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Prof. Quinn Curtis
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August 3, 2018

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

Re: Proposed Rule: Regulation Best Interest (Release No. 34-83062; File No. S7-07-18)

Dear Mr. Fields,

I commend the SEC's efforts to protect investors against the effects of conflicts of interest in investment advice. With the demise of the DOL Fiduciary Rule, steps to address conflicted advice should be a priority. While the SEC has decided to take an approach different from the DOL's, the extensive record created by the Fiduciary Rule should not be overlooked, and Regulation Best Interest could be improved by engaging with the lessons of the Fiduciary Rule.

As an initial matter, the DOL, in its Regulatory Impact Analysis, made extensive and detailed efforts to value the benefits to investors of mitigating the conflict of interest between brokers and clients created by a commission compensation structure. It's surely the case that some of the assumptions behind these calculations could be called into question,[1] but the existence of conflicts of interest and their material impact on consumers is documented by an extensive academic literature and some precision is possible. The proposed rule largely disregards this literature and discards the DOL's calculations. This is a significant omission because the proposed regulation identifies concrete costs associated with disclosure, while largely punting on the quantification of benefits. I hope that the staff will engage with the wealth of data available regarding the impact of conflicts of interest in in its revised proposal.

The proposed regulation also overlooks important work regarding the ineffectiveness of disclosure. I would specifically direct you to the paper, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest* by Daylian M. Cain, George Loewenstein and Don A. Moore.[2] The paper illustrates that attempts to disclose conflicts of interest in advisory relationships can have the perverse effect of leading the conflicted advisor to further distort their advice to offset the effect of the disclosure, while the recipient of advice responds by increasing reliance on the conflicted advice. Such research calls into question the effects of disclosure on mitigating the problem of conflicted incentives.

[1] Curtis, Quinn, The Fiduciary Rule Controversy and the Future of Investment Advice (March 1, 2018). Virginia Law and Economics Research Paper 2018-04. Available at SSRN: https://ssrn.com/abstract=3121708 or http://dx.doi.org/10.2139/ssrn.3121708

[2] Journal of Legal Studies, Vol. 34, No. 1 (January 2005).

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Finally, the precise wording of the proposed regulation would benefit from attention to the Fiduciary Rule. One area of concern is the requirement that broker-dealers "mitigate"[3] material conflicts of interest arising from financial incentives. "Mitigate," as used in the proposed regulation, clearly does not mean "eliminate," but a standard dictionary definition of mitigate--"to make less severe"--would seem to cover almost any remedial action, no matter how trivial. Some clarity here is essential. The Fiduciary Rule's BIC exemption, Section II(d)(2), provides language specifying what mitigation might require:

> In formulating its policies and procedures, the Financial Institution has specifically identified and documented its Material Conflicts of Interest; adopted measures reasonably and prudently designed to prevent Material Conflicts of Interest from causing violations of the Impartial Conduct Standards set forth in Section II(c); and designated a person or persons, identified by name, title or function, responsible for addressing Material Conflicts of Interest and monitoring their Advisers' adherence to the Impartial Conduct Standards.[4]

This language, particularly the requirement that firms adopt "measures reasonably and prudently designed to prevent Material Conflicts of Interest from causing violations of the Impartial Conduct Standards," provides much more guidance as to what it means to "mitigate" conflicts of interest. Given the importance of the mitigation requirement, which cannot be satisfied merely be disclosure, I hope the SEC will consider a revision of the proposed rule with clearer language on this critical requirement.

Best regards,

Quinn Curtis
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University of Virginia School of Law
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[3] Regulation Best Interest, 83 Fed. Reg. at 21,681 (April 18, 2018).
[4] Best Interest Contract Exemption, 81 Fed. Reg. 21,077 (April 8, 2016).