



August 7, 2018

*Submitted electronically through <http://www.regulations.gov>*

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

**Re: Regulation Best Interest [File Number S7-07-18]; Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles [File Number S7-08-18]; Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers [File Number S7-09-18]**

Dear Mr. Fields,

Fidelity Investments (“Fidelity”)<sup>1</sup> appreciates the opportunity to provide comments to the Securities and Exchange Commission (“SEC” or “Commission”) on its proposed package of regulations and interpretations of the standards of conduct applicable to broker-dealers and investment advisers when providing investment advice to retail investors (“Proposal”).<sup>2</sup> Given our longstanding and ongoing commitment to the needs and interests of our customers, Fidelity fully supports a requirement that broker-dealers and investment advisers act in the best interest of retail investors when providing investment advice.

We commend the SEC for its efforts to develop thoughtful, comprehensive proposals through an inclusive process. We support the SEC’s goals of enhancing the quality and

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<sup>1</sup> Fidelity was founded in 1946 and is one of the world’s largest providers of financial services, including investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing, and many other financial products and services to more than 27 million individuals and institutions, as well as through 12,500 financial intermediary firms. Fidelity submits this letter on behalf of Fidelity Brokerage Services LLC, an SEC-registered introducing broker-dealer and FINRA member; National Financial Services LLC, an SEC-registered clearing broker-dealer and FINRA member; and SEC-registered investment advisers Fidelity Personal and Workplace Advisers LLC, Strategic Advisers LLC, and Fidelity Management & Research Company, the investment adviser to the Fidelity family of mutual funds.

<sup>2</sup> See Regulation Best Interest, Securities Exchange Act Release No. 83062 (Apr. 18, 2018), 83 Fed. Reg. 21574 (May 9, 2018) (“Reg BI Proposal”); Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles, Securities Exchange Act Release No. 83063 (Apr. 18, 2018), 83 Fed. Reg. 21416 (May 9, 2018) (“Form CRS Proposal”); Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, Investment Advisers Act Release No. 4889 (Apr. 18, 2018), 83 Fed. Reg. 21203 (May 9, 2018) (“IA Interpretation Proposal”).



transparency of retail investors' relationships with broker-dealers and investment advisers, while preserving retail investor choice and access to a variety of advice relationships and investment products. As noted, it has long been Fidelity's view that broker-dealers and investment advisers should act in retail investors' best interest, and that a standard embracing this obligation would benefit both retail investors and the financial services industry. The development of consistent standards across account types and services, including retirement and non-retirement, is, of course, within the SEC's purview and a proper subject matter for its regulations and interpretations.

Fidelity has actively engaged for many years in regulatory discussions on the standards of conduct for broker-dealers and investment advisers. We responded to the SEC's 2013 Request for Data and Other Information,<sup>3</sup> the SEC's June 2017 Request for Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers,<sup>4</sup> and we provided extensive comments to the Department of Labor ("DOL") on its Fiduciary Rule<sup>5</sup> ("DOL Fiduciary Advice Rule"). Fidelity has long advocated for the SEC to develop standards of conduct for broker-dealers and investment advisers when providing investment advice to retail investors.<sup>6</sup>

The Proposal clearly recognizes that broker-dealers serve a critical role for customers, and it is thoughtfully crafted to further the SEC's express goal of preserving broker-dealers' ability to provide investment advice without an additional fee. This is especially important for customers who cannot afford additional advisory fees or who need only occasional guidance, who might otherwise forego seeking valuable advice entirely.

In attempting to preserve customer choice, the Proposal stands in notable contrast to other recent unsuccessful and inconsistent regulatory efforts. In particular, the DOL Fiduciary Advice Rule, which was adopted in 2016 and involved retail retirement accounts, was not only immensely expensive and disruptive before it was vacated in 2018, it made it extremely challenging for broker-dealers to continue to offer investment advice. At the same time,

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<sup>3</sup> Securities and Exchange Commission, *Duties of Brokers, Dealers and Investment Advisers* Release No. 34-69013 (March 1, 2013) (Fidelity comments available at <https://www.sec.gov/comments/4-606/4606-3117.pdf>).

<sup>4</sup> Public Statement by SEC Chairman Jay Clayton: *Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers* (June 1, 2017), available at <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31> (the "Public Statement") (Fidelity comments available at <https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2216673-160638.pdf>).

<sup>5</sup> *Fidelity Investments* comment letter submitted July 21, 2015 at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00658.pdf>; *Fidelity Investments* comment letter submitted September 24, 2015 at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/03089.pdf>; *Fidelity Investments* comment letter submitted April 17, 2017 at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01385.pdf>; and *Fidelity Investments* comment letter submitted August 7, 2017 at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00545.pdf>.

<sup>6</sup> See Letter to Ms. Elizabeth M. Murphy Re: Duties of Brokers, Dealers and Investment Advisers, Release No. 34-69013; IA-3558; File No. 4-606 (July 5, 2013); Letter to The Honorable Jay Clayton Re: Standards of Conduct for Investment Advisers and Broker-Dealers (August 11, 2017).

individual states have established or are considering their own inconsistent standards of conduct for broker-dealers and investment advisers, without attempting to coordinate or reconcile their conflicts with one another or to address the consequences of those conflicts for customers. The SEC's effort to bring consistency and stability to this important area with clear, practical, and balanced rulemaking is both needed and timely.

In our view, the Proposal establishes an effective framework for broker-dealers to address potential conflicts of interest and significantly advances the goal of ensuring that retail investors understand their broker-dealers' and investment advisers' fees, services and obligations. In particular, Fidelity strongly favors the proposed requirement that broker-dealers maintain written supervisory procedures to identify, assess, and manage conflicts of interest, which will greatly benefit retail customers.

However, in order to attain the goal of protecting retail investors while ensuring their continued access to the breadth of services and investment products available to them, we recommend the following changes, discussed more fully below:

- The SEC should clarify that disclosure and client consent can be an effective means of satisfying broker-dealers' conflicts obligations under Regulation Best Interest, much as it historically has been used to satisfy investment advisers' duty of loyalty.
- The SEC should confirm that, as with investment advisers, the duty of care does not preclude broker-dealers or investment advisers from using disclosure to limit the scope of their advice in any particular instance to a defined universe of products, including, for example, proprietary products, products that generate third-party compensation, or specific categories of products.
- The SEC should not distinguish between conflicts of interest based on financial incentives and all other conflicts of interest. Almost every conflict of interest involves a financial element to some degree.
- The SEC should adopt the longstanding definition of materiality for conflicts of interest developed by the Supreme Court under Rule 10b-5, and ought to provide more detailed guidance on disclosure principles for conflicts of interest.
- The definitions of "retail customer" under Regulation Best Interest and "retail investor" under Form CRS should be harmonized, and should exclude institutional customers as defined by FINRA rules.
- The impact of Regulation Best Interest, Form CRS, and the proposed restrictions on the use of certain titles should be further considered and developed as they apply to affiliated broker-dealers and investment advisers.
- Firms should have more flexibility regarding the format, length, and content of Form CRS and the applicable delivery requirements, and the timing of initial delivery should be more consonant with the needs of firms and their customers.

