Bank of America

August 7, 2018

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

Re: Regulation Best Interest (File No. S7-07-18); Regulation Form CRS Relationship Summary (File No. S7-08-18); and Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers (File No. S7-09-18).

Dear Ladies and Gentlemen:

Bank of America[1] appreciates the opportunity to submit this letter in response to the Securities and Exchange Commission's ("SEC") request for comments on the proposed package of rules relating to a standard of conduct for broker-dealers when recommending securities transactions to retail investors, and the related relationship summary and interpretation of the Investment Advisers Act.[2] We hope that the SEC finds our comments helpful and constructive.

Bank of America, through its Merrill Lynch Pierce Fenner & Smith Incorporated subsidiary, administers more than five million brokerage and investment advisory accounts holding more than $2 trillion in assets for a diverse group of retail investors. Our clients range from small households to ultra-high net worth investors, with widely divergent financial circumstances, financial goals and objectives, and investment strategies. Bank of America seeks to meet the needs of these investors with an array of services and products, from self-directed "no advice" brokerage, to an online investment advisory program, to brokerage accounts and discretionary investment management, with differing levels of advice (or no advice), types of investable assets, and fee arrangements.

Bank of America has long supported the fundamental objective of the SEC's rulemaking package: to promote a "best interest" standard for broker-dealers when providing personalized investment advice to retail investors. In 2010, in response to an SEC request, Bank of America

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[1] Bank of America Corporation is one of the world's largest financial institutions, serving its clients with a full range of banking, investing, asset management and other financial and risk management products and services. It is among the world's leading wealth management companies. Of particular note for purposes of this letter is that Bank of America Corporation and/or its affiliates are registered as both broker-dealers and investment advisers.

[2] Regulation Best Interest ("Reg BI"), 83 Fed. Reg. 21,574 (May 9, 2018) (to be codified at 17 C.F.R. pt. 240); Form CRS Relationship Summary ("Form CRS"); Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names of Titles, 83 Fed. Reg. 21,416 (May 9, 2018) (to be codified at 17 C.F.R. pts. 240, 249, 275, and 279); and Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation ("Proposed Interpretation"), 83 Fed. Reg. 21,203 (May 9, 2018) (to be codified at 17 C.F.R. pt. 275).

advocated for a "best interest" standard to apply to both broker-dealers and investment advisers.[3] Bank of America reiterated that position in subsequent comment letters to the Department of Labor in response to their proposed fiduciary rulemaking as applied to retirement accounts.[4] While Bank of America continues to believe that there should be a uniform standard of conduct that applies to both broker-dealers and investment advisors, we also appreciate the legal and practical impediments to mandating a single standard. Although Reg BI and the related proposals would not establish one "uniform," fully "harmonized" standard for both broker-dealers and investment advisors, we support the principles-based approach in the proposals and the resulting enhancement to existing investor protections.

The remainder of this letter addresses specific suggestions to improve Reg BI, the Form CRS, and the Proposed Interpretation of the Investment Advisers Act.

1. Regulation Best Interest

Reg BI sets forth a "best interest" standard that is not specifically defined, but contains three separate obligations: Disclosure, Care, and Conflicts of Interest.[5] The following sections relate to Reg BI.

a. Definition of "Material Conflict of Interest"

The "Disclosure Obligation" requires broker-dealers to reasonably disclose, prior to or at the time of the recommendation, all "material conflicts of interest" associated with the recommendation.[6] In Reg BI, the SEC proposes to "interpret" a "material conflict of interest" as a "conflict of interest that a reasonable person would expect might incline a broker-dealer – consciously or unconsciously – to make a recommendation that is not disinterested."[7] In its

[3] Letter from R. Scott Henderson, Deputy General Counsel, Bank of America to Elizabeth M. Murphy, Sec.'y, U.S. Sec. and Exch. Comm'n (Aug. 30, 2010) (addressing comments on File No. 4-606: Study Regarding Obligations of Brokers, Dealers, and Investment Advisers). We note that the primary "harm" to investors identified by the SEC study was confusion over different standards attached to advice from broker-dealers and investment advisors. *Id.*

[4] Letter from R. Scott Henderson, Deputy General Counsel, Bank of America to U.S. Department of Labor ("DoL") (July 21, 2015) (addressing comments to the DoL's proposed definition of the term "Fiduciary" and Best Interest Contact Exemption, 81 Fed. Reg. 20,945 et. al. (Apr. 20, 2015)); Letter from R. Scott Henderson, Deputy General Counsel, Bank of America to U.S. Department of Labor (July 21, 2017) (responding to Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31,278 (July 6, 2017)).

