AARP Real Possibilities

August 7, 2018

Via: *Rule-comments@sec.gov*

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: RIN 3235-AM35
File Number S7-07-18
Request for Comment on Regulation Best Interest

Dear Chairman Clayton:

On behalf of our 38 million members and all Americans saving for retirement and other important life events, AARP[1] writes today to applaud this important first step to accomplishing one of the most important reforms the Security and Exchange Commission (Commission) can undertake to benefit retail investors. The Commission can play a critical role in ensuring that all financial industry professionals, who provide retail clients with advice about securities, are held to a clear and uniform standard of conduct where the advice is solely in the interest of the investor. AARP appreciates the opportunity to respond to the Commission's request for public comment on standards of conduct for registered investment advisers (IA) and broker-dealers (BD).

I. Executive Summary

Adoption of a uniform standard, that would apply to both BDs and IAs when providing personalized investment advice to retail customers, as contemplated by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Section 913), is of critical importance and long overdue. The standard should be based on the core principle that when providing personalized investment advice to retail customers, a

[1] AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocates for what matters most to families with a focus on health security, financial stability and personal fulfillment.

financial professional must always act in the best interest of those customers regardless of their marketing strategy, business model, or registration status. Ensuring that all financial professionals who offer investment advice to retail investors are subject to a fiduciary standard is needed to ensure a level and transparent market for consumers seeking investment advice.

As you move forward, AARP urges the Commission to maintain its mission of protecting consumers and implement a strong fiduciary standard for financial professionals who provide personalized investment advice to retail investors. AARP has provided an Appendix to this letter, which includes extensive research that may be of assistance to the Commission as it undergoes this analysis.

II. Failure to impose a fiduciary standard undermines the financial security of Americans saving for retirement.

As consumers move closer to retirement, they may be more vulnerable to the negative impact of advice that is not in their best interest for three reasons: (1) the assets they have to invest are larger; (2) they may lack strong financial literacy skills;[2] and (3) reduced cognition may affect financial decision-making.[3] In addition, the detrimental effects of advice that is not in the investors' best interest may have the most negative potential impact on individuals with modest balances[4] as they have fewer economic resources -- any additional costs or losses diminish what little savings they have. For all these reasons, investors close to retirement are especially vulnerable as they make significant and often one-time decisions such as moving retirement savings out of more protected employer-based plans.

Increasingly, the way that most Americans save and invest is through their employer-sponsored retirement plans, most typically a 401(k)-type savings plan. The Government Accountability Office (GAO) has estimated that $20,000 in a 401(k) account that had a

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[2] Annamaria Lusardi, et al., *Financial Literacy and Financial Sophistication in the Older Population: Evidence from the 2008 HRS* (Sept. 2009), http://www.mrrc.isr.umich.edu/publications/papers/pdf/wp216.pdf ("In view of the fact that individuals are increasingly required to take on responsibility for their own retirement security, this lack of [financial] knowledge has serious implications."); *see also* Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Planning: Implications for Retirement* Wellbeing, Nat'l Bureau of Econ. Research Working Paper 17,078, at 6 (May 2011), http://www.nber.org/papers/w17078.pdf (one-third of survey respondents did not understand compound interest, one-quarter did not understand inflation implications and half did not know about risk diversification).

[3] *E.g.,* Keith Jacks Gamble, et al., *How Does Aging Affect Financial Decision Making?* (Issue Brief No. 15-1), Ctr. for Retirement Research at Boston College, at 1, 6 (Jan. 2015), http://crr.bc.edu/wp-content/uploads/2015/01/IB_15-1-508.pdf (declining cognition begins to accelerate after age 60 and has a noticeable effect on financial literacy; "given the increasing dependence of retirees on 401(k)/IRA savings, cognitive decline will likely have an increasingly significant adverse effect on the well-being of the elderly."); *see* generally Tara Siegel Bernard, *As Cognition Slips Financial Skills Are Often the First to Go*, NEW YORK TIMES (Apr. 24, 2015), http://www.nytimes.com/2015/04/25/your-money/as-cognitivity-slips-financial-skills-are-often-the-first-to-go.html?_r=0 ("A person's financial decision-making ability peaks at age 53, or more generally, in their 50s").

[4] *See* n. 1, *supra*.

one percentage point higher fee for 20 years would result in more than a 17 percent reduction in the account balance, a loss of over $10,000.[5] We estimate that over a 30-year period, the account would be about 25 percent less. Even a difference of only half a percentage point — 50 basis points — would reduce the value of the account by 13 percent over 30 years. As you can see, conflicted advice resulting in higher fees and expenses and lower returns can have a huge impact on retirement income security levels.

Furthermore, those with small accounts have fewer economic resources, and consequently any additional costs or losses diminish what little savings they have worked so hard to amass. Lower and middle-income retirement investors need every penny of their retirement savings.

III. The Proposed Regulation Best Interest (Reg BI) undercuts retail investors' ability to distinguish between the standards of care applicable to financial professionals.

Both BDs and IAs play an important role in helping Americans manage their financial lives, as well as with accumulating and managing their retirement savings. Retail investors receiving investment advice should receive a consistent standard of care that is solely in their best interest, regardless of whether the advice comes from a BD or an IA. In 2011, AARP supported the SEC staff recommendation in its Section 913 Study to adopt parallel rules under the Investment Advisers Act of 1940 (Advisers Act) and the Securities Exchange Act of 1934 establishing an over-arching fiduciary duty that is identical for BD and IA, as long as it is no less stringent than the existing standard under the Advisers Act. We believe that such an approach, if properly implemented, could both enhance investor protections and preserve key beneficial elements of the transaction-based BD business model.

AARP appreciates that the SEC's proposal under discussion today seeks to impose a higher standard than the existing suitability standard on BD. AARP has long supported advice in the best interest of individuals saving or investing. To that end, AARP was very supportive of the Department of Labor's (DOL) fiduciary rule, which required that retirement investment advice be in the best interest of the client saving for retirement -- advice that minimizes conflicts of interest, is solely in the interest of the client, and which is provided with the care, skill, prudence and diligence that a prudent person would use. Unfortunately, in its current form, the Commission's proposed Reg BI does not impose a fiduciary standard and further fails to define the contours of the "best interest" standard. Absent a fiduciary standard, investors will continue to be vulnerable and will not receive the protections they need and deserve. AARP has long stated that a suitability standard

[5] U.S. Gov. Accountability Office, *GAO-07-21, Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 7 (Nov. 2006).

does not protect investors from the potentially detrimental impact of conflicted advice. AARP recommends that the Commission amend its proposal and adopt the state trust definition of best interest (which the Employee Retirement Income Security Act (ERISA) also adopted). Such a definition is of long-duration and understandable to industry stakeholders and consumers. A financial professional would have to make recommendations both "solely in the interest" of the consumer and with the "care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use."

a. The proposal leaves investors confused and at risk.

