated persons may make recommendations of securities or investment strategies to retirement plan participants in a variety of different ways including through participant call center staff or through in-person or on-line enrollment meetings. Although the regulatory focus on such interactions has largely concerned rollover recommendations, broker-dealer personnel may also furnish recommendations concerning the investment of in-plan assets.

As noted above, the decision to engage the broker-dealer to provide plan-related services is not made at the individual plan participant-level but at the plan sponsor-level. For example, where a plan sponsor engages a bundled provider of recordkeeping and administrative services and to make available an investment platform of funds from which the plan's investment option menu may be selected, the delivery of call center-based participant support is typically part of the contracted-for bundle of services. Those call centers are typically staffed by personnel who are registered representatives of a related broker-dealer entity. Accordingly, when a participant dials the call center 800 number arranged for by the plan sponsor with an investment-related inquiry, her inquiry is frequently handled by a broker-dealer representative.

In our view, it would be both unnecessarily disruptive to the recordkeeping service model and confusing to plan participants to require the discharge of the Disclosure Obligation on a one-off basis at the point of service (*i.e.*, as part of each call center interaction in which a covered recommendation may be furnished). A far more effective and administratively feasible approach would be to permit the broker-dealer to satisfy its Disclosure Obligation through an on-line posting and/or through an addendum or an attachment to the fee and expense disclosures required under ERISA Reg. section 404a-5. Although the section 404a-5 obligation is borne by the plan's administrator, and not by the recordkeeper, in actual practice the section 404a-5 disclosures are typically prepared on behalf by the recordkeeper on the administrator's behalf; the recordkeeper could readily add an addendum or an attachment to the section 404a-5 disclosure that would discharge the Disclosure Obligation with respect to its broker-dealer. Inasmuch as the section 404a-5 document is the principal source of information for plan participants to learn about the fees and expenses associated with participating in their plan, it would also be a natural place to furnish the information required by the Disclosure Obligations.

b. <u>Potential for Participant Confusion Over the Role of the Broker-dealer and its Associated Persons Absent Coordination With DOL</u>

Our client companies agree with the Commission's expressions of concern that retail investors may be confused about the differences among financial services providers such as broker-dealers, investment advisers and dual registrants. While the Disclosure Obligation's requirement that retail customers be furnished information with respect to the material facts related to the scope and terms of the client relationship seeks to allay that confusion for purposes of the federal securities laws, it does nothing to address and could potentially worsen the degree of confusion pertaining to the fiduciary or non-fiduciary status of broker-dealers for purposes of ERISA when engaging in investment related communications with ERISA plan participants. Consistent with our comments later in this letter pertaining to the Regulatory Status Disclosure requirements under Exchange Act Proposed Rule 17a-14, a retirement plan participant is likely to want to know not just whether his interactions are with a financial professional acting in a broker-dealer or in an investment adviser capacity for purposes of the federal securities laws, but also whether that individual is acting in the capacity of an investment adviser for purposes of ERISA. The Regulatory Status Disclosure and the Disclosure Obligation, in isolation, do nothing to address that cross-regulatory regime confusion. Moreover, the requirement in Proposed Rule 17a-14 that an investment adviser acting as such must disclose that it is a fiduciary, coupled with the prohibition of the use of the terms "advisor" or "adviser" by broker-dealers acting as such begs the question of the financial professional's status as an investment adviser for purposes of ERISA.

One approach to resolving these overlapping regimes would involve complementary Commission and DOL guidance that a broker-dealer who has discharged its Regulatory Status Disclosure and Disclosure Obligation to a plan participant does not act as investment advice fiduciary for purposes of ERISA when making a securities recommendation to a plan participant. Conversely, where a financial professional wishes to make recommendations to plan participant as an ERISA investment adviser and therefore as an ERISA fiduciary, that advice should be delivered by an investment adviser registered as such under the Investment Advisers Act of 1940 with the result that the fiduciary acknowledgment furnished by that registered investment adviser would pertain to fiduciary status both under common law and ERISA.

Absent such coordination, however, it will continue to be the case that a broker-dealer could become an investment adviser for purposes of ERISA when engaging in the provision of recommendations to plan investment fiduciaries and/or participants under the DOL's "five part test" for determining investment adviser fiduciary status.

c. Recommendations of Securities or Investment Strategies to Plan Participants and Beneficiaries With Respect to Plan Distributions, Including Rollover Distributions.