[5] Regulation Best Interest, 83 Fed. Reg. at 21,587. In the Proposal, the SEC asks whether the Commission should provide "further guidance on the proposed best interest obligation" and "should the guidance be with respect to particular transactions or relationships." *Id.* at 21,591. We believe that the industry would be well-served if the SEC provided examples of when particular activities, particularly with respect to conflicts elimination or mitigation, do or do not meet the "best interest" standard. The SEC should consider issuing Frequently Asked Questions if the Reg BI proposal is adopted.

[6] *Id.* at 21,602.

[7] *Id.* Citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92, 194 (1963).

proposal, the SEC specifically asked whether the Commission should "use a different interpretation for what is a 'material conflict of interest'."[8]

We agree that disclosure of conflicts of interest should not apply to "any" conflict, and should be limited to "material" conflicts.[9] However, we urge the SEC to revise the interpretation of "material" to align with the Supreme Court's long-standing definition of "materiality" in the context of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") as set forth in *Basic, Inc. v. Levinson*, "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[10] The *Basic* standard for materiality is well understood by broker dealers, would promote consistency and legal certainty with other sections of the Exchange Act, and would foster the SEC's disclosure objectives in Reg BI.[11] (Alternatively, the SEC should state in its final release that firms can rely on the *Basic* standard of "materiality" when complying with Reg BI.)[12]

b. Frequency and Timing of the Disclosure

"The Disclosure Obligation would apply 'prior to or at the time of' the recommendation."[13] The proposing Release states that if the broker-dealer has previously made the relevant disclosure to the retail customer, and there have been no material changes to the recommendation, then the broker-dealer would not be required to repeat that disclosure at each subsequent recommendation, depending on the facts and circumstances of the prior disclosure.[14] However, "where a significant amount of time passes between the disclosure and a recommendation, the broker-dealer generally should determine whether the retail customer should reasonably be expected to be on notice of the prior disclosure; if not, the broker-dealer generally should not rely on such disclosure."[15]

Because of the uncertainty, variability, and subjectivity of interpreting a "significant amount of time," we suggest that the statement be eliminated.[16] We instead suggest that the

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[8] Regulation Best Interest, 83 Fed. Reg. 21,574, 21,608 (May 9, 2018) (to be codified at 17 C.F.R. pt. 240).

[9] *Id.*, 83 Fed. Reg. at 21,602.

[10] *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 US 438, 449 (1976)); see also *Matrixx Initiatives, Inc. v. Siracusano*, No. 09-1156, 2011 WL 977060 (U.S., Mar. 22, 2011) (affirming *Basic's* materiality test).

[11] *Basic, Inc. v. Levinson*, 485 U.S. at 231-32; Regulation Best Interest, 83 Fed. Reg. at 21,574.

[12] *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 at 191-92, 194 (1963).

[13] Regulation Best Interest, 83 Fed. Reg. 21,574, 21,605 (May 9, 2018) (to be codified at 17 C.F.R. pt. 240).

[14] *Id.*

[15] *Id.* at 21,605-21,606.