AARP commends the Commission's effort to restrict the use of the terms "adviser" and "advisor" by a BD in its proposed client relationship summary. The regulatory imbalance between the duties of BDs and IAs has persisted for many years, even as evidence demonstrating that BDs have transformed themselves from salesmen into advisers has grown. Many BDs today call themselves "financial advisers," offer services that clearly are advisory in nature, and market themselves based on the advice offered. For example, one firm advertises that it "proudly strive[s] to embrace [its] own fiduciary responsibilities" and that its "highest value is to 'always put the client first.'"[6] However, its Form ADV brochure (a regulatory filing that the SEC requires to be given to clients after a transaction is completed) demonstrates otherwise, noting that "[d]oing business with our affiliates could involve conflicts of interest if, for example, we were to use affiliated products and services when those products and services may not be in our clients' best interests."[7] As a result of such marketing and misleading statements, the average retail investor cannot distinguish between BDs and IAs and does not recognize that their "financial advisor" operates under a lower legal standard than that to which an IA is held. Nor is it surprising that investors expect that those who advertise themselves as a trusted advisor will provide financial advice in the best interest of the investor.

Federal regulations have not kept pace with changes in business practice; consequently, BDs and IAs continue to be subject to different legal standards when they offer advisory services. According to the Commission's 2011 Study on Investment Advisers and Broker-Dealers, as of the end of 2009, FINRA-registered BDs held over 109 million retail and institutional accounts and approximately 18 percent of FINRA-registered BDs also are registered as IAs with the Commission or a state.[8] In addition, consumers and regulators face a market where there are tens of thousands of financial

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[6] Letter from Robert Reynolds, President and CEO of Putnam Investments, to U.S. Dep't of Labor (July 20, 2015), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00077.pdf.
[7] Putnam Advisory Company, LLC, SEC Form ADV Part 2A at 25 (Mar. 30, 2016), http://www.adviserinfo.sec.gov/IAPD/Content/Common/crd_iapd_Brochure.aspx?BRCHR_VRSN_ID=375046.
[8] SEC Staff *Study on Investment Advisers and Broker-Dealers* (Jan. 11, 2011), https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

products, many of which contain complex rules, requirements, and fees. Regulators must also confront the enormous challenge of ensuring that these products are fairly structured and sold, and that consumers understand all of the key terms and conditions of these products. Where there are different standards of conduct dependent merely upon which investment and for what purpose the investment will be used, the result can be not only continued investor confusion and reduced personal savings but also an unfair system which only the most sophisticated investors can navigate.

Retail investors deserve a regulatory system that is designed to promote the best interest of the investor and imposes comparable standards on securities professionals who are performing essentially the same function as financial advisers. Research has found that investors typically rely on the recommendations they receive from BDs and IAs alike. The trust that most investors place in financial professionals is encouraged by industry marketing, leaving investors vulnerable not only to fraud, but also to those who would take advantage of that trust in order to profit at their expense. For example, retiree Janice Winston testified at a Senate briefing on the importance of unconflicted advice. In her testimony she shared, "I thought that anyone I paid to advise me would be guided only by my best interest. This is important, because I really have no good way to evaluate whether my investments are performing well or whether I am paying too much in fees. Imagine my surprise when I learned that my investment advisor was not necessarily required to act in my best interest."[9] Retail customers who place their trust in salespeople that market services as acting in their best interest can end up paying excessively high costs for higher risk or underperforming investments that only satisfy a suitability standard, not a fiduciary standard. That is money most middle-income investors cannot afford to lose -- every penny counts.[10]

AARP Foundation recently spoke with Anna Duressa Pujat, a retired university librarian who contributed to her employer-provided retirement account for 20 years before retiring.[11] When Anna retired, she rolled her savings into a ROTH IRA and was ultimately deceived twice by unscrupulous advisers. Anna states, "I want people to know that investors often don't know what is happening with their accounts until

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[9] Pension Rights Center, Retiree Janice Winston speaks out in support of strong fiduciary regulations (Sept. 13, 2013), http://www.pensionrights.org/newsroom/speeches-statements/retiree-janice-winston-speaks-out-support-strong-fiduciary-regulation-0

[10] *See* Craig Copeland, *2015 Update of the EBRI IRA Database: IRA Balances, Contributions, Rollovers, Withdrawals, and Asset Allocation*, EBRI ISSUE BRIEF NO. 437, at Figures 2, 4, 6, 19 (Sept. 2017), https://www.ebri.org/pdf/briefspdf/EBRI_IB_437_IRAs.12Sept17.pdf (finding that the average IRA account balance in 2015 was $99,017, but 45% of those owning IRAs had less than $25,000 in their accounts at year-end 2015; accounts were largest closest to retirement age); Alicia H. Munnell & Anqi Chen, *401(k)/IRA Holdings in 2016: An Update from the SCF* (Issue Brief No. 17-18),Ctr. for Retirement Research at Boston College (Oct. 2017), http://crr.bc.edu/briefs/401kira-holdings-in-2016-an-update-from-the-scf/ (households approaching retirement had approximately $135,000 in 401(k) and IRA assets which provides only $600 per month in retirement).

[11] *See* Declaration of Anna Duressa Pujat, attached to *AARP's Motion to Intervene in Chamber of Commerce v. U.S. Dep't of Labor*, Case No. 17-10238 (5th Cir. filed Apr. 26, 2018).

something goes wrong…even with the information at one's disposal, it can be hard to fully comprehend." Anna and her husband shared that, outside of their home, her retirement account is their greatest financial asset and they depend on this money for their basic needs and financial security. After suffering financial losses from exorbitant service fees and inappropriate and risky investments with her retirement funds from previous advisers, Anna recently shared, "Having the fiduciary rule would give me confidence that I am receiving the financial guidance I know I need."

b. The duties of BDs must be clearly defined.

The current proposal does not define what is definitively a best interest standard. Instead, the question of whether a BD acted in the best interest of its retail investor is left to be determined by consideration of the facts and circumstances surrounding the recommendation. However, AARP's research indicates that investors do not understand the different legal standards that apply to different types of financial professionals. Retail investors expect that financial professionals are required to act in the investor's best interest. Although older Americans may not be able to tell you the precise legal definition of fiduciary, they have clear views on what they expect from financial professionals.