Unlike the plan sponsor-level decision to engage a broker-dealer for purposes of providing in-plan services to participants and beneficiaries, the decision over the engagement of a broker-dealer for purposes of investing plan distribution proceeds, including through an IRA rollover transaction, is within the control of each individual participant and beneficiary. To a large extent, rollover-related conversations are at the heart of efforts to clarify applicable standards of conduct within the plan servicing context. Accordingly, we think it would be most appropriate for the individualized delivery of disclosure materials related to any material conflicts of interest on the part of the broker-dealer to occur at the inception of those discussions. Differences in the nature of the in-plan servicing relationship versus the plan distribution servicing relationship should be recognized for purposes of how a broker-dealer may satisfy its Disclosure Obligation. In particular, website posting of material conflicts disclosures should suffice for purposes of servicing plan participants on in-plan matters whereas more prominent disclosure delivery may be warranted at the inception of a distribution-related broker-dealer relationship.

4. The Proposed Care Obligation

In regards to the Proposed Care Obligation, we disagree with the inclusion of the word "prudence." The Commission notes that the term "prudence" is infrequently used in the federal securities laws. We would also note that the term is used with great frequency in the body of law developed with respect to the standards of conduct owed by fiduciaries under ERISA. In this regard, section 404 requires that any ERISA fiduciary carry out his or her duties prudently and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the costs of plan administration.

Particularly in light of the DOL's recent efforts to re-classify all providers of investment recommendations as investment adviser fiduciaries for purposes of ERISA and the Code, we have concerns that if the Commission were to move forward with the adoption of the word "prudence" for purposes of Regulation Best Interest, it might tend to reinforce the false perception that broker-dealers are by definition investment advice fiduciaries for purposes of ERISA.

Separately we note that the Proposed Care Obligation includes not merely a duty of prudence, diligence and skillful care, but also a duty of loyalty albeit one that stops appropriately short of a duty of undivided loyalty since broker-dealers are permitted to take their own financial interests with respect to a recommendation so long as the client's interest are primary. We are particularly concerned about the Commission's observations that "where a broker-dealer is choosing among identical securities with different cost structures, it would be inconsistent with the best interest obligation for the broker-dealer to recommend the more expensive alternative for the customer even if the broker-dealer had disclosed that the product was higher cost and had policies and procedures reasonably designed to mitigate the conflict under the Conflict of Interest Obligations, as the broker-dealer would not have complied with its Care Obligation."

In the retirement plan industry, it is frequently the case that a plan sponsor and a broker-dealer will strike a bargain on the level of plan servicing to be provided and on the cost of that servicing. Frequently, but not always, the plan sponsor may wish to pay for the cost of servicing through the fund's investments, as opposed to a cost structure where the costs of servicing require external, plan-level charges. The mutual fund industry has developed multiple share classes for retirement plan sponsors to select from among for the precise purpose of affording flexibility with respect to the way client services are paid for. We believe the implication that a broker-dealer must always recommend the least expensive of the share classes available to a client plan or participant is problematic and overlooks the point that many clients prefer to pay for all of their services through their investments.

5. The Conflict of Interest Obligations

Proposed Regulation B.I. contains two distinct but substantially overlapping conflict of interest obligations. In our view, the degree of overlap is so significant that we believe the two should be should be combined and restated as a single obligation as described below; doing so would streamline the regulation and enhance compliance efforts by reducing the potential for unnecessary confusion.

As proposed, sub-part (a)(2)(iii)(A) of Reg. 15*l*-1 requires that a broker-dealer establish, maintain and enforce written policies and procedures reasonably designed to identify and at a minimum, disclose or eliminate *all* material conflicts of interest associated with a retail customer recommendation. Similarly, sub-part (a)(2)(iii)(B) also requires the establishment, maintenance and enforcement of written policies and procedures reasonably designed to identify the majority sub-category of conflicts within the universe of all universe of all such material conflicts – namely, those that arise from *financial incentives* – and to disclose and mitigate or eliminate those.

The rationale for requiring that financial conflicts, unless eliminated, be not only disclosed but also mitigated whereas mere disclosure of non-financial conflicts would suffice, is not immediately clear to us. We expect that the large majority of material conflicts will involve financial conflicts. More importantly, it is not clear to us why the proposed language would require mitigation of all material financial conflicts. In our view, broker-dealers' obligations to mitigate material financial conflicts of interest should be required to the extent reasonably necessary to reasonably assure that recommendations to retail customers will satisfy the regulation's best interest standard of conduct.

Moreover, it is unclear to us whether certain of the types of material conflicts identified by the Commission lend themselves to mitigation. As an example and in particular, the Commission has identified the sale of proprietary products and services as a material conflict. *See* 83 Fed. Reg. 21618 (May 9, 2018). A broker-dealer that had chosen to limit its product and service offerings exclusively to proprietary products could certainly disclose that limitation, but it would seem inappropriate to require, in addition, that the proprietary product and service limitation also be mitigated. It is unclear to us how that particular conflict might be mitigated, short of compelling all broker-dealers to add non-proprietary product offerings – a requirement that would completely overturn the business model of proprietary-only distributors.