- The proposed restrictions on the use of certain titles may prove to be unnecessarily complicated in practice and fail to dispel investor confusion.

## I. REGULATION BEST INTEREST

Proposed Regulation Best Interest (“Reg BI”) provides a principles-based framework designed to ensure that broker-dealers act in the best interest of their retail customers. It imposes three distinct obligations to meet this standard: (1) a duty to disclose material information about the brokerage relationship; (2) a duty of care; and (3) a duty to address conflicts of interest.

The SEC did not merely extend its prior guidance on the “fiduciary” duty of investment advisers under the Investment Advisers Act of 1940, as amended (“Advisers Act”), to broker-dealers, but wisely proposed instead a workable standard of conduct tailored to the brokerage model. Similarly, the SEC has proposed an enhanced standard of conduct for broker-dealers, for which Fidelity has long advocated. We believe this standard significantly enhances the obligations already applicable to broker-dealers under the Securities Exchange Act of 1934, as amended (“Exchange Act”), and FINRA’s rules, as well as the common law of agency and trust forming the foundation of the federal securities laws.<sup>7</sup>

Although Reg BI takes the core duties of care and loyalty as its starting point, it departs from these well-understood constructs in one fundamental respect that would have significant unintended and undesired consequences. Specifically, the proposal appears to reject, for broker-dealers only, the bedrock principle that agents – including not just broker-dealers, but also investment advisers, trustees, and others who are subject to the highest fiduciary standards – can effectively address many conflicts through informed customer consent after full disclosure.<sup>8</sup> Instead, Reg BI would require every “financial incentive” conflict to be “mitigated or eliminated,” regardless of whether mitigation or elimination are reasonable, or possible, for any specific conflict and without consideration of the facts and circumstances involved. This would impose a *higher* standard of conduct on broker-dealers than on investment advisers and other fiduciaries, and would likely lead firms to favor advisory accounts over transaction-based brokerage accounts. This disparity of options to address conflicts would also harm investors by eliminating broker-dealers’ ability to offer many commonplace and useful kinds of advice without additional charge, resulting in higher costs and more limited choices for retail investors, especially for those who are unwilling to pay separate advisory fees or for whom separate

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<sup>7</sup> Reg BI Proposal at 21640-1.

<sup>8</sup> See Restatement (Third) of Agency § 8.06 (allowing a principal to consent to conduct by an agent that would violate its duties owed to the principal, provided that “the agent (i) acts in good faith, (ii) discloses all material facts that the agent knows, has reason to know, or should know reasonably affect the principal’s judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and (iii) otherwise deals fairly with the principal”); Tamar Frankel & Arthur B. Laby, Regulation of Money Managers: Mutual Funds and Advisers § 13.02 (2016) (“Whenever a fiduciary proposes to act for personal benefit or benefit of another rather than for the client’s, the fiduciary must restore the arm’s length relationship. That is, the fiduciary must disclose the material facts to the entrustor and obtain informed and independent consent.”).

advisory fees are not appropriate and who might otherwise forego seeking valuable advice entirely.

***A. We support the SEC’s statement of a broker-dealer’s best interest obligation generally.***

We support Reg BI’s reasonable and practical definition of “best interest” as the obligation to provide investment advice to retail customers “without placing the financial or other interest of the [broker-dealer] ahead of the interest of the retail customer.”<sup>9</sup> We agree with Chairman Clayton that Reg BI promotes “the core principle that the professional can’t put their interests ahead of the investor’s interests.”<sup>10</sup> As proposed, whether a broker-dealer’s recommendation is in the best interest of a retail customer would be determined in the context of the specific recommendation and the specific customer, along with the facts and circumstances satisfying the other components of Reg BI.<sup>11</sup>

The SEC’s definition is a marked improvement over the analogous definition in the DOL Fiduciary Advice Rule, which would have required firms to act “without regard to the financial or other interest” of the firm or anyone other than the retail investor. The impracticality of the DOL Fiduciary Advice Rule when applied to a transaction-fee model caused many broker-dealers to move away from brokerage advice in favor of fee-based investment advisory services.<sup>12</sup> We believe Reg BI’s definition is a more rational approach, preserving the ability of broker-dealers to provide advice in a transaction-fee model while ensuring customers’ interests remain paramount.

***B. The SEC should align broker-dealer and investment adviser standards by allowing broker-dealers to use disclosure, mitigation, and/or elimination to address all material conflicts, not just those of a “non-financial incentive” nature.***

It is a cornerstone principle of the common law of agency and trusts, and the federal securities laws, that disclosure is an effective means to address many conflicts of interest. Disclosure has also been a critical tool for broker-dealers to mitigate conflicts of interest that can

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<sup>9</sup> Proposed Exchange Act Rule 15l-1(a)(1).

<sup>10</sup> A Conversation with SEC Chairman Jay Clayton, FINRA Annual Conference, May 22, 2018, video available at <http://www.finra.org/industry/conversation-sec-chairman-jay-clayton>.

<sup>11</sup> *Id.* (“We are not proposing to define “best interest” at this time. Instead, we preliminarily believe that whether a broker-dealer acted in the best interest of the retail customer when making a recommendation will turn on the facts and circumstances of the particular recommendation and the particular retail customer, along with the facts and circumstances of how the four specific components of Regulation Best Interest are satisfied.”).

<sup>12</sup> See Beilfuss, L. (2017). ‘Fiduciary’ Rule Accelerates Account Shift Across Brokerage Industry. *The Wall Street Journal*. [online] Available at: <http://www.wsj.com/articles/fiduciary-rule-accelerates-account-shift-across-brokerage-industry-1500494055> (“A new retirement-savings rule that began to take effect last month is already having an impact on the brokerage industry, helping push up fee-based assets at the big full-service firms and drive up assets in self-directed accounts at discount firms.”).

arise in the course of customer relationships,<sup>13</sup> and it should continue to be available to broker-dealers as one means to address potential conflicts of interest presented by the broker-dealer model.<sup>14</sup>

In its current form, Reg BI would helpfully allow broker-dealers access to a full range of options – including disclosure, consent and other forms of mitigation, or complete elimination – for “non-financial incentive” conflicts of interest. This is the same flexible set of conflict management tools used by investment advisers and other fiduciaries.