In six state specific opinion polls conducted by AARP, we asked residents age 50 plus questions related to various investor and consumer reforms.[12] Respondents overwhelmingly favored requiring financial professionals to put the consumer's interest ahead of their own when making recommendations. In a 2018 poll, almost 70 percent of respondents agreed that the government should establish a rule that would require professional financial advisors to give advice that is in the best interest of the account holders when giving advice about retirement accounts.[13] In addition to a fiduciary duty of care, respondents have favored upfront disclosure of fees, commissions, and potential conflicts that could bias advice. The level of support for this commonsense reform ranged from a low of 88 percent (Arkansas) to a high of 95 percent (Indiana).[14] Moreover, not only do investors believe that investment advice should be provided in their best interest, but most of the financial services industry generally agree. *See*, e.g., SIFMA Comment Letter 506 to Department of Labor (DOL) ("The industry … shares that goal" "to ensure financial services providers are looking out for their customer's best interest").[15] For decades, registered IA and certified financial planners have successfully and profitably provided fiduciary advice. Expanding that model to the BD space would

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[12] http://www.aarp.org/money/scams-fraud/info-04-2010/finprotect_states.html.
[13] AARP 2018 Mid-Term Voter Issues Survey (2018), https://www.aarp.org/content/dam/aarp/politics/advocacy/ 2018 /08/aarp- national- multi-issue-voter-survey-Q21.pdf.
[14] *Id*.
[15] https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00506.pdf.

provide consistency across the regulatory landscape as well as much need consumer protection.

There is no question that there is currently confusion among retail investors in the marketplace as a result of standards that are not uniform and do not address the perpetually evolving universe of investment products and industry practices. The Commission has proposed that BDs act in the best interest of the retail customer "without placing the financial or other interest of the [broker-dealer] making the recommendation ahead of the interest of the retail customer."[16] This is only a small piece of what a best interest standard entails. This standard does not appear to provide additional, much-needed protections for retail investors. Unfortunately, this proposal is similar to the current standard for BD. In order to safeguard the hard-earned savings of retail customers seeking investment advice from financial professionals, the Commission should propose a standard that includes clear definitions and guidance along with requirements that are harmonized for both IAs and BDs engaging retail customers. Harmonization is necessary in today's environment because salespeople often act as "advisors" and the standards of conduct related to providing advice are unclear to the average retail investor.

Multiple studies have demonstrated that retail investors are often unsure of the difference between the legal standards of conduct for a BD (subject to suitability obligations under the Financial Industry Regulatory Authority (FINRA) rules) and an IA (subject to fiduciary obligations under the Advisers Act). Financial professionals who provide investment advice in the form of "recommendations" and engage in the sale of securities products should be required to act in the best interest of the retail customer "without regard to" the financial or other interest of the BD or IA providing the advice. Including this language in the proposed standard**,** along with other specific requirements, would significantly strengthen the consumer protections that are the stated objective of the Commission's proposal.

Currently, when a retail customer engages an IA, the adviser is subject to the Advisers Act, current SEC rules, and state investment adviser laws. IAs provide a wide range of services such as managing portfolios of pooled investments, sponsoring wrap fee programs, acting as portfolio managers and generally providing advice about securities including advice in conjunction with offering products and recommendations. Clients are typically charged based on the percentage of assets under management, but can also pay for services by the hour or at a fixed rate. In the Advisers Act there is an implicit requirement that the adviser act as a fiduciary.

[16] https://www.sec.gov/rules/proposed/2018/34-83062.pdf.

On the other hand, when a retail customer engages a BD, the BD is subject to the Securities and Exchange Act of 1934, the rules of the SEC, FINRA, and state broker-dealer laws. The financial advisor may provide services such as making recommendations of specific securities products such as mutual funds, stocks and other financial products, purchasing or selling securities products, including variable and index annuities and some insurance products. The distinction is that the BD is a salesman who may offer a range of products and services. Therefore, while the BD may often provide investment advice during the course of their business, they are exempt from the requirements of the Advisers Act. This is because the advice is deemed "incidental" to their business and they do not charge specifically for the advice. This regulatory regime makes it possible for financial advisors in the BD space to avoid obligations designed to protect the customer and can lead to the client receiving conflicted advice.

Concerns regarding the potential harm to retail customers resulting from BD/IA conflicts of interest, and in particular the conflicts associated with financial incentives, have existed in the financial services industry for many years. The current system requiring that financial advisors and investment advisers act in the "best interest" of clients has not provided protections from the conflicts of interest and unscrupulous conduct often identified by regulators. The question at hand is whether Reg BI, as proposed, would work to alleviate the kinds of risks, conflicted advice and aggressive sales activities that have been repeatedly identified by regulators. Reg BI retains the status quo in key ways because retail customers will continue to have to figure out what standard of care applies to the relationship with their financial professional and this requires the same facts and circumstances analysis that retail investors have yet to master.

It is our understanding that the Commission views this proposal as setting forth clear minimum standards for BD conduct that will improve the quality of recommendations and address the issue of conflicts. The SEC contends that the requirements will provide additional protection for retail customers. However, we are concerned that this proposal will not meet the Commission's objective and may in fact create additional confusion.

According to the Commission, Reg BI sets forth new obligations under the Exchange Act which would establish an "explicit best interest obligation". Currently, there is no explicit obligation under FINRA or the Exchange Act that requires BDs to make recommendations that are in their customers' "best interest." While the suitability rule has been interpreted to require that a BD make recommendations that are "consistent with a customer's best interests," the SEC asserts that the current FINRA suitability rule does not explicitly set forth a best interest standard. This proposed rule would require that all BDs, and natural persons who are associated persons of a BD, act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities. The Commission further contends that all of these obligations are greater than the suitability standard, and taken together would improve investor protection by minimizing the potential harmful impacts that BD conflicts of interest may have on recommendations provided to retail customers. We disagree. To be effective, Reg BI should specifically prohibit certain sales practices and call for a uniform fiduciary standard for all financial professionals when providing investment advice to retail customers.

As currently proposed, the Reg BI obligation would not provide the "additional protections" retail customers are seeking and could potentially cause more confusion. A thorough reading of Reg BI and its obligations appear strikingly similar to the obligations set forth in the FINRA suitability rule including its guidance. Despite the enhancements of the FINRA rule over the years, FINRA has provided limited protections to retail investors and has not prevented unscrupulous sales people and advisers from parading as working in the client's best interest while offering retail customers conflicted advice and unsuitable recommendations to boost their own compensation, sales, and revenues.

