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ASSOCIATION

February 8, 2019

Lourdes Gonzalez, Esq.
Assistant Chief Counsel for Sales Practices,
Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

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

Dear Ms. Gonzalez:

The Florida International Bankers Association ("FIBA") appreciates the opportunity to address with the U.S. Securities and Exchange Commission (the "SEC") its members' concerns regarding the potential impact that proposed Regulation Best Interest ("Reg BI" or "Regulation") would have on its members' cross-border private wealth business.[1] FIBA strongly supports the SEC's efforts to enhance the quality of recommendations provided by broker-dealers to retail customers and to improve the broker-dealer regulatory regime. This letter is intended to highlight certain aspects of the cross-border business which may be uniquely impacted by Reg BI, and to offer insights on that impact. In doing so, we provide proposals that would harmonize the impact of Reg BI with existing definitions of "retail customer," the core compliance framework of the industry, and the non-U.S. law framework within which the cross-border private wealth industry must compliantly work.

Background

Reg BI would require all broker-dealers, when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer, to act in the "best interest" of the customer and not place the interests of the broker-dealer or its associated persons ahead of the interests of the customer. Those laudable goals are shared by FIBA. It is FIBA's concern, however, that if adopted as currently proposed, certain aspects of the proposal would impose an undue burden and unique and disproportionate compliance costs upon those broker-dealers who service non-U.S. clients.

[1] FIBA, established in 1979, is comprised of over 125 financial institution and supporting members. It has long served as a leading voice on matters affecting the regulation of Latin American financial trade, including anti-money laundering and other regulatory issues. Among other business lines, its members engage in private wealth management – both as bankers and broker-dealers – with non-U.S. customers seeking to engage in the U.S. banking and capital markets (collectively, the "cross-border industry").

The uniqueness of the cross-border industry, and the core uniqueness of the application of Reg BI to the cross-border industry lies in the key differences inherent in providing broker-dealer services to non-U.S. residents as opposed to U.S. residents. These include, among others:

1. Non-U.S. resident investment into U.S. accounts is often driven by non-economic factors including dollarization of currency risk, family security and risk, geographic diversification, and the international tax considerations tied to those.[2]

2. Non-U.S. resident investors often operate within a frame of reference more attuned to their home country experiences and in languages other than English.

3. Brokers who service non-U.S. resident clients often travel to meet with their clients in countries that present additional layers of law and regulation and may legally constrain the in-country performance of certain service activities, including the production or delivery of transaction-specific documents.

4. Non-U.S. investors often gravitate to non-U.S. investment structures such as Regulation S offerings.

Non-Economic Considerations and their Documentation

Reg BI is heavily premised on an economics-driven model that fails to take into account many of the highly personalized non-economic reasons underlying cross-border investment. FIBA is concerned that by reducing the investment process to a purely economic, metrics-based analysis, those important – albeit difficult to quantify – variables may be minimized and customer choice limited by firms seeking objectively verifiable compliance.

Reg BI's focus on the economics of a broker's recommendation is exemplified by its guidance on reasonable diligence standards. The SEC provides factors for consideration such as "the cost associated with a recommendation . . . investment objectives, . . . liquidity, . . . volatility, likely performance of market and economic conditions, [and] the expected return of the security or investment strategy."[3] Such considerations fail to capture much of the reality behind international investors' decision-making, which often strays from solely economic factors.

As a corollary, the requirement that broker-dealers maintain the information upon which those individualized "best interest" decisions are made, may well have unintended consequences when applied to non-economic drivers. Requiring broker-dealers to maintain and document

[2] As an example, non-residents with accounts at U.S. financial institutions are only entitled to a $60,000 threshold exemption from the U.S. Estate Tax, in contrast to the $5.6MM exemption enjoyed by U.S. residents. This incentivizes the use of corporate account holding structures for non-U.S. residents, which adds to the complexity of the cross-border business.

[3] Reg BI, 83 Fed. Reg. at 21610.

sensitive family and personal information about clients far in excess of current FINRA suitability-centered recordkeeping requirements in order to support certain investments could create a treasure trove of data for unrelated disputes. FIBA is concerned that the requirement will make its members a target-rich environment for subpoenas and other third-party discovery efforts having nothing to do with customer relationships.