For “financial incentive” conflicts, however, Reg BI would automatically require broker-dealers to implement either additional mitigation beyond disclosure or complete elimination, regardless of the facts and circumstances of the conflict or the practicality and efficacy of other forms of mitigation. This would effectively establish a higher standard of conduct for broker-dealers than investment advisers and other fiduciaries, who have no such constraint. The Advisers Act and common law principles unambiguously permit investment advisers to address most conflicts by disclosing them and obtaining client consent, and advisers are permitted to exercise their reasonable judgment to determine whether disclosure is sufficient or additional mitigation or elimination is necessary. That approach has been applied successfully by investment advisers and other fiduciaries for decades. To meet the SEC’s stated goals of harmonizing the standards that apply to broker-dealers and investment advisers when providing investment advice to retail investors, and reducing retail investor confusion, the SEC should, at a minimum, align Reg BI with existing investment adviser standards to manage conflicts with the same range of options — *i.e.*, through full and fair disclosure, customer consent, additional mitigation, or elimination, based on the facts and circumstances of the particular conflict and the context of the relationship.

Of course, Reg BI’s new requirement to maintain written policies and procedures for conflict management, and the enhanced duty of care protecting customer’s interests, must inform the exercise of judgment when crafting a response to any individual conflict. A broker-dealer, therefore, would still be required (1) to make a reasonable determination whether disclosure or something more is sufficient for any particular conflict, (2) to ensure that the prominence and detail of disclosure is concomitant with the nature and severity of the conflict, (3) to document, for regulatory inspection, its conflict management policies and procedures, (4) to supervise those conflict management policies effectively, and (5) to provide advice tailored to the needs and circumstances of each individual customer under its duty of care. Taken together, these form the basis for an effective standard of conduct, with the same latitude afforded to fiduciary investment advisers.

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<sup>13</sup> See, e.g., Report on Conflicts of Interest, A Report from the Financial regulatory Authority (“FINRA”), (October 2013), available at <http://www.finra.org/sites/default/files/Industry/p359971.pdf>, at p. 13 (“The U.S. regulatory regime relies heavily on disclosure to customers as a tool to mitigate conflicts that may arise in the course of a firm’s business. ... FINRA believes that to make disclosure effective, firms should look beyond minimum disclosure obligations under statute, regulation and case law, to identify practices that are effective in helping customers make informed decisions.”).

<sup>14</sup> See Letter to The Honorable Jay Clayton, *supra* note 6.

We note that Reg BI already proposes exactly this approach for “non-financial incentive” conflicts, relying on the broker-dealer’s reasonable judgment to determine whether disclosure, additional mitigation, or elimination is the appropriate remedy for a particular conflict in light of the relevant facts and circumstances. To ensure parity with investment advisers, Reg BI should permit broker-dealers this same flexibility for all material conflicts, including “financial incentive” conflicts.<sup>15</sup> If the SEC chooses to maintain a requirement for broker-dealers to mitigate rather than disclose specific conflicts, we urge the SEC to clarify that obtaining customer consent after adequate disclosure is included within Reg BI’s definition of “mitigation”.

***C. The SEC should affirm that broker-dealers may limit, through disclosure, the universe of products and services considered in making any specific recommendation.***

In addition to limiting the use of disclosure under the duty of loyalty, Reg BI as proposed would prohibit a broker-dealer from using disclosure to define the scope of its duty of care. As a result, both the duties of loyalty and care would prevent a broker-dealer from ever limiting the range of products and services it would need to consider before making any recommendation. This is contrary to the SEC’s stated intent, and would not provide a workable framework in which any broker-dealer could provide advice as a practical matter. As with the duty of loyalty, a broker-dealer’s duty of care as described would be more restrictive than even the fiduciary standards applicable to investment advisers.

As proposed, the duty of care would require that a broker-dealer “exercise reasonable diligence, care, skill, and prudence to ... [h]ave a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer ....”<sup>16</sup> The SEC specifically stated in the proposal’s preamble that this requirement was not intended to “prohibit ... recommendations from a limited range of products, or recommendations of proprietary products, products of affiliates, or principal transactions.”<sup>17</sup> However, the proposal also states that under the duty of care, although a broker-dealer would “not be required to analyze all possible securities, other products, or investment strategies to find the single ‘best’ security or investment strategy for the retail customer, broker-dealers generally should consider reasonably available alternatives offered by the broker-dealer as part of having a reasonable basis for making the recommendation.”<sup>18</sup>

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<sup>15</sup> We note that the disparate treatment of broker-dealers and investment advisers under Reg BI would be aggravated by the difference in liability for breach of the standards. There is no private right of action for breach of an investment adviser’s fiduciary duty. *See Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979). A broker-dealer who violated the duty of care or loyalty, in contrast, would be subject to arbitration or litigation for the breach. Although the SEC notes that it did not intend Reg BI to create a new right of action, the higher standards of Reg BI would nonetheless clearly apply to existing rights of action under FINRA rules. This would provide yet another incentive for broker-dealers to abandon brokerage advice in favor of an advisory model.

<sup>16</sup> Proposed Exchange Act Rule 15l-1(a)(2)(ii)(B).

<sup>17</sup> Reg BI Proposal at 21609.

<sup>18</sup> *Id.*

Reg BI further suggests, however, that this obligation to consider “reasonably available alternatives” could not be narrowed by disclosure.<sup>19</sup> Any limitation of the universe of products considered would therefore be a per se violation of the broker-dealer’s duty of care, even if disclosed, understood, and consented to by the customer. Contrary to the SEC’s statement, the proposed duty of care would prevent a broker-dealer from ever recommending only proprietary products, revenue-sharing products, or any specific category or subset of securities.

The proposed duty of loyalty leads to the same result. As discussed above, the duty of loyalty would not allow a broker-dealer to address “financial incentive” conflicts through disclosure alone. As a result, any difference in the compensation a broker-dealer would receive from products in a limited universe and any “reasonably available alternative” outside that universe would constitute a “financial incentive” conflict that would automatically require mitigation and could not be addressed by disclosing the limited universe and any potential conflicts presented.