IV. Reg BI must confront the multitude of conflicts that already exist in the marketplace and offer clear guidance to financial professionals and retail investors.

As stated above, FINRA's suitability rule requires that a financial professional "act in the best interest of a client;" however, this standard is a "suitability" standard and not a fiduciary standard. Yet a review of regulatory enforcement actions indicate that FINRA's rules do not protect retail customers from unsuitable recommendations and conflicted advice.

The Advisers Act requires that conflicts be mitigated by disclosure to clients via Form ADV Part 2A and/or the 2B. In the retail BD context, these conflicts are likely to be disclosed in prospectuses that typically contain industry jargon and are not easily understandable. The Commission's proposal would now require that conflicts of interest related to recommendations and financial incentives be managed by BDs via disclosure and conflict management. Our concern is that due to the ambiguity of the proposal, a number of existing conflicts, which are further described below, will not be adequately remedied or mitigated. Currently, there exist a wide array of opportunities for conflicts, including but not limited to:

- Firm versus client (proprietary products, third party products, revenue sharing)
- Client versus client
- Firm employee versus client (compensation arrangements, incentives, bonuses)
- New product conflicts

Firm versus client

Conflicts between the firm and a client are usually the most common. An obvious conflict can present itself when a financial professional sells or recommends proprietary products or products issued by an affiliate or third party. These types of conflicts can be found in a BD's private wealth management business or in an investment advisory firm as firms seek to leverage their brokerage or other platforms to cross-sell products and services. While there are firms that have open product architecture platforms, which allows for the sale of third party products as well as proprietary products, financial professionals may be paid higher commissions, or other rewards, for selling proprietary products -- usually at the expense of customers. In addition, conflicts arise in situations when firms involved in both the manufacture and distribution of products do not operate with an appropriate level of independence from other business lines within a firm. Accordingly they do not maintain adequate safeguards necessary to alleviate the pressure for financial professionals to choose and recommend proprietary products that may not be suitable or in a client's best interest, but do provide greater revenue for the firm or the financial professional.

Clearly, it is a conflict for a financial professional to offer or recommend a product to a customer for which he receives greater compensation than other less expensive products, or to offer a product that may not be not suitable for the client mainly because of the compensation that the financial professional will receive.[17]

Conflicts of interest of this nature are a common problem faced by firms with revenue sharing or other partnering arrangements with third parties. In July of 2015, FINRA ordered Wells Fargo Advisors, LLC, Wells Fargo Advisors Financial Network, LLC, Raymond James & Associates, Inc., Raymond James Financial Services, Inc., and LPL Financial LLC to pay restitution for similarly failing to waive mutual fund sales charges for certain charitable and retirement accounts. Collectively, an estimated $55 million in restitution was reportedly paid to more than 75,000 eligible retirement accounts and

[17] *See* In the Matter of SunTrust Investment Services, Release No. 81611 (Sept. 14, 2017), www.sec.gov/litigation/admin/2017/34-81611.pdf. Suntrust Investment Services ("STIS") settled SEC claims that it breached its fiduciary duty to its advisory clients, made inadequate disclosures that failed to explain certain conflicts of interest related to fees and charges, and had deficiencies in compliance policies and procedures in connection with its mutual fund share class selection processes. Specifically, investment adviser representatives of Suntrust purchased, recommended, or held "Investor class" or "Class A" mutual fund shares for advisory clients when less-expensive "Institutional class" or "Class I" shares of the same mutual funds were available. More than 4,500 client accounts of STIS were affected. *See Also* In the matter of Questar Capital Corporation, http://www.finra.org/sites/default/files/fda_documents/2016049977801%20Questar%20Capital%20Corp.%20CRD%2043100%20AWC%20jm.pdf%20REDACTED.pdf. FINRA cited Questar for overcharging clients and failing to apply available sales charge waivers to eligible retirement accounts and charitable organizations, from 2009 through 2016. The firm paid $796,892 in restitution to clients who paid excessive sales charges on mutual fund shares.

charitable organizations as a result of those cases.[18] Later that year, FINRA also ordered five additional firms to repay customers for the same violations.[19]

The Commission should promulgate uniform rules designed to ensure the necessary diligence and independent judgment to protect retail customers' interest. The average retail customer, with little experience and understanding of the obligations of BDs and IAs, can become an unsuspecting victim. For example, FINRA fined and suspended Michael Murphy Hurtgen for soliciting retail customers to invest in a private placement offering without notifying his firm. While the firm had approved outside business activity, it had not approved Hurtgen's solicitation of its clients. In addition, FINRA found that the sales materials that Hurtgen distributed to the solicited retail clients failed to provide a balanced presentation and sound basis for evaluating the investment that was being promoted, contained misleading information, and also failed to comply with the content standards for communications with the public.[20]

Other conflicts can arise between firms and a client when the firm performs multiple roles with respect to a client or transaction or when the adviser engages in trading activities while his other clients are simultaneously active in the same markets. For example, Jeremy Licht, doing business as JL Capital Management, settled SEC allegations that he perpetuated a fraudulent scheme by day trading in an omnibus account, by delaying allocation of those trades until he had an opportunity to observe the security's performance over the course of the day during which the trades occurred. The SEC alleged that Licht sometimes sold the security the same day if its stock price rose, locking in a day-trading profit for the sale, which he allocated to himself. In addition, Licht disproportionately allocated unprofitable purchases -- those whose price dropped -- to clients, which caused Licht's clients to lose money. Licht purportedly waited several hours and/or until after trade business hours to allocate trades from his omnibus account to either his or his clients' accounts.[21]

Unfortunately, this scenario is not unique. While IAs have a fiduciary obligation and BDs are supposed to make suitable recommendations to customers, year after year, the SEC and other regulators have found instances where retail investors have become the unwitting victims of unscrupulous financial professionals like Mr. Licht. Lack of harmonization between standard of care obligations perpetuates this cycle. Furthermore, disclosure of conflicts is not enough. Disclosure will not protect the retail

[18] http://www.finra.org/newsroom/2015/finra-sanctions-wells-fargo-raymond-james-and-lpl-30-million.
[19] http://www.finra.org/newsroom/2015/finra-orders-5-firms-pay-18-million-failing-waive-fund-sales-charges.
[20] *See* In the matter of Michael Murphy Hurtgen, http://www.finra.org/sites/default/files/fda_documents/2016049202201%20Michael%20M.%20Hurtgen%20CRD%201742647%20AWC%20sl.pdf.
[21] *See* In the Matter of Jeremy Licht, JL Capital Management, www.sec.gov/litigation/admin/2017/34-81584.pdf.

client from conflicted advice because not all conflicts can be mitigated or avoided or the transaction overall may not be in the client's best interest.