[16] *Id.*

disclosure of material conflicts of interest can be satisfied in advance of a particular recommendation on a one-time basis, such as in an account opening agreement, or on the Firm's website.[17] When there are changes to such material conflicts of interest, then the broker-dealer would need to update that disclosure. The firm would also update disclosures annually, as needed.

c. Layered Disclosure

We generally support the proposed framework for layered disclosure.[18] However, we recommend that the SEC: (i) eliminate the Regulatory Status Disclosure since it can be set forth in account opening documents; (ii) either eliminate or shorten to one page the Form CRS because it is duplicative of the Disclosure Obligation within Reg BI; and (iii) be more specific about the types of fees to be disclosed under the Disclosure Obligation, and apply a "materiality" threshold to those fees.[19] For example, we suggest the SEC consider the approach taken by the North American Securities Administrators Association (NASAA) and its model fee disclosure regarding miscellaneous fees.[20]

d. Clarification on Limited Range of Products

We suggest that the SEC state more clearly how the Care Obligation of the Best Interest Standard can be met when a broker-dealer limits the range of products, including limiting it to affiliated products.[21] For example, we request confirmation that when a broker-dealer affiliated with a federal or state-chartered bank determines to offer a bank sweep program established by its affiliated bank, it can fulfill the Care Obligation without also offering a competitor's bank sweep program.

e. Clarification Regarding Bonuses Awarded Based On Assets Under Management

In the Conflicts of Obligation section regarding financial incentive conflicts, the SEC stated that:

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[17] We also request that the SEC consider permitting an "access equals delivery" standard for the disclosure obligations in Reg BI and the Form CRS. *See* SEC Release No. 33-8591 (July 19, 2005). Firms should be permitted under Reg BI to inform clients where to find the website disclosure when they open an account and thereafter as it changes.

[18] Regulation Best Interest, 83 Fed. Reg. 21,574, 21,602 (May 9, 2018) (to be codified at 17 C.F.R. pt. 240).

[19] *Id.*

[20] *See* Tobias Singer, *Uniform Fee Charts Gather Steam: Merrill Lynch and Cetera sign on*, FINANCIAL PLANNING (Sept. 17, 2017), https://www.financial-planning.com/news/merrill-lynch-cetera-ladenburg-voya-join-fee-agreement.

[21] Regulation Best Interest, 83 Fed. Reg. at 21,608-21,610.

> [W]e believe certain material conflicts of interest arising from financial incentives may be more difficult to mitigate, and may be more appropriately avoided in their entirety for retail customers or for certain categories of retail customers (*e.g.*, less sophisticated customers). These practices may include the payment or receipt of certain non-cash compensation that presents conflicts of interest for broker-dealers, for example, sales contests, trips, prizes, and *other similar bonuses that are based on* sales of certain securities or *accumulation of assets under management*.[22]

It is entirely appropriate that a broker-dealer, and its representatives, seek to increase their clients' assets under management. To the extent that a broker-dealer compensates a registered representative for doing so, it should not be viewed as creating a conflict of interest that cannot be addressed through disclosure and, where needed, mitigation.[23] To require otherwise would be to stifle the most basic goal of wealth management: increasing assets under management.

We request confirmation that Reg BI would not apply to the payment of compensation, such as bonuses, to a registered representative who is successful in increasing her assets under management in a given year, or, in circumstances where the representative has been recruited to join a broker-dealer and whose clients subsequently transfer assets from the prior representative's firm. We request that the SEC confirm that such compensation, including bonuses, can still be based, in part, on assets that are "accumulated."

f. Definition of "Retail Customer"

Reg BI proposed to define "retail customer" as "a person, or the legal representative of such person who: (1) Receives a recommendation of any securities transaction or investment strategy involving securities from a broker, dealer or a natural person who is an associated person of a broker or dealer, and (2) uses the recommendation primarily for personal, family or household purposes."[24]

We suggest that this definition be modified so that it mirrors FINRA Rule 2210 (a)(6), and FINRA Rule 4512 (c), which are well understood by the brokerage industry, and have been incorporated into existing policies, procedures, and systems.[25] We also suggest that this

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[22] *Id.* at 21,621-21,622 (emphasis added).

[23] FINRA already mandates such a disclosure. When a member firm hires a new registered representative from another member firm, FINRA Rule 2273 requires the new firm to send to the representative's customers of the former firm an educational communication that includes a statement about the payment of financial incentives such as bonuses. FINRA Rule 2273; FINRA Regulatory Notice 16-18.

[24] Regulation Best Interest, 83 Fed. Reg. 21,574, 21,595 (May 9, 2018) (to be codified at 17 C.F.R. pt. 240).