Disclosure, however, is the only viable solution in this circumstance because there is no reasonable way to “mitigate” the limitation of the universe itself apart from disclosing it. Working within a defined universe of securities is a practical necessity when providing any investment advice. No broker-dealer could realistically consider and compare each and every available investment option when making a recommendation to a customer, even if it limited its analysis to those products or services that were available on that broker-dealer’s platform. Given the vast array of readily available investment options in the marketplace, and the breadth of securities typically available to customers through broker-dealers, some limitation of the universe of investment options must be undertaken in order for a broker-dealer, or any other type of adviser, to adequately understand, compare and formulate a recommendation.

To illustrate the problem, consider a broker-dealer offering an online investment advice tool that helps a retail customer select a bond mutual fund. The tool could be labeled “Bond Fund Recommendation Tool,” the customer would understand that any recommendation the tool makes is limited to the universe of “bond funds” described, and the tool could provide valuable advice to the customer in selecting a bond fund. Nonetheless, if there are any “reasonably available alternatives” to bond funds that the broker-dealer also sells – for example, bond ladders, individual bonds, certificates of deposit, or similar income-producing investments – the mere provision of a tool that focused solely on bond mutual funds would violate the duty of care by not considering each alternative product. Designing, implementing, and maintaining such a tool would be impossible.

Under the proposed duty of loyalty, moreover, if there is any difference in the broker-dealer’s compensation between the products that the “Bond Fund Recommendation Tool” considers and any “reasonably available alternative” products (which is almost inevitable), there would be a “financial incentive” conflict of interest for which disclosure is not sufficient under proposed Reg BI. It would not be enough for a broker-dealer to disclose fully that the tool provides recommendations solely on bond funds; the broker-dealer would still have an obligation

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<sup>19</sup> Reg BI Proposal at 21612.

to mitigate or eliminate whatever conflicts there might be between the universe of considered bond funds and everything else it does not consider.

The proposed rule could be read to define “reasonably available alternatives” as only those products that a broker-dealer makes available on its own platform, so that a broker-dealer would not have to consider similar products it does not also sell. This interpretation was presumably not intended since it suggests that broker-dealers could simply limit what they offer or make available on their platforms without any obligation to disclose or mitigate any conflicts associated with such limitation. That reading, moreover, would provide broker-dealers with an undesirable incentive to purge their platforms of any alternative products similar to products they might recommend, or to increase transaction fees and commissions on those alternative products. That would narrow the options available to customers and work counter to the SEC’s goal of preserving customer choice. It would also disadvantage larger broker-dealers with a full range of investment choices in favor of broker-dealers with limited platforms, and similarly disadvantage broker-dealers generally in favor of investment advisers who have no comparable restriction on defining their services and limiting the scope of their advice.

None of this works to the benefit of customers in any event. Customers of a broker-dealer compelled to narrow its offerings as a result of Reg BI would, in the end, receive recommendations from the same limited set of securities but lose the ability to compare and choose other products the broker-dealer might otherwise have offered. Customers who do not need or want investment advice would also lose access to investment options that the broker-dealer might otherwise have offered. Reg BI as currently drafted, therefore, would not eliminate the conflict but, instead, amplify its adverse impact on customers.

Just as investment advisers are permitted to limit the scope of their investment advisory services by contract to a predefined set of products or securities, broker-dealers must be allowed to design and disclose product platforms and offerings that are best suited to their business models, market demographics, and customer needs, including limitation of the universe of investments on which they provide recommendations in any particular instance. Not only is this principle reflected in SEC and staff precedent governing investment advisers,<sup>20</sup> but it reflects the practical and other realities facing broker-dealers when making recommendations to customers.

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<sup>20</sup> See, e.g., The Evolving Market for Retail Investment Services and Forward-Looking Regulation, available at <https://www.sec.gov/news/speech/speech-clayton-2018-05-02>, at footnote 21: “[N]either IAs nor BDs are required to recommend the absolute “best” product for a retail investor — putting aside the question of whether it’s meaningful to talk about a “best” product given that investing is not an exact science and reasonable professional minds may differ, IAs and BDs may tailor their investment options to a particular set of products, and recommend from among those to their clients or customers.” Indeed, it has been common practice for investment advisers to offer narrowly customized advice solutions, either based on asset class (e.g., advising only on equity securities) or product-type (e.g., mutual fund wrap programs that offer advice only on open-end investment companies.). In addition, Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act provides that the SEC may promulgate rules to establish a best interest standard of conduct for brokers and dealers that is “no less stringent” than the standard applicable to investment advisers under the Advisers Act. Section 913 explicitly provides that receiving commission-based compensation, in itself, should not be considered a violation of any such standard, nor should the sale of only proprietary or other “limited range of products.”

For example, so long as the customer is made aware of the limitation through full and fair disclosure, it should continue to be permissible for broker-dealers to, among other things:

- Restrict their associated persons from recommending securities that are not covered by the broker-dealers' research departments or otherwise well known by the firm;
- Offer investment analysis and other online or rep-assisted investment tools that consider a limited or specific set of securities and investments;
- Define the universe of securities and investments on which they provide recommendations depending on the circumstances of the recommendation and the broker-dealer's business model, for example, to investments that are generally appropriate for a broad spectrum of retail investors, or to a specific segment of investors, regardless of whether other securities on the broker-dealer's platform might also be suitable or available to customers; and
- Provide recommendations only on proprietary or revenue-generating products because the use of such products is factored into the financial arrangement with a customer.

It is important to note that a broker-dealer's best interest obligations will protect customers from being disadvantaged by recommendations made based on a properly disclosed limited universe of investment alternatives. When making a recommendation from within a limited universe of investment alternatives, a broker-dealer would still be required to meet the best interest duty of care by ensuring that any recommendation is appropriate for the customer based on the customer's specific financial needs and preferences. A broker-dealer would also be required to meet the duty of loyalty by considering additional mitigation or elimination of conflicts arising within any limited universe it selects and discloses. For example, if a broker-dealer discloses that it considers only proprietary products when making recommendations, it still could not recommend only the more remunerative products from within that universe without further disclosing or mitigating that conflict.