Client versus client

Conflicts can arise between clients and present challenges for financial professionals, particularly IAs subject to a fiduciary duty. Client versus client conflicts can arise when multiple clients are interested in the same products/securities, company, asset or other business venture. For example, a firm could have discussions with clients on both sides of a deal. Typically when an IA purchases securities for clients, he identifies the accounts for which the trades are purchased at the time of the order or shortly thereafter. Often regulators have found evidence that unscrupulous financial professionals cherry pick winning trades sometimes benefiting larger or special customers, or worse, that the financial professional has taken the profitable trades for his own account.[22]

It is important that a financial professional not favor large clients over smaller clients when the clients are involved in the same transactions. It may be that a particular investment is more suitable for a specific client because of a certain fact or circumstance. However, it is critical that the financial professional do the appropriate analysis to avoid benefiting himself at the expense of any client, or from benefiting one client over another. Conflicts may also arise between clients when a financial professional charges clients different fees for the same services or investment strategies when the clients are substantially similar.

Setting appropriate fees and fee schedules can be complicated and unsuspecting retail customers may find themselves paying fees they did not agree to pay. Regulators have brought regulatory actions against firms who inappropriately charged fees to customers that were not disclosed or anticipated by the customer.[23] Fee transparency is important.

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[22] *See* The Dratel Group (DGI), www.finra.org/sites/default/files/fda_documents/2008012925001_FDA_TP58 525.pdf. William Dratel fraudulently allocated profitable trades to Dratel's personal account and unprofitable trades to DGI's discretionary customers' accounts. *See also* Keith Springer, 55 S.E.C. 632 (2002), https://www.sec.gov/litigation/opinions/34-45439.htm. Representative violated just and equitable principles of trade.

[23] *See* Merrill Lynch, finra.org/sites/default/files/fda_documents/2008014187701_FDA_JM992548.pdf. *See Also* In the Matter of Barclays Capital Inc., https://www.sec.gov/litigation/admin/2017/33-10355.pdf. Barclays improperly charged advisory clients approximately $50 million in advisory fees. Barclays misrepresented that it was performing ongoing due diligence and monitoring third-party managers. As a result, Barclays improperly charged 2,050 client accounts approximately $48 million in fees. Second, Barclays Capital charged 22,138 client accounts excess fees of approximately $2 million and also disadvantaged certain retirement plan and charitable organization brokerage customers by recommending and selling them more expensive mutual fund share classes when less expensive share classes were available, without disclosing that Barclays had a material conflict of interest, i.e., that it would receive greater compensation from the purchases of the more expensive share classes. In addition, Barclays did not disclose that the purchase of the more expensive share classes would negatively impact the overall return on the customers' investments because of the different fee structures for the different fund share classes.

The Commission should expand its proposal to include guidance that requires financial professionals to provide fee transparency in the form of policies, or consistently applied guidelines, so that clients can assess the fairness and appropriateness of fees before starting an engagement with a financial professional.

Firm employee versus client

Conflicts involving an individual employee and clients can arise when an employee's compensation arrangement or incentives affect how and whether the employee recommends or offers certain products.[24] For an IA, the Form ADV Part 2A requires disclosure of the compensation structure of its employees. In addition, Form ADV part 2b ("brochure supplement") asks about other business activities (outside business activities) that represent more than 10 percent of the adviser's business. The form also asks about "additional compensation from outside activities" referring to the receipt of economic benefits for providing advisory services to an issuer for example. This includes sales awards, bonuses (based in part on the number of sales, client referrals or new accounts opened), or other prizes that are not included in a regular salary. These questions are designed to uncover potential conflicts of interest. These forms are typically supplied to the client when the accounts are opened and again if an update is required if there are any material changes to report during the course of the relationship.

Furthermore, many clients have a brokerage account, as well as, an advisory account. Dually registered advisors are able to toggle between standards of care. The regime that the Commission is proposing with Reg BI would further cement the complexity and confusion that exists today, and which has historically not protected or benefitted retail customers.[25]

New product conflicts

Financial firms are regularly innovating and offering new products from favored distributors, at least in part in an effort to increase revenues.[26] As the creator of these

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[24] *See* in the Matter of SunTrust Investment Services, Release no. 81611, Sept. 14, 2017, www.sec.gov/litigation/admin/2017/34-81611.pdf. *See also* In the Matter of Wells Fargo Advisors, LLC. https://www.sec.gov/litigation/admin/2018/33-10511.pdf. Certain registered representatives at Wells Fargo Advisors improperly solicited customers to redeem their market-linked investments ("MLI") early and purchase new MLIs without adequate analysis or consideration of the substantial costs associated with such transactions.

[25] *See* Final Rule: Amendments to Form ADV, https://www.sec.gov/rules/final/2010/ia-3060.pdf. *See also* the SEC Investor Bulletin on the Form ADV-Investment Adviser Brochure and Brochure Supplement https://www.sec.gov/oiea/investor-alerts-bulletins/ib_formadv.html.

[26] *See* In the Matter of UBS AG, https://www.sec.gov/litigation/admin/2015/33-9961.pdf. UBS sold $190 million of medium term structured notes in registered offerings to 1,900 retail investors during the financial crisis. UBS perceived that investors interested in diversifying their stock and bond portfolios were attracted to these types of structured products so long as the underlying trading strategy was transparent. The notes had a 3 year term and the investors were entitled to a cash payment at maturity dependent on the trading performance. UBS told investors that structured notes were a "transparent" and "systematic" currency trading strategy. UBS did not disclose that it took unjustified markups, engaged in hedging trades, traded in advance of certain hedging transactions--that negatively impacted or had the potential to

products, these firms are in the best position to identify the conflicts of interest that may exist at the time the product is created or conflicts that may develop over time. From the BD perspective, complex products have remained the focus of regulators because of the harm conflicts inflict on retail customers. Hence, regulators have been heavily focused on conflict identification and conflict management. Firms have often failed to disclose the conflicts and the risks of those products to customers in advance and in plain language, thereby failing to ensure that customers comprehend the nature of the conflicts that a firm or financial adviser may have in recommending a particular product.[27] These conflicts can be particularly serious when complex financial products are sold to less knowledgeable customers who cannot understand the industry jargon. Conflict mitigation or management should ensure that distribution channels have adequate controls to protect customer interests.[28] With a new product there are no "reviews" of the product and no way to check from outside sources how good or bad a product is. Therefore, firms should be required to carefully evaluate and decline to offer products to customers when the conflicts associated are too significant to be effectively managed.