[25] FINRA Rule 2210 (a)(6) (defining "retail investor" as "any person other than an institutional investor, regardless of whether the person has an account with a member." *Id.*); FINRA Rule 4512 (c) (establishing "institutional account" as "the account of: (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person

definition be made consistent with the definition of "customer" in Exchange Act Rule 17a-3 (a)(17).[26] Finally, we believe that the definition of "retail customer" should also be the same as the proposed Form CRS definition of "retail investor."[27]

In addition, while we do not believe that the SEC intended to do so, the proposed definition of "retail customer" potentially captures registered investment advisors or regulated market professionals. Registered investment advisers may have the authority to enter into transactions on behalf of persons who transact "primarily for personal, family or household purposes" and, therefore, could be considered the legal representatives of such persons. Accordingly, Reg BI's "retail customer" definition should be clarified to specifically exclude registered investment advisers or regulated market professionals from its scope.

To the extent that the SEC declines to adopt FINRA's definition of "retail investor" for Reg BI, the SEC should adopt an alternative definition of "retail customer" offered in SIFMA's August 7, 2018 comment letter to the SEC. We support this alternative definition because it would avoid application of the regulation to institutions (which is beyond the intended focus of Reg BI) and would be appropriately tailored to those persons who need the protections of that regulation.

2. Form CRS Relationship Summary

The purpose of the Form CRS is to deliver to retail customers and prospects a short summary of the services, fees, conflicts and disciplinary history of firms and their financial professionals.[28] We agree with the SEC that this relationship summary should "be as short as practicable."[29] We suggest that Firms be provided the flexibility to draft their own Form CRS – using topic headings mandated by the SEC – so that it can be tailored to their particular business model, products, services, and client choices. In addition, the Firm's Form CRS should be allowed to use links and references to other disclosures, including on its website or in account

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(whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million." *Id.*). *See* Letter from Securities Industry and Financial Markets Association's ("SIFMA") to Brent J. Fields, Sec.'y, U.S. Sec. and Exch. Comm'n (Aug. 7, 2018) (analyzing the proposed "retail customer" definition and additional reasons to consider using the FINRA definition of "retail investor." *Id.*)

[26] 17 C.F.R. 240.17a-3 (a)(17).

[27] Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names of Titles, 83 Fed. Reg. 21,416 (May 9, 2018) (to be codified at 17 C.F.R. pts. 240, 249, 275, and 279) (proposing to define "retail investor" as "a prospective or existing client or customer who is a natural person (an individual)." *Id.* at 21,419).

[28] Form CRS Relationship Summary, 83 Fed. Reg. at 21,419.

[29] *Id.*

opening documents. Such flexibility will promote the SEC's goal of "plain English" disclosures, which will more likely be read and understood by retail investors.[30]

a. The Regulatory Status Disclosure Is Unnecessary, Duplicative, and Expensive

The SEC is proposing to establish new rules under the Exchange Act (15l-3 (a) and (b)) and the Investment Advisers Act (proposed rules 211h-1 (a) and (b)) to disclose, in retail investor communications, the firm's registration status with the Commission and the associated natural person's relationship with the Firm.[31] The Regulatory Status Disclosure will be required in all print or electronic communications, including televised or video presentations (where a voice overlay and on-screen text would be necessary according to the SEC).[32]

For dual-registrants, the Firm will need to prominently disclose the following on their print or electronic communications: "[Name of Firm], an SEC-registered broker-dealer and SEC-registered investment adviser."[33] Associated natural persons will be required to prominently disclose on their business card or signature block on emails: "[name of professional], a [title] of [Name of Firm], an associated person of an SEC-registered broker-dealer and a supervised person of an SEC-registered investment adviser."[34]

We recommend that the Regulatory Status Disclosure be eliminated because it duplicates the capacity requirement in Form CRS, and at least in part duplicates FINRA Rule 2210 (d)(3), which requires that a member firm disclose the member's name on any retail communications and correspondence.[35]

Moreover, the Regulatory Status Disclosure will impose significant costs to implement since tens of thousands of business cards will need to be amended in order to add the new required disclosure. Finally, as a practical matter, for video presentations like WebEx or Skype

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[30] With respect to the questions asked in Form CRS, Firms should be given the flexibility to design their own questions. Moreover, the SEC should confirm that Firms are not required to develop supervisory policies and procedures regarding the answers to those questions, or to fulfill recordkeeping obligations under relevant SEC and FINRA rules. Rather, these answers should be viewed as part of the "conversation starter" goal of Form CRS.