This problem can be easily avoided by recognizing disclosure as the appropriate solution. Indeed, we note that the DOL Fiduciary Rule acknowledged this problem and was careful to resolve it through disclosure, despite its otherwise often impractical approach to conflicts of interest. Section IV of the DOL's Best Interest Contract Exemption specifically permitted financial institutions to limit the universe of securities considered when making recommendations, subject to disclosure and certain other requirements.<sup>21</sup> The DOL rule provided that, after any limited universe was defined and disclosed, conflicts of interest arising

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<sup>21</sup> Adoption of Class of Exemption, 81 FR 21002, 201080-1 (April 8, 2016). (“A Financial Institution that limits Advisers’ investment recommendations, in whole or part, based on whether the investments are Proprietary Products or generate Third Party Payments, and an Adviser making recommendations subject to such limitations, shall be deemed to satisfy the Best Interest standard of Section VIII(d) if: (1) Prior to or at the same time as the execution of the recommended transaction, the Retirement Investor is clearly and prominently informed in writing ... of the limitations placed on the universe of investments that the Adviser may recommend to the Retirement Investor. ...”).

within the limited universe itself must be mitigated or otherwise addressed. We urge the SEC to adopt a similar approach.

***D. Reg BI should treat all material conflicts identically.***

We believe that distinguishing between “financial incentive” conflicts and all other conflicts is not meaningful, and does not support an effective framework for managing conflicts. From the customer’s perspective, if a conflict of interest results in poor investment advice, the broker-dealer’s motivations are irrelevant. We therefore urge the SEC to focus instead on the *materiality* of a particular conflict of interest rather than the category to which it belongs.

It is difficult to identify any material conflict that does not have a financial element or incentive at some level, and while the proposal provides an extensive list of “financial incentive” conflicts, it gives *no* examples of “non-financial incentive” conflicts.<sup>22</sup> Nor does the proposal articulate a clear rationale why a material conflict of one type may be disclosed, but a material conflict of the other type may not and must always be mitigated or eliminated. Both presumably could result in the same impact on the customer.

***E. Reg BI should adopt the definition of materiality developed by the Supreme Court under Rule 10b-5.***

Reg BI “interpret[s] 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.”<sup>23</sup> The proposed definition looks to whether a third party would perceive a conflict as influencing a broker-dealer’s advice, and requires consideration of whether a conflict of interest might “unconsciously” affect a recommendation. We suggest a more direct definition of “material conflict of interest,” that is, the well-known and longstanding definition of materiality developed by the Supreme Court under Rule 10b-5: information is material when there is “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” and, when the disclosure relates to a contingency, materiality “will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light

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<sup>22</sup> The SEC explains that “financial incentives” may include, but are not limited to, compensation practices established by the broker-dealer, including fees and other charges for the services provided and products sold; employee compensation or employment incentives (*e.g.*, quotas, bonuses, sales contests, special awards, differential or variable compensation, incentives tied to appraisals or performance reviews); compensation practices involving third parties, including both sales compensation and compensation that does not result from sales activity, such as compensation for services provided to third parties (*e.g.*, sub-accounting or administrative services provided to a mutual fund); receipt of commissions or sales charges, or other fees or financial incentives, or differential or variable compensation, whether paid by the retail customer or a third party; sales of proprietary products or services, or products of affiliates; and transactions that would be effected by the broker-dealer (or an affiliate thereof) in a principal capacity.

<sup>23</sup> Reg BI Proposal at 21602.

of the totality” of the circumstances.<sup>24</sup> The materiality standard set forth in *Basic v. Levinson* clearly defines materiality without depending on consideration of nebulous “unconscious” motivations, which are, by definition, difficult to ascertain. This definition also has the benefit of a long history of judicial application in many different contexts, including conflicts of interest,<sup>25</sup> and is well-suited for use in assessing conflicts here.

***F. The SEC should clarify that compensation based on accumulation of assets is permissible.***

The SEC has properly pointed out that certain conflicts of interest can be so problematic that it simply may not be possible to mitigate them effectively. For example, we agree that sales contests improperly favoring certain investment products over others involve uniquely troubling conflicts and should generally be impermissible. However, we believe the SEC’s suggestion that “bonuses ... based on ... accumulation of assets under management ... may be more appropriately avoided in their entirety” is overbroad. Asset-gathering alone does not present the same conflicts as product-specific sales contests and, when properly designed, is a neutral measure of overall performance. To the extent a firm’s asset-gathering activities improperly prefer certain products over others or result in unsuitable recommendations, these would already be subject to the SEC’s proposed requirement for broker-dealers to establish and implement reasonable conflict management policies and procedures, and, in any event, would still be subject to Reg BI’s duty of care and existing FINRA rules prohibiting unsuitable recommendations. We ask that the SEC make plain its intention not to eliminate reasonable measures of a representative’s performance, including consideration of assets gathered, so long as such measures do not harm the customer. As proposed, this prohibition would also unfairly

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<sup>24</sup> *Basic v. Levinson*, 485 U.S. 224, 231–32, 238 (1988); see also *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 445, 449 (1976); *SEC v. Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2413 (2014) (“[I]f the misrepresentation was immaterial—that is, if it would not have ‘been viewed by the reasonable investor as having significantly altered the “total mix” of information made available’ ...” citing *Basic*); *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 478-481 (2013) (“[*Basic*] is best known for its endorsement of the fraud-on-the-market theory. But the opinion also established something more. It stated the proper standard for judging the materiality of misleading statements regarding the existence and status of preliminary merger discussions. (‘Materiality in the merger context depends on the probability that the transaction will be consummated, and its significance to the issuer of the securities.’)”) (citations omitted); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 27-28, 38, 43-45, 47 (2011) (“Under *Basic Inc. v. Levinson*, § 10(b)’s materiality requirement is satisfied when there is ‘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.’ The Court declined to adopt a bright-line rule for determining materiality in *Basic*, observing that ‘[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.’ ... The question is whether a reasonable investor would have viewed the nondisclosed information ‘as having significantly altered the ‘total mix’ of information made available.’”) (citations omitted).

<sup>25</sup> See *Siemers v. Wells Fargo & Co.*, 2006 WL 2355411 (N.D. Cal. Aug. 14, 2006) (finding broker-dealer’s failure to disclose conflicts arising from ‘payback agreement’ for showcasing particular funds was material omission under the *Basic* standard); *In re AIG Advisor Group*, 2007 WL 1213395 (E.D.N.Y. Apr. 25, 2007), aff’d 390 Fed. Appx. 495 (2d Cir. 2009) (using *Basic* standard to conclude that omissions concerning conflicts of interests resulting from payments received in form of revenue sharing and directed brokerage from mutual fund in exchange for recommending funds to customers, were immaterial as a matter of law).

disadvantage broker-dealers as compared with investment advisers. The conflict posed when an investment adviser pays its representatives based on assets gathered is precisely the same as the conflict created when a broker-dealer makes these payments. The SEC's proposal, however, would eliminate the practice for only broker-dealers. As noted, we believe that, neutrally applied, these payments are a fair and effective measure of representative performance and should be allowed for both advisers and broker-dealers when properly designed to protect customer interests.