<u>Employee versus firm conflicts</u>
An employee who engages in personal trading or outside business activities, such as outside investment opportunities, may create circumstances that conflict with a client or with the Firm. These arrangements are required to be approved in advance;[29] however, often they are not. Regulatory records are filled with instances where firm employees

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negatively impact pricing inputs which depressed the index. UBS misled investors about key features of this complex financial instrument, which ultimately caused losses to the investors.

[27] *Id*.

[28] *See* In the Matter of Merrill Lynch Pierce, Fenner & Smith Inc. Release No. 10103 (filed June 23, 2016), https://www.sec.gov/litigation/admin/2016/33-10103.pdf. Merrill Lynch's failed to adequately disclose certain fixed cost in a proprietary volatility index linked to structured notes known as Strategic Return Notes ("SRNs") of Bank of America. Merrill Lynch sold $150 million of these volatility notes to 4,000 retail investors in 2010 and 2011. The disclosures made it appear as if the volatility product had low fixed costs. The offering materials failed to disclose a third fixed regularly occurring cost included in its proprietary volatility index known as the "Execution Factor" (an additional cost of 1.5% on the Index each quarter). The SEC stated that a reasonable retail investor would have considered it important to the totality of information available when purchasing the SRNs because the Execution Factor imposed a significant transaction cost (1.5% of the Index value each quarter, accruing on a daily basis). Merrill Lynch's failure to disclose the Execution Factor rendered the cost disclosure materially misleading. *See also* In the Matter of Merrill Lynch Pierce, Fenner & Smith Inc., http://www.finra.org/sites/default/files/MLCO_AWC_113016.pdf. FINRA sanctioned the firm for failing to supervise securities in customer brokerage accounts, and lacking adequate supervisory systems and procedures to ensure the suitability of transactions. In addition, FINRA found that twenty-five leveraged customers with modest net worth, conservative investment objectives, and 75 percent or more of their account assets invested in Puerto Rican securities, suffered aggregate losses of nearly $1.2 million as a result of liquidating those securities to meet margin calls.

[29] *See* FINRA Rule 3280, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id= 12012.

meet clients by virtue of their employment at the Firm and later convince clients to invest in outside opportunities.[30]

Another obvious conflict of interest may arise when an employee competes with the firm. This could occur when the employee competes with the firm for the purchase or sale of property, assets, services or other interests. This type of conflict puts the financial professional ahead of the client and could potentially disadvantage a client.

With the multitude of conflicts already extensively documented, AARP is justifiably concerned that Reg BI is neither clear enough nor strong enough to remedy the harm being perpetrated on vulnerable retail investors. AARP believes it would be helpful for retail investors -- as well as financial firms -- to have some examples demonstrating when a BD would be deemed, under this new proposal, to be acting in their best interest. Therefore, we offer a number of scenarios for the Commission's consideration and as an opportunity for clarification and explanation. We welcome other examples for further clarification.

Under the following scenarios, involving a retail customer working with a BD, would the BD be deemed compliant with Reg BI? If not, how would non-compliance be resolved by the Commission? If yes, please explain how compliance with Reg BI would be determined. Please include the factors that would be considered and the analysis that would be undertaken in each case.

- Retail investor, John, is in a diversified, low cost 401(k) plan that is meeting his needs in terms of saving for retirement. John leaves his company to start a new job. His BD recommends that John roll over his 401(k) funds into an IRA held at the BD's firm, which has much higher fees for comparable investments (30 basis points higher than John's current 401(k) plan.) John agrees to roll over the funds and is placed in a similarly diversified but higher cost plan.

- BD advises his client, Jane, a retail investor who currently has a Roth IRA, to use some of the funds in her IRA to purchase a variable annuity. Jane is 65 years old and has a defined benefit pension plan, which will pay her 60 percent of her pre-retirement income. Jane has minimal investment experience.

- Kurtis, a novice retail investor, sees a commercial advertisement for structured variable annuities, called buffer annuities. The advertisement claims this protects against downside risk and volatility. That sounds promising to Kurtis so he contacts his "advisor" to see if that product would be right for him. Kurtis does not

[30] *See* In the Matter FINRA vs. Aon D. Miller, Complaint No. 2012034393801, (filed May 23, 2018). Miller participated in private securities transactions without providing written notice to his firm after the Firm declined to authorize him to act as a selling agent for a commercial real estate investment company founded by a childhood friend of Miller. Miller convinced several of the Firm's customers to invest the outside commercial real estate investment. http://www.finra.org/sites/default/files/NAC_2012034393801_Miller_052318.pdf.

fully understand the product but his BD wholeheartedly recommends the investment.

- BD works for Company A and recommends only proprietary products offered by Company A to his clients. Two years later, the BD switches firms and becomes employed by Company B, which also only offers its own proprietary products. Company B's products are comparable to Company A's products but are more expensive. BD encourages his clients to sell the proprietary investments from Company A and purchase products offered by Company B.
    - Assuming products from Company A and B are similar, and the BD waives the commission fees, would this meet a best interest standard?

- BD offers an annuity that pays a minimum of 2 percent. If the market goes up more than 6 percent, then it pays an additional 1 percent. There is also a provision that if the market does not do well the company reserves the right to pay less than the minimum of 2 percent. There is a 4 percent surrender charge. BD recommends this product to Joe, a 67 year old retired retail investor. The BD does not verbally disclose the surrender charges and conditions upfront and in person. Joe agrees to invest in the variable annuity but he does not understand the terms associated with this product.

- BD recommends that Clair, a retail investor who currently has an IRA, purchase several tax-free bonds for which she would pay the BD a commission.

- Richard, a 90-year-old retail investor, approaches a BD about purchasing safe U.S. Treasury bonds. BD Advisor recommends that Richard purchase several lower grade junk bonds, telling Richard that these bonds will produce higher returns. BD does not disclose to Richard that the bonds are not investment grade, and that the bonds carry more risk.

- BD represents two clients who are married (Client A and Client B). The clients have a joint investment account. Client A and Client B divorce. The clients present a court order to BD stating that the marriage has been dissolved and the investment account is to be divided equally. Client A and Client B decide to continue working with BD, utilizing the same strategies and want identical accounts. BD agrees to retain both clients and complies with the court's order dividing the funds and opening two identical but separate accounts at his firm. BD charges the clients different fees for identical account services -- charging Client A 1 percent and Client B 1.5 percent.