[31] Form CRS Relationship Summary, 83 Fed. Reg. at 21,467.

[32] Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names of Titles, 83 Fed. Reg. 21,416, 21,468 (May 9, 2018) (to be codified at 17 C.F.R. pts. 240, 249, 275, and 279).

[33] *Id.* at 21,467.

[34] *Id.*

[35] FINRA Rule 2210 (d)(3).

for Business, adding, as suggested by the SEC, a "voice overlay and on-screen text" will be difficult to implement, costly, and challenging to effectively supervise.[36]

3. Proposed Interpretation Regarding Standard of Conduct for Investment Advisers

In this section, we respond to the SEC's request for comments regarding three areas of enhanced Investment Adviser Regulation: federal licensing and continuing education; provision of account statements; and financial responsibility.[37]

In the 2011 Study, the Staff stated that, "we believe that where investment advisers and broker-dealers perform the same or substantially similar functions, they should be subject to the same or substantially similar regulation."[38] We agree and suggest that the SEC propose rules that harmonize the regulation not just in these areas, but also, as stated below, with respect to supervision and examination.

First, the Advisers Act does not require any continuing education and licensing requirements for SEC-registered advisers. The lack of a continuing education requirement is a gap for investment advisers, which was noted by the Staff in the 2011 Study.[39] We urge the SEC to remedy this gap and mandate continuing education for SEC-registered investment advisers. To the extent that a representative is dually registered with FINRA and the SEC, then the FINRA continuing education requirements (existing Rule 1250) should satisfy such a requirement.[40] We urge the SEC to work together with FINRA and the States to establish the continuing education course and attendant requirements, including topics to be addressed and methods of delivery.

Second, the SEC asked whether retail clients of investment advisory firms should receive account statements, directly or via the client's custodian.[41] To the extent that a retail client is not

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[36] The SEC asked in the Release whether the proposed rules should apply to "all communications with retail investors, including oral communications." Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names of Titles, 83 Fed. Reg. 21,416, 21,469 (May 9, 2018) (to be codified at 17 C.F.R. pts. 240, 249, 275, and 279). We strongly urge the SEC to not extend the Regulatory Status Disclosure to oral communications. It would be virtually impossible to supervise whether that disclosure was made in all oral communications. Moreover, we cannot understand what benefits would be derived from such a requirement given that the Form CRS contains the same requirement.

[37] Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation ("Proposed Interpretation"), 83 Fed. Reg. 21,203, 21,211-21,214 (May 9, 2018) (to be codified at 17 C.F.R. pt. 275).

[38] Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* ("Study") 130 (Jan. 2011), available at https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[39] *Id.* at 138.

[40] FINRA Rule 1250. This rule will be superseded by FINRA Rule 1240 on Oct. 1, 2018.

[41] Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation ("Proposed Interpretation"), 83 Fed. Reg. 21,203, 21,213

receiving account statements directly from their SEC-registered investment adviser or from the custodian of their assets, this appears to be a gap that needs to be rectified by the SEC through rulemaking.

The SEC also asked whether there are disclosures of additional fees and expenses that SEC-registered investment advisers should provide.[42] As noted earlier, we believe that the SEC should follow the NASAA model fee disclosure regarding miscellaneous fees, and propose a similar rule for SEC-registered investment advisers.[43]

Third, the SEC requested comment on whether various broker-dealer financial responsibility rules, such as Rule 15c3-1 (net capital rule), 15c3-3 (customer protection), as well as extensive recordkeeping and reporting requirements, audit requirements, fidelity bond requirements, and membership in SIPC, should be subject to rulemaking for SEC-registered investment advisers.[44] We believe that the SEC should consider rulemaking in these areas since these rules clearly enhance investor protection. Similarly, requiring investment advisers to hold more capital, and to obtain a fidelity bond, would better protect investors. These are appropriate topics for SEC rulemaking and should lead to enhanced investor confidence in our industry.