***G. The definition of “retail customer” should be aligned with the definition of “retail investor” for purposes of Form CRS and made consistent with FINRA’s approach to applying suitability obligations.***

We believe that the different definitions of “retail customer” and “retail investor” create complication and confusion for firms and investors, particularly considering how the proposals would need to be operationalized in practice if adopted in the form of a final regulation. Specifically, the definition of “retail customer” for the purposes of proposed Reg BI is different from the definition of “retail investor” for the purposes of Form CRS, and both of these are different from FINRA’s current approach to suitability obligations, which excludes institutional customers if certain requirements are met.<sup>26</sup>

The proposed definition of “retail customer” would weaken the institutional suitability safe harbor provision of FINRA Rule 2111 — approved by the SEC — which effectively relieves a broker-dealer of customer-specific suitability obligations when making recommendations to natural persons (and trusts) with total assets of \$50 million or more who have opted out of the rule’s protection, without regard to whether the recommendation is to be used for personal, family, or household purposes.

Instead, we suggest that Reg BI and Form CRS establish a uniform definition of “retail customer” that:

- excludes investors (natural persons and entities) with \$50 million or more in assets;
- excludes investors who are “qualified purchasers” (as defined in Section 2(a)(51) of the Investment Company Act of 1940 (“Investment Company Act”));
- excludes persons who are not yet customers (“prospects”); and
- excludes ERISA and non-ERISA employer sponsored retirement plans regardless of size, as well as their sponsors, trustees, and advisers (but includes plan participants).

In particular, excluding prospects and other non-customers, and limiting Reg BI to interactions with such persons only once they have engaged the firm, would be consistent with

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<sup>26</sup> See Proposed Exchange Act Rules 151-1(b)(1) and 17a-14(e)(2); FINRA Rule 2111(b).

FINRA's current approach to suitability obligations.<sup>27</sup> This would align with the regulation of investment advisers, who have disclosure and other responsibilities to clients but who, aside from generalized disclosure required by Form ADV, do not have a duty to disclose conflicts to prospects (although they are, even in those interactions, subject to anti-fraud standards barring deceptions and misleading statements).<sup>28</sup> We are aware of no other general securities law requiring delivery of a document to a prospect, who may have only a single passing interaction with the firm and never becomes a customer. The SEC could, of course, require that Form CRS be provided upon request by any customer or prospect and available on a firm's website.

***H. The impact of Proposed Reg BI on affiliated registrants should be further considered and developed.***

We are concerned that the proposal does not fully account for Fidelity and similar firms, where many representatives may be dual-registered with a broker-dealer and an affiliated investment adviser. We would like to see greater clarity and guidance in either the rule itself or the adopting release that clarifies the application of Proposed Reg BI to affiliated registrants with dual-hatted representatives. By way of example, it is not clear whether or how frequently disclosure is required to put a customer on notice of the capacity in which a dually registered broker-dealer and investment adviser is acting. We suggest that an affiliated broker-dealer and investment adviser should have the option to be treated identically as a single dual-registered entity in the firms' judgment in any particular context. For Form CRS, for example, an affiliated broker-dealer and investment adviser providing advice through a single dual-registered representative should be able to choose to use the same version of Form CRS a single dual-registered firm would deliver, or to select separate versions for the broker-dealer and investment adviser if more appropriate to describe the firm's business.<sup>29</sup>

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<sup>27</sup> See FINRA Rule 2111 (Suitability) FAQ, Q2.2 / A2.2, available at <http://www.finra.org/industry/faq-finra-rule-2111-suitability-faq>. ("The suitability rule would apply when a broker-dealer or registered representative makes a recommendation to a potential investor *who then becomes a customer*. Where, for example, a registered representative makes a recommendation to purchase a security to a potential investor, the suitability rule would apply to the recommendation if that individual executes the transaction through the broker-dealer with which the registered representative is associated or the broker-dealer receives or will receive, directly or indirectly, compensation as a result of the recommended transaction. In contrast, the suitability rule would not apply to the recommendation in the example above if the potential investor does not act on the recommendation or executes the recommended transaction away from the broker-dealer with which the registered representative is associated without the broker-dealer receiving compensation for the transaction.") (Emphasis added).

<sup>28</sup> See Advisers Act § 206(1)-(2). Section 15(c) of the Exchange Act prohibits a broker-dealer from inducing or attempting to induce the purchase or sale of a security using any manipulative, deceptive, or other fraudulent device or contrivance. Sections 9(a) and 10(b) of the Exchange Act and section 17(a) of the Securities Act of 1933 ("Securities Act") also include antifraud provisions that are applicable to broker-dealers when dealing with retail customers.

<sup>29</sup> We further recommend below that the Proposal be revised to require a single version of Form CRS for all broker-dealers and investment advisers

## II. INVESTMENT ADVISER INTERPRETIVE GUIDANCE

As noted,<sup>30</sup> we do not believe that the SEC should make any changes to the standard of conduct under the Advisers Act as set forth in judicial precedent and SEC rules and interpretations, including *SEC v. Capital Gains Research Bureau*,<sup>31</sup> or that the standard requires further interpretive guidance or clarification. Further, in light of the fact that the key goals of the proposals are to harmonize the standards applicable to broker-dealers and investment advisers and to reduce investor confusion about these standards, we note that the Advisers Act standard, which encompasses duties of care, loyalty, and disclosure, already aligns well with the structure of the proposed best interest standard for broker-dealers in Reg BI.

If the SEC decides to issue additional guidance on investment advisers' fiduciary duty, however, any such guidance should reflect the common law principles defining the federal fiduciary obligations of investment advisers and articulate the proposition that investment advisers may rely on effective disclosure, consent, and contractual provisions to fairly articulate the scope of their duties and manage conflicts of interest, as discussed below.

### *A. The guidance should differentiate an investment adviser's obligations to retail investors and to sophisticated institutional clients.*

Any SEC interpretive guidance should explicitly recognize that there are differences in how an investment adviser's fiduciary duty obligations apply with retail clients (which appears to be the primary focus of the proposed interpretive guidance) as compared with institutional clients. Such differentiation should recognize, among other things, that any obligation on the part of an investment adviser to evaluate "whether a client's account or program type . . . continues to be in the client's best interest" or to make a reasonable inquiry into a retail client's "investment profile" and update it as necessary to reflect changed circumstances do not necessarily apply to an institutional client (such as a pension plan or pooled vehicle for which the investment adviser is responsible for managing the institutional client's account based on the client's specified investment strategy or mandate).