- BD works for one company and offers two products: (1) an S&P fund at less than 50 basis points; (2) a variable annuity at more than 200 basis points. BD recommends the variable annuity to Tim, his retail investor.

- Grace is a retail investor currently invested in a balanced fund IRA. Her BD advises her to purchase a variable annuity within the IRA.

- BD manages an employer-sponsored 401(k) plan. BD says a lot of people in the plan do not know what to do with their money. Therefore, for an additional fee, he offers to advise participants on investing their 401(k) money in the various options offered by the plan.

- Bill approaches his BD because he is interested in a 529 plan for his newborn son. Bill has no previous investment experience. BD agrees to sell Bill a 529 plan, which pays BD a commission exceeding one percent but does not disclose to Bill that he also has the option of purchasing a direct-sold 529 plan which may be available in his home state with only a small enrollment fee.

- BD represents Company A. On January 2017, BD opens an account for Sally, a retail investor. The account contains low cost diversified mutual fund investments from ABC mutual fund family. In April of 2018, Company A launches a new mutual fund product from a different mutual fund family ("XYZ mutual fund family"). Around the same time, Company A runs a sales challenge for its BDs -- the BD with the most sales of its new mutual fund this quarter will receive a substantial bonus in July. BD reaches out to Sally and tells her about a new and exciting mutual fund product. He does not identify problems with her existing investments but BD recommends that Sally switch her mutual fund investments from the ABC fund family into the new mutual fund offered by XYZ mutual fund family, a different family of funds. He does not mention he will get another commission if she makes this switch.

V. The Commission should expand its disclosure obligation provision.

The Commission should require advisers to provide fee disclosure any time an adviser makes a recommendation for any and all types of accounts. The Commission should not take a narrow approach to the type of account, particularly "retail" accounts. First, advisers frequently ask potential or existing clients to disclose all assets in all accounts. Second, advisers do not typically limit their recommendations to retail accounts. Advisers will often provide advice on institutional accounts such as 401(k), 403(b), 457 and Roth accounts as well as recommendations to roll-over or transfer institutional accounts to retail accounts. Individuals often have both institutional and retail accounts and advisers often serve multiple types of products. The key factor is the adviser recommending an investment. A retail investor cannot make a determination to invest if they do not know the risks, rewards, conflicts and fees in advance of their decision. Furthermore, it is not enough for the financial professional to solely rely on their own opinion. The professional must assess what a prudent expert would recommend and document their decision-making process.

a. Timing requirements

The timing of disclosures is crucial. At the time of or immediately prior to investing is not adequate disclosure. Some advisers will hand a packet of fee and other disclosures as the transaction is being signed or finalized. The Commission should make it clear that this is plainly inadequate.

All key disclosures should be made significantly in advance of an investment decision. To the extent the current SEC rules permit disclosure at the time of, simultaneous with, or after an investment sale, all such rules should be promptly amended. Individuals need to know key terms and conditions in order to make an informed decision, including the fees on an investment and any monetary or other conditions for cancelling or modifying the investment. Tens of thousands of complaints are filed each year for the simple reason that advisers did not disclose or explain the fees or penalties for investment changes.

b. Electronic versus paper disclosures.

The Commission must also consider all of the implications of electronic versus paper disclosures. First, many of the current required disclosures are long and complicated. For example, a prospectus or summary of information can be over 100 pages long. If the Commission is serious about disclosures, then it must make them workable for the average retail investor. Most significantly, waivers should be short and clear so investors actually read them. Second, key information, fees, and conditions must be highlighted to ensure online investors see the information. Third, the Commission should explicitly prohibit advisers from solely providing an electronic address for retail investors to access disclosures. It is inadequate disclosure if advisers simply point investors to another medium that they must search for to obtain critical consumer disclosures. Fourth, advisers should always be required to provide disclosures in advance and on paper. All fee, conflict of interest, and surrender and change of contract charge disclosures should be provided substantially before the completion of the sale and execution of a transaction. Advisers should be required to document the types of investments the investor wanted, what the adviser recommended, what the investor agreed to, and all key terms and conditions. A paper copy should be provided, or at a minimum offered, to the retail investor. Finally, oral disclosures should never be permitted.

VI. Investor knowledge gaps must be tackled if the Commission is to successfully create new rules that will provide consumer protection.

The Commission concedes that it is difficult for a customer to police or recognize a BDs actual knowledge of risks and rewards associated with an investment. It also suggests that requiring higher standards of BDs would be a futile effort given that customers are unable to assess the BD's actual knowledge or skills.[31] Yet, the proposed disclosure regime expects that customers alone would be able to comprehend the BD's

[31] https://www.sec.gov/rules/proposed/2018/34-83062.pdf at 217.

compensation structure and nature of conflict: "In particular, this obligation would foster retail customer awareness and understanding of key broker-dealer practices as well as material conflicts of interest."[32] The proposed rule cannot have it both ways, assuming that through disclosure customers will have the skills necessary to sufficiently understand how a BD is operating in order to make decisions about a potential customer relationship and also stating that customers cannot understand a BD's qualifications.

While the Commission states that "a broker-dealer's actual level of understanding is difficult to confirm,"[33] it expects investors to play a larger role in vetting their BD: "To the extent that uncertainty about a broker-dealer's conflicts of interest associated with a recommendation complicates a retail customer's evaluation of the recommendation, the Disclosure Obligation would reduce that uncertainty and, therefore, would help retail customers better evaluate broker-dealer recommendations."[34] As stated earlier in this letter, we believe the Commission should instead consider placing a heightened standard on BDs -- policed by an entity other than the customers themselves -- when they provide what are perceived as advisory services.

The economic analysis notes that reduced consumer trust may drive people out of markets entirely.[35] This phenomenon has already taken place: an April 2017 Gallup poll reported that 54 percent of Americans owned stocks, a sharp reduction from an average of 62 percent in the years prior to the 2008 financial crisis.[36] The analysis suggests that disclosure and management of conflicts could increase trust in markets. However, as noted above, relying primarily on disclosure has the potential to increase false confidence in the safety of a financial product, and to deflect blame away from a financial entity when the product does not function as expected.[37] For investors relying on BDs to provide individualized advice, rather than merely executing transactions, the resulting boost in false confidence only leads to a continuation of improper advice and potential financial harm that ultimately increases costs to the public.

a. The economic analysis fails to adequately identify the benefits and costs to retail investors.

