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

File Number S7-07-18, Regulation Best Interest
File Number S7-08-18, Form CRS Relationship Summary

Dear Mr. Fields,

Thank you for the opportunity to comment on proposed Regulation Best Interest as well as the companion proposal regarding Form CRS. The Regulation Best Interest proposing release requests comment on whether the proposed rule addresses deficiencies in the current standard applicable to broker-dealers that provide advice. In this letter, I discuss one such deficiency, namely a concern regarding investor expectations, and the underlying cause of those expectations.

The Regulation Best Interest proposing release refers to a "misalignment" of investor expectations regarding the level of protection investors should receive and the level of protection they actually receive. In that regard, the proposed rule aims to better align broker-dealers' legal obligations with investor expectations. In my view, the Commission has not sufficiently articulated an important link in the argument related to investor expectations and the need for Regulation Best Interest, as well as the need for the proposed disclosure obligation in Form CRS. In my opinion, the Commission has not clearly described the underlying cause of investor expectations, which justify proposed Regulation Best Interest.

Why do investors expect broker-dealers to operate under a best interest standard? What aspect of broker-dealers' conduct is inconsistent with those expectations? The answer to these questions in my view is deeper than the use of titles or the marketing of "trust." Rather, the answer lies in what it means for one person to advise another. The act of providing advice, whether given by a broker-dealer or any other professional, necessarily suggests to the recipient that he or she is receiving advice that is in the recipient's best interest. Thus, to the extent a broker-dealer provides advice, and the advice is *not* in an investor's best interest, the investor's reasonable expectations are unlikely to be met.

To understand why providing advice gives rise to a reasonable expectation that the advice is given under a best interest standard, one can begin by examining the meaning of the term "advise." According to the Oxford English Dictionary, to "advise" is "to give guidance or suggestions, or state one's opinion, to (a person, etc.) as to the best course of action; to counsel, make recommendations to; (also more generally) to give one's assessment of something to (a person), usually as a basis for making a decision."[1] As I have explained elsewhere,[2] the key to this definition for present purposes is the phrase "as to the best course of action." Implicit in this phrase is that "best" means best for the advisee. Similarly, the word "recommend," which is embedded in the definition of "advise," and which is a key trigger for the Commission's proposal, means "[t]o mention or present (a thing, course of action) to . . . a person . . . as being desirable or advisable."[3] Implicit is that the "thing" or "course of action" under consideration (here this might be a given securities transaction) is "desirable" or "advisable" for the recipient of the advice. To advise, therefore, requires that the adviser give guidance, counsel, or recommendations in the interest of the advisee, not in the interest of the adviser or another third person.

To further clarify, one can contrast the term "advise" with other activities that do not require acting in another's best interest. For example, to "convince" someone of something is to "induce, prevail upon, persuade."[4] Nothing in the meaning of "convince" suggests that the speaker must act in the other's best interest. Similarly, to "persuade" means to "urge successfully *to* do something; to attract, induce, or entice to something or in a particular direction."[5] To persuade suggests that the speaker is urging the recipient to act, but not necessarily to act in the recipient's best interest. By contrast, advising entails putting the advisee's interest before the adviser's interest, or the interest of a third person. If a speaker suggests a course of action to another and the course of action is not in the recipient's best interest, the speaker is not "advising." Inherent in the act of advising is acting in the advisee's best interest.

This understanding of advice conforms with our intuitions – and examples of the way in which advice reflects a best interest standard are ubiquitous. When a patient seeks advice from a physician about a proper course of treatment, the patient expects the physician to advise based on the patient's best interest, not based on what might be best for the physician, the hospital, or the healthcare system. When a client seeks advice from a lawyer on a legal matter, the client expects the lawyer to advise based on what is best for the client, not based on what would benefit the lawyer, her law firm, or some other hidden motive.

Conforming broker-dealers' legal obligations with investors' reasonable expectations provides a compelling reason to adopt Regulation Best Interest and to take other steps to ensure proper disclosure. Reasonable expectations provide a compelling reason because the very act of advising necessarily means acting in another's best interest as opposed to the interest of the

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[1] OXFORD ENGLISH DICTIONARY ONLINE (2018).

[2] Arthur B. Laby, *Selling Advice and Creating Expectations: Why Brokers Should Be Fiduciaries*, 87 WASH L. REV. 707, 767 (2012).

[3] OXFORD ENGLISH DICTIONARY ONLINE (2018).

[4] *Id.*

[5] *Id.*

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adviser or a third party. Requiring broker-dealers to conform to the reasonable expectations that they engender through the act of advising is long overdue.

Sincerely,

A. B. Laby

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