The SEC's interpretation should also recognize that the requirements regarding contractual disclosure of conflicts should take these differences into account by, for example, permitting greater complexity in disclosures to institutional clients. Institutional clients are well-equipped to understand and assimilate more sophisticated disclosure, and, in light of their level of sophistication, their complex needs may not be satisfactorily fulfilled by more simplified disclosure.

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<sup>30</sup> See supra note 6.

<sup>31</sup> See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963). ("Capital Gains")

***B. The guidance should confirm an investment adviser's ability to satisfy its duty of loyalty by fully and fairly disclosing its material conflicts of interest and obtaining consent.***

We are concerned that some statements in the proposing release could be read to undermine the venerable principle under the Advisers Act that an adviser may rely on disclosure and consent to address its material conflicts of interest and satisfy the duty of loyalty. In particular, we are concerned that the SEC's statements on inadequate or insufficient disclosure (*i.e.*, disclosure that, as drafted, is insufficient to produce informed client consent) might call into question, or be construed as calling into question, the adequacy or sufficiency of disclosure to address conflicts generally. In particular, the SEC states that "[d]isclosure of a conflict alone is not always sufficient to satisfy the adviser's duty of loyalty and section 206 of the Advisers Act" and that, "in some cases, conflicts may be of a nature and extent that it would be difficult to provide disclosure that adequately conveys the material facts or the nature, magnitude and potential effect of the conflict necessary to obtain informed consent and satisfy an adviser's fiduciary duty. In other cases, disclosure may not be specific enough for clients to understand whether and how the conflict will affect the advice they receive."<sup>32</sup>

The two examples provided by the interpretation, however – conflicts that are too complex or lengthy to be understood by the customer – concern only inadequate or incomprehensible disclosure in a particular case, and do not address whether clear and understandable disclosure may be used to address a conflict. The concept that disclosure must clearly convey the existence and nature of a conflict in language comprehensible to the customer is embedded in the SEC's own language that disclosure must be "adequate." In other words, if disclosure is too complex to be reasonably understood by an objective reader, it is inadequate by definition. Indeed, the proposing release recommends that when a conflict is too complex or lengthy to describe, the adviser can clarify the conflict and disclosure so that the customer can knowingly consent to it – in other words, it acknowledges that adequate disclosure is sufficient. Accordingly, the SEC should confirm that full and fair disclosure of material conflicts and informed consent, implicit or explicit depending on the circumstances, continues to be the existing standard under common law and the Advisers Act.

We are also concerned about statements in the proposing release that appear to introduce a subjective test for disclosure – in effect, creating a regime in which a reasonably drafted disclosure may be called into question because a given client had questions or might have misread the disclosure. For example, the SEC states that "it would not be consistent with an adviser's fiduciary duty to infer or accept client consent to a conflict where ... the facts and circumstances indicate that the client did not understand the nature and import of the conflict."<sup>33</sup> A subjective test for disclosure and consent is problematic if it means the adequacy of disclosure – even reasonably drafted disclosure – is determined in hindsight on a case-by-case, client-by-client basis subject to second-guessing by clients and regulators. Statements such as these are

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<sup>32</sup> IA Interpretation Proposal at 21209.

<sup>33</sup> *Id.*

particularly troubling given other statements in the proposing release providing that, “where full and fair disclosure and informed consent is insufficient, we expect an adviser to eliminate the conflict or adequately mitigate the conflict so that it can be more readily disclosed.”<sup>34</sup>

To give advisers a measure of certainty, therefore, the SEC should reaffirm that disclosure remains a viable means to address conflicts, and that the adequacy of disclosure continues to be determined according to an objective, reasonable person standard. To do otherwise would casually upend decades of law and practice.

### III. FORM CRS

Fidelity shares the SEC’s view that retail investors benefit by understanding the nature and cost of accounts and services provided to them by broker-dealers and investment advisers with whom they do business. Fidelity has always supported providing investors the information they need to make informed investment decisions and understand the nature of the accounts and services we offer. Disclosure is useful when it provides information necessary to make informed decisions in a format and context that is understandable and actionable by the average retail investor.<sup>35</sup> However, while we agree with the goal of the disclosures proposed by the SEC, we believe there is a more effective approach than the proposed rule currently contemplates. To help ensure that Form CRS is relevant and understandable to the retail investors<sup>36</sup> that will receive it, we ask that the SEC consider our suggestions below.

***A. We propose that Form CRS be shorter and more comprehensible, like the sample form Fidelity has created for the SEC’s consideration.***

While we commend the SEC for proposing different models of Form CRS to allow investors to compare services across companies, we believe that Form CRS can accomplish its objective in a single-page form, applicable for either a single or dual-registered firm, which is designed to provide a high-level understanding of the key concepts to investors. A revised and redesigned one-page Form CRS created by Fidelity is attached as an Appendix for the SEC’s consideration.

Fidelity’s proposed Form CRS was designed by our affiliate, Fidelity Labs, whose mission is to develop new products and businesses to promote the financial wellbeing of Fidelity’s current and future customers. Fidelity Labs pursues its mission, in part, by designing new products, including its recently launched *Student Debt Tool*,<sup>37</sup> incubating new businesses,

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<sup>34</sup> *Id.*

<sup>35</sup> See “A Plain English Handbook, How to create clear SEC disclosure documents,” at 7, available at <https://www.sec.gov/pdf/handbook.pdf> (“Knowing your audience is the most important step in assuring that your document is understandable to your current or prospective investors.”).

<sup>36</sup> While we agree that it is helpful for information to be made available to investors as they consider which service provider is right for them, as discussed above, we recommend that the SEC conform and re-work the definitions of “retail customer” and “retail investor” to synchronize the two in order to avoid any unnecessary complication and confusion.

<sup>37</sup> *Fidelity Student Debt Tool*, available at [www.fidelity.com/studentdebt](http://www.fidelity.com/studentdebt).

teaching and sharing innovations, and conducting research through multiple-user testing in support of these efforts. Fidelity Labs' extensive experience over many years learning what draws investors' attention, what they are likely to read or discard, and how to convey sophisticated concepts in plain English, is reflected in the version of Fidelity's Form CRS that is attached as an Appendix. We believe that this Form takes into account the design elements articulated by the SEC in its Plain English Handbook along with using key design elements that are informed by our experienced employees whose focus is on graphic design and applying design thinking techniques to customer-facing products and services.