The economic analysis repeatedly conflates projected costs to investors with projected costs to BDs. If a BD subject to a new, heightened obligation to act in the investor's best interest provides such investor with an objectively better product in the absence of

[32] *Id*. at 256.
[33] *Id*. at 219.
[34] *Id.* at 260.
[35] https://www.sec.gov/rules/proposed/2018/34-83062.pdf at page 221
[36] Jeffrey M. Jones, *U.S. Stock Ownership Down Among All but Older, Higher-Income*, Gallup (May 24, 2017), https://news.gallup.com/poll/211052/stock-ownership-down-among-older-higher-income.aspx.
[37] Lauren Willis, *Decision making and the Limits of Disclosure: The Problem of Predatory Lending: Price*, *Maryland Law Review*, Vol. 65 No. 3 (2006).

conflicts of interest, the investor obtains a benefit from that transaction. Depending on changes in market-wide compensation practices, the BD's compensation might be reduced. This would be a cost to the BD but, conversely, a potential benefit to the investor. To the extent that a best interest requirement effectively shifts costs from the investor to the BD, that shift should not be considered to impose costs on both sides.

Yet the analysis suggests that if BDs avoid certain products in order to meet their obligations under Reg BI, costs would be imposed on retail customers for products that may be beneficial in certain circumstances.[38] The Commission fails to give an example of what such a specific product or hypothetical customer would be. Presumably, if a product frequently fails to meet customers' objectives once BDs are under an obligation to act in the customer's best interest, this is a product that imposes higher costs or provides lower returns to the customer. Eliminating such a product would thereby effectively reduce costs to the investor, not increase them.

Similarly, the analysis suggests that BDs, under a best interest requirement, might provide lower-quality recommendations based on new compensation arrangements that "reduce the incentives of broker-dealers to exert effort."[39] If this result were true, the advice rendered was not actually in the customer's best interest because this obligation implies that the BD would exert effort to make proper recommendations without regard to his own compensation.

b. Competition analysis does not account for investor perceptions of the marketplace.

The analysis states that "to the extent that there are customers who prefer the commission structure of a broker-dealer, but who chose to use an investment adviser because of their fiduciary standard of conduct, we expect that the proposed rule will enhance competition between broker-dealers and investment advisers."[40] In other words, a heightened standard for BD would improve competition. At the same time, the analysis rejects the concept of actual direct competition between the two on the basis of non-conflicted advice: "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."[41] However, as testing has repeatedly shown, in the retail investor's view the two categories of financial professionals are viewed as interchangeable, thus effectively competing with one another. Failing to recognize this

[38] *Id*. at 257.
[39] *Id*. at 312.
[40] *Id*. at 320.
[41] *Id*. at 331.

leads to a proposed rule that only modifies investor perceptions rather than improving BD behavior.[42]

Additionally, the analysis downplays the significant consequences of even one-time advice, claiming that "the nature of the relationship between customers and broker-dealers and the level of monitoring by broker-dealers tends to be episodic, rather than ongoing." While this may be true for some customer relationships, BDs who operate in what is perceived to be an advisory role may make only one-time recommendations with highly significant consequences. Retirement plan rollovers are one case for particular concern. For example, a federal employee with assets in the Thrift Savings Plan might be directed toward an account with much higher fees when seeking advice from a financial professional.[43] If BDs are marketing financial advice, not sales and execution services -- and countless advertising pitches suggest that they provide advice under some notion of serving the client's best interest[44] -- the episodic nature of this relationship is immaterial with regard to the significant costs investors may incur due to conflicts of interest.

It is notable that the costs to firms under this rule are extensively documented based on a series of assumptions. Yet the potential benefits to retail investors are not quantified, while costs to firms are mischaracterized as also being investor costs. While the Commission clearly faced and acknowledged methodological constraints in quantifying benefits, this is a markedly one-sided analysis. One potential conclusion is that, as written, the benefits to investors are unclear because the specific benefits of heightened disclosure, the centerpiece of the rule, are themselves unclear and not quantifiable.

VII. The financial services industry agrees that a fiduciary standard is the appropriate standard for providing retirement investment advice.

The financial services industry repeatedly states that investment advice should be provided in the best interest of the participant and retirement investor. Registered investment advisers and certified financial planners have for decades successfully provided fiduciary advice. Noting that the public demand for fiduciary advice has increased dramatically and that the market continues to move in the direction of providing fiduciary advice, earlier this year the Certified Financial Planner (CFP) Board of Standards approved revisions to its *Standards of Professional Conduct*, which sets forth the ethical standards for CFP® professionals. The revision broadens the

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[42] Angela A. Hung, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, Rand Institute for Civil Justice (2008), https://www.sec.gov/news/press/2008/2008-randiabdreport.pdf.
[43] Mark Miller, *Thinking of a retirement account rollover? Think twice*, Reuters (Dec. 23, 2014), https://www.reuters.com/article/us-column-miller-retirement/thinking-of-a-retirement-account-rollover-think-twice-idUSKBN0K110020141223.
[44] Micah Hauptman and Barbara Roper, *Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have It Both Ways*, Consumer Federation of America (Jan. 18, 2017), http://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf.

application of the fiduciary standard, effectively requiring CFP® professionals to put a client's interest first at all times.

VIII. Conclusion

AARP remains committed to the strongest possible fiduciary standard for retirement investment advice and recommends a similar standard for all other investment advice. There is a growing need to update the rules that accurately reflects the realities of the marketplace today and provides investors with the protections they need to save and invest for retirement. We urge the Commission to implement a uniform fiduciary standard to protect investors.

We look forward to working with you and your colleagues to ensure that the Commission's rulemaking, and its companion proposals 3235-AL27 and 3235-AM36, deliver meaningful investor protections for the customers of investment advisers and broker-dealers. As we review the issues raised in other comments, AARP may respond with further comments. If you have any questions, please feel free to contact me or Jasmine Vasquez of our Government Affairs office at [redacted] or at [redacted].

Sincerely,

David Certner
Legislative Counsel and Legislative Policy Director

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URLs to Appendix:

File 1: https://www.aarp.org/content/dam/aarp/politics/advocacy/2018/08/file-one.pdf

File 2: https://www.aarp.org/content/dam/aarp/politics/advocacy/2018/08/Pages31-70.zip

File 3: https://www.aarp.org/content/dam/aarp/politics/advocacy/2018/08/Page71-111.zip