FIBA urges the Commission to consider clarifying that "best interest" may also include subjective client desires and other non-economic considerations which need not be objectively verifiable.

Overwhelming, Plain English Disclosure

By definition, non-U.S. resident clients reside outside of the U.S. and, naturally, bring to the brokerage relationship a different frame of reference regarding financial services. The complexity of the disclosure needed to meet Reg BI has led many to comment whether the proposed interpretation may result in too voluminous disclosure that would overwhelm investors. FIBA joins that chorus.

Potentially aggravating the disclosure requirement is the uncertainty surrounding whether the "Plain English" requirement proposed in Reg BI could be read to exclude the use of the home country language spoken by a particular non-U.S. resident retail customer. The use of non-English language and forms—under language-fluent and licensed supervision to assure regulatory compliance – is common place in the cross-border industry and Reg BI should not inhibit that practice.[4]

As many commentators note, the complexity of the proposed disclosure is difficult enough to understand for U.S. resident customers who already have a degree of familiarity with U.S. capital markets. That difficulty would be compounded for non-U.S. customers, regardless of language, by disclosures centered on U.S. brokerage industry nuances such as trailers, advisory versus ancillary brokerage advice, and other uniquely-U.S. notions. While the intent of those disclosures remains salutary, FIBA is concerned that the *amount* of required disclosure may overwhelm rather than educate; and more so if mandated to be in English rather than a native and familiar language.

FIBA urges that the Commission consider clarifying that (i) the "Plain English" standard proposed in Reg BI is not an English-only requirement, but rather is simply meant to convey that a simple and clear "Plain English" style of writing is required, even when the language used in the document is other than English and (ii) that the degree of the complexity of the disclosure be reasonably designed to take into account the diversity of the recipients.

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[4] *See*, FINRA Case #2016051493702, *In re: Connell*.

Retail Customer

As proposed, Reg BI would define a "retail customer" – the person whose "best interest" is to be protected – as a person who "(1) receives a recommendation of any securities transaction or investment strategy involving securities from a [broker-dealer] . . . and (2) uses the recommendation primarily for personal, family, or household purposes.[5]" No opened account is required for a person to be deemed a retail customer nor that the recipient have any economic interest in the investment.[6] Strictly read, this "purpose" test may lead to the awkward inclusion of corporate trustees and other nominee parties as those to whom the "best interest" disclosure and inquiry must be applied – despite their acting without beneficial or proprietary interest. This anomaly is magnified in the cross-border sphere by the prevalence of accounts being titled in corporate name and often administered by corporate representatives, who act "for" individuals and families, absent a stake in the assets.

Further, Reg BI focuses on when a recommendation is made and a person merely receiving a recommendation triggers the obligations of the broker, regardless of whether that person has an account that may actually execute the trade. Given the complexity of opening accounts for foreign nationals under Title III of the Patriot Act, and other Anti-Money Laundering Customer Identification Programs, a requirement more closely aligned in time with an actionable recommendation after account opening might be more effective. By limiting the definition of "retail customer" to customers with whom broker-dealers have formal relationships, the definition would also be closer to that traditionally interpreted by FINRA. Although FINRA itself does not define "customer," the Second Circuit has considered "the precise boundaries of the FINRA meaning of 'customer'" and held that a "customer" is one who "either (1) purchases a good or service from a FINRA member, or (2) has an account with a FINRA member.[7]" That change would also be consistent with the new Customer Due Diligence rules which predicate obligations on new accounts (i.e., formal relationships).[8]

FIBA urges that the Commission consider limiting the definition of "Retail Customer" to formal client relationships and clarifying that the "Best Interest" requirement is to be applied solely to those with proprietary interests in an account and not non-beneficial owner intermediaries.

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[5] Reg BI, 83 Fed. Reg. at 21682.

[6] The requirement that a recommendation be consistent with the investment profile of the retail customer who has not opened an account also creates a quandary in that a prospect to whom a recommendation is made has no established investment profile with a broker-dealer against which Reg BI compliance can be measured.

[7] *Citigroup Glob. Markets Inc. v. Abbar*, 761 F.3d 268, 275 (2d Cir. 2014).

[8] Under 31 CFR 1020.100(a), "account" means "a *formal banking relationship* established to provide or engage in services, dealings, or other financial transactions, including a deposit account, a transaction or asset account, a credit account, or other extension of credit." 31 CFR 1020.100 (emphasis added). "Customer" means "a person that opens a new account."