In particular, Fidelity's proposed Form CRS incorporates a hierarchy of questions – referred to as “scaffolding” – that is purposefully structured to educate investors without overwhelming them with too much content.<sup>38</sup> At the same time, Fidelity's proposed Form CRS incorporates the SEC's concept of “layered” disclosure, including short URLs and QR codes which link to additional information for investors to evaluate further and understand the firm's services. In this way, the Form CRS serves as a guide directing investors to where they can obtain more detailed information, rather than just a laundry list of information.

We believe Fidelity's proposed single-page Form CRS is more likely be read by investors, and thus more likely to cause them to seek additional information they would like to know, thereby accomplishing the SEC's goals.

***B. The content requirements should be more flexible and streamlined to improve the usefulness of disclosure for investors.***

Consistent with Fidelity's proposed Form CRS, we believe the SEC should take a principles-based approach to the format, length and content of its Form CRS. The Form CRS instructions contain certain prescribed language which may not apply to all accounts, services, and models, and therefore could be misleading to retail investors. We recommend that any SEC content requirements for the Form CRS be suggestive rather than prescriptive, and should permit firms the flexibility to modify as necessary. Accordingly, we urge the SEC to consider prescribing content and topics, but not specific language for purposes of Form CRS to allow firms flexibility, along the lines of Fidelity's proposed form.

For example, dual registrants, affiliated registrants, and other firms with complex business models (including those with multiple advisory programs and broker-dealer platforms) would find it very challenging to summarize their offerings within the four-page limit and other content and formatting constraints of the form as proposed, let alone to do so in a manner that provides sufficient detail to convey meaningful information to investors, and is sufficiently accurate to avoid creating liability for a misstatement. We also note that Form CRS does not

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<sup>38</sup> See Stanford Law School Design Principles, “Use visual design and interactive experiences, to transform how you present legal info to lay people,” available at <http://www.legaltechdesign.com/communication-design> (“design a document to be less of a “text-dump” — just putting all the detailed information out there for a person to read — and more of a designed experience, that helps the reader make sense of the information, relate it to their own situation, and figure out how best to act in response to it”); see also *id.* (“when you give people too much information, they get distracted by less relevant info and make inferior decisions.”).

take into account firms that have an affiliated broker-dealer and investment adviser and representatives that are registered with both entities. We urge the SEC to provide flexibility for firms to meet the Form CRS requirements. Specifically, firms should have the flexibility to use a combined Form CRS for dual registrants or affiliate entities or to have a separate Form CRS for each legal entity with links to the Form CRS for different business models and entities.

The Form CRS instructions' description of fees and costs also is more of a laundry list that could confuse investors and crowd Form CRS with too much detailed information that may not be relevant to their accounts. The Form CRS should instead inform investors of the types of fees they may incur and direct them, via a link, to more detailed disclosure regarding fees relating to specific account types. Fidelity's proposed Form CRS includes suggested language in our section on "How will I pay for your investment advice" that reflects a high-level approach which includes a comparison between brokerage and investment advisory (with key points relating to fees demarcated in a separate color from the remainder of the text), and a separate URL or QR code where investors can obtain even more information. Form CRS is the first step for a prospective customer to understand the different services provided by advisors and brokers.

As an alternative approach, and in order to ensure that investors receive uniform and easy-to-understand information regarding the differences between broker-dealers and investment advisers generally (with respect to standards of conduct and comparison of services), we propose that the SEC issue standard language, similar to the information FINRA provides on its website and the SEC provides on investor.gov, and require firms to link to that standard disclosure.

***C. The delivery requirements for Form CRS should be revised to provide greater flexibility.***

As proposed, a broker-dealer is required to deliver Form CRS when a customer "first engages" the firm's services. The concept of "engagement of services" is both new and undefined in the broker-dealer context. We propose instead that delivery of Form CRS by a broker-dealer should be required at the earlier of (i) a customer's account opening or execution of a customer agreement and (ii) the provision of a recommendation to the customer.

We expect that existing customers are already familiar with the services offered to them by their broker-dealer or investment adviser and suggest that these customers do not need an initial Form CRS sent to them, but can of course access a copy posted on the firm's website.<sup>39</sup>

We also urge the SEC to allow broker-dealers that provide brokerage services to retail investors through independent, non-affiliated third parties such as banks, family offices and investments advisers (both registered and exempt from registration) to deliver the Form CRS to

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<sup>39</sup> We believe it is reasonable to require firms that maintain a firm website to maintain a current version of Form CRS on their websites. We also support the SEC's position that with respect to material changes of information provided in a Form CRS, firms must either provide an updated Form CRS to retail investors or communicate the changes in another way such as posting on the firm's website.

the unaffiliated third party, and contractually agree that the third party will in turn provide the form to the retail investor, as applicable.

We commend the SEC for allowing for electronic delivery of the Form. However, the proposal seems to assume that electronic delivery would always be in the form of a PDF document. We urge the SEC to build in greater flexibility with respect to both the format of the document and the method of delivery, in light of the many ways that customers consume information today. This flexibility should include permitting a client to consent orally to electronic delivery of Form CRS,<sup>40</sup> and allowing firms to provide a link to their Form CRS during a telephone conversation.

The SEC also should continue to explore novel and flexible methods for access to Form CRS. For example, the SEC could require that firms with a website for retail customers use a uniform URL standard for the location of their Form CRS (for example, [www.firmname.com/CRS](http://www.firmname.com/CRS)). That would make it easier for investors to locate the information and make comparisons across firms. Alternative delivery methods, including for example by video, are also well worth considering.

***D. The delivery requirements for Form CRS should exempt certain categories of third parties from the requirement to delivery Form CRS.***

We recommend that the SEC exclude limited-purpose broker-dealers acting solely as mutual fund general distributors from the obligation to deliver Form CRS to direct mutual fund investors that invest on an unsolicited basis, and shareholders investing through an intermediary (such as a full service broker-dealer or bank) that has an independent obligation to deliver such information to its client. We also suggest that the SEC explicitly exempt from the Form CRS requirement certain categories of broker-dealers, including clearing firms, principal underwriters, and distributors of mutual funds, as these firms do not have a direct relationship with the end investor based on their business models.

Since an investor does not receive recommendations or advice from a fund's limited-purpose broker-dealer, or other categories of broker-dealers noted above, they fall outside the scope of Regulation Best Interest and distribution by these entities (in addition to the investor's broker-dealer or investment