We also note that disclosure of financial conflicts and the client's consent, following receipt of those disclosures, has long been the model followed by registered investment advisers. A requirement that broker-dealers must always mitigate financial conflicts of interest would seem to impose a greater conflict-related burden on broker-dealers than the registered investment adviser community.

The Commission's preamble explanation of the duty to mitigate suggests that reframing the proposed financial conflict of interest obligation language in the manner we propose would be consistent with the Commission's regulatory objective. In this regard, the preamble explanation indicates the Commission is preliminarily of the view that conflicts of interest arising from financial incentives would generally include, without limitation, broker-dealer compensation practices; fees and charges for services provided and products sold; employee compensation and incentives such as quotas, bonuses, sales contests, special awards, differential or variable compensation, and incentives tied to performance appraisals or reviews; third-party compensation including sub-transfer agent and administrative services payments involving mutual funds; commissions and sales charges; all other fees and financial incentives; differential or variable compensation and sales of proprietary products and services; however the Commission's intention *is not to require broker-dealers to mitigate every material conflict of interest.* 83 Fed. Reg. 21618.

In regards to the degree of mitigation required under the proposed conflict of interest obligation, we are concerned about the preamble explanation's references to the position adopted by DOL under the former BIC Exemption that differential compensation may only appropriately recognize the time and expertise necessary to understand an investment. 83 Fed. Reg. 21620. Our clients report that, when engaged in efforts that preceded the vacatur of the BIC Exemption, attempts to calibrate differential compensation to a "time and expertise" metric were exceedingly difficult given the complete absence of any ready set of templates or benchmarks suggestive or appropriate time and expertise benchmarks to apply to competing product sets. Moreover, the notion of time and expertise differential compensation metric does nothing to address the most fundamental of all material financial available for broker-dealers to apply in terms of gauging the differences in time and expertise that may be relevant to the recommendation of one product over another or how to calibrate the variations in compensation that would be supported by those time and expertise differentials.

B. Comments on Proposed Form CRS Relationship Summary, Required Disclosures and Name and Title Restrictions

1. Clarifying the "Retail Investor" Status of Plan Participants and Beneficiaries

As expressed in the introductory paragraphs of this comment letter, our clients are concerned that the definition of "retail investor" for purposes of the Proposed Form CRS delivery obligation could be read, absent appropriate clarification, to include defined contribution plan participants and beneficiaries. In this regard, Proposed Reg. § 240.17a-14(e)(2) defines the term "retail investor" to mean –

> a customer or prospective customer who is a natural person (an individual). This term includes a trust or other similar entity that represents natural persons, even if another person is a trustee or managing agent of the trust.

Read literally, the definition would appear to include participants in 401(k) and similar types of defined contribution plans since such participants maintain accounts in tax advantaged trusts and are natural persons. As noted in our comments on the term "retail customer" for purposes of Proposed Regulation B.I., in item A.2, above, we think it would make little sense to require broker-dealers to deliver and re-deliver a current Form CRS to each of the individual plan participants and beneficiaries covered under a defined contribution plan serviced by a broker-dealer entity. First, the decision to engage the broker-dealer for purposes of providing services to the plan is made at the plan sponsor-level and not at the participant level. Second, the delivery and re-delivery of Form CRS to every participant and beneficiary with an account in a defined contribution plan would add significantly to the level of cost and expense related to the servicing of that plan.

For these reasons, we believe that plan participants and beneficiaries should be excluded from the definition of "retail investor" for purposes of the Form CRS disclosure obligation.

2. Proposed Restriction on the Use of the Title "Adviser" or "Advisor"

As noted in part b of our comment A.3, above, our client companies agree with the Commission's expressions of concern that retail investors may be confused about the differences among financial services providers such as broker-dealers, investment advisers and dual registrants. With that concern having been noted, in the absence of coordinating regulation with the Department of Labor, some broker-dealers and their associated persons will acquire investment adviser fiduciary status with respect to the services that they provide to plans. The Department of Labor's service provider disclosure regulations under section 408(b)(2) of ERISA generally require investment adviser and other fiduciary service providers to acknowledge their status as such.

In light of that possibility, we believe the Commission should make an exception to its proposed prohibitions on the use of the terms "advisor" or "adviser" by broker-dealers and associated persons who are functioning as investment advisers for purposes of ERISA and the Code, but not for purposes of the federal securities laws. Absent an exception, some broker-dealers may face a conflict between their obligation to acknowledge ERISA investment adviser fiduciary status and the obligation under the Commission's name and title restrictions to refrain from the use of the word "adviser."

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We hope that these comments are helpful. Thank you for your consideration of them.

Very truly yours,

Thomas Roberts