Constraints Under Local Law

The regulatory trigger included in Reg BI requiring that many of the disclosures be made at the time of recommendation would create unique information delivery challenges for the cross-border industry. Cross-border brokers often travel outside of the U.S. to meet with clients or prospect for new ones. Their activities while physically present in those jurisdictions are highly-customized to local law requirements and carefully calibrated to assure local compliance. They are often not permitted by those local laws to access internal information systems while abroad or carry materials detailing specific products or transactions. Indeed, in many countries, laws proscribe what materials may be provided to local residents and the manner of soliciting new clients in person. Strictly applied, Reg BI would create a conundrum for cross-border representatives who would be obligated to deliver in person copious disclosure documents accompanying recommendations while in non-U.S. jurisdictions, even to prospects who have not contractually agreed to establish a client relationship under specified and legally appropriate terms. More than awkward, the timing of Reg BI's requirement may effectively eliminate the opportunity for cross-border broker-dealers to present locally compliant account opening terms and conditions to prospects before the exchange of documentation.

On a more practical level, cross-border representatives would be hard pressed to meet Reg BI's tailored product and representative disclosure obligations under current industry-wide standards protocols governing local in-country technology access and activity. Under technology transfer laws, data protection laws and cyber-security considerations, as an example, broker-dealers are often limited in accessing their firm's internal systems while traveling outside the U.S. Any requirement that would require tailored crafting and access to multiple internal sources by the traveling representative while in country, would be difficult to meet.

Beyond the cyber-security and legal restrictions from crafting tailored disclosure while traveling in another country, broker-dealers are also limited in the physical materials they may travel with as traveling with sensitive data is often restricted due to broker and client security; even if physical documentation could be foreseen well enough to have the materials prepared prior to travel. Those hurdles to compliance and the related increased pre-account costs may well drive broker-dealers out of certain markets, limit international investor choice and close off non-U.S. investors from the U.S. markets.

FIBA urges that proposed Reg BI be revised to permit disclosure within a reasonable time *after* the recommendation is made – illustratively, upon a traveling broker's return to their office – and when made to an account party.

The Reg S Gap

Because many non-U.S. investors buy products that are exempt from registration under the Securities Act of 1933 (the "1933 Act") pursuant to Regulation S,[9] Reg BI may uniquely

[9] 17 CFR 230.901, et seq.,

affect products traditionally used by international customers such as offshore structured products, offshore debt and equity offerings, and offshore mutual funds. Issuer-prepared product disclosure customarily provided in connection with offshore offerings intended for multiple non-U.S. jurisdictions would not necessarily satisfy the proposed product disclosure requirements under Reg BI. As investments issued under Reg S are not currently subject to the Reg S-K[10] level of disclosure standards applicable to offerings registered under the 1933 Act, the obligations Reg BI imposes would conflict with the safe harbor the SEC intends to provide by way of Reg S, as distributor broker-dealers would incur SEC registration level disclosure obligations for recommendations of products that are not SEC registered. FIBA is concerned that this "Reg S gap" will shift the burden of satisfying U.S. Reg BI product disclosure obligations either to the U.S. distributor brokers, a task for which they are ill-suited, or potentially eliminate the U.S. distribution channel altogether given the added costs of Reg BI disclosure to the product manufacturer.

FIBA urges that exempting financial products not subject to disclosure standards applicable to U.S. registered offerings would cure the "Reg S gap" inherent in forcing U.S. broker-dealers to address gaps in offshore reporting and raising them to U.S. standards, or the unenviable alternative of forcing offshore issuers to incur greater costs for U.S. broker disclosure, placing at risk the U.S.-based distribution channel.

Conclusion

As proposed, Reg BI would present significant and unique challenges to the cross-border private wealth broker-dealer business. FIBA believes that its comments and proposals will lessen that impact while preserving Reg BI's intent to enhance investor protection and to provide clarity to broker-dealer obligations. We thank the SEC for this opportunity to comment and very much appreciate the openness the Staff has shown to our concerns. We welcome the opportunity to further discuss.

Sincerely,

David Schwartz
President & CEO
Florida International Bankers Association
("FIBA")
80 SW 8th St #2590
Miami, FL 33130

[10] 17 CFR 229.1, et seq.,