Finally, the SEC Staff previously recommended in the 2011 Study that the Commission review "supervisory requirements for investment advisers and broker-dealers."[45] Broker-dealers are subject to explicit statutory and FINRA rules to supervise their associated persons.[46] These rules require, among other things, broker-dealers to establish a supervisory system with a supervisory hierarchy, to conduct periodic inspections of its various branch offices and other locations, and to supervise outside business activities and private securities transactions of its associated persons. By contrast, other than the personal securities trading provisions of the Advisers Act code of ethics Rule 204A-1, there are no explicit obligations of supervision for investment advisers.[47] We support the SEC's previous recommendation that the Commission

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(May 9, 2018) (to be codified at 17 C.F.R. pt. 275).

[42] *Id.* at 21,213.

[43] We note that on Feb. 7, 2018, the Massachusetts Securities Department published a "Preliminary Request for Public Comment on Proposed Fee Table for State-Registered Investment Advisers." Massachusetts Securities Division, *Preliminary Request for Public Comment on Proposed Fee Table for State-Registered Investment Advisers* (Feb. 2018), available at http://www.sec.state.ma.us/sct/sctfeetable/Fee-Table-Summary-and-Instructions.pdf. The SEC could review this proposal as part of any proposed rulemaking on its own. *Id.*

[44] *See* Exchange Act rules 15c3-1, 15c3-3.

[45] Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* 138 (Jan. 2011), available at https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[46] Exchange Act Section 15 (b)(4)(E); FINRA Rules 3110 and 3120.

[47] As the SEC Staff noted in the Study, the requirements for advisers are "more general and implicit: advisers and their officers are liable if they fail to supervise associated persons; and the Staff's interpretations…embody an expectation that an adviser's compliance processes will include provisions for effective supervision." Study at 135;

focus on regulation that will harmonize examination and oversight of regulated employees of broker-dealers and investment advisers.[48]

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Bank of America appreciates and supports the SEC's efforts to produce a workable and effective best interest standard for personalized investment advice to retail retirement investors. We believe the current proposals demonstrate substantial progress and reflect the SEC's open communication with interested parties over the last several years. We hope that we will continue to have opportunities to work with the Commission to further refine and improve these proposals for the benefit of retail investors.

Sincerely,

R. Scott Henderson

cc: Andrew M. Sieg

See also Advisers Act Rule 206 (4)-7 and SEC Release No. IA-2204 (Dec. 17, 2003) (requiring written policies and procedures, review of those Compliance Procedures annually, and a designated Chief Compliance Officer responsible for administering the Compliance Procedures); Advisers Act Rule 203 (e)(6) (highlighting the SEC's authority to bring action against any person who "has failed reasonably to supervise…another person who commits such a violation if such other person is subject to his supervision." *Id.*).

[48] We also highlight a critical difference between FINRA's examination of its broker-dealer member firms and the SEC's examinations of its registered investment advisers. *Report on FINRA Examination Findings* (Dec. 2017), available at http://www.finra.org/sites/default/files/2017-Report-FINRA-Examination-Findings.pdf. FINRA examines its member firms at least once every four years and many are examined even more frequently (large member firms are examined annually). *Id.* By contrast, the SEC Office of Compliance Inspections and Examinations (OCIE) exam schedule is risk-based and does not necessarily result in an examination of such adviser. In its 2019 Fiscal year Budget Request to Congress, the SEC stated that it examined 2,114 advisers, which represented, "approximately [fifteen] percent of registered investment advisers in FY 2017" and noted that "nearly [thirty-five] percent of all registered investment advisers have never been examined." *Fiscal Year 2019, Congressional Budget Justification Annual Performance Plan* pp. 27-30, available at https://www.sec.gov/files/secfy19congbudgjust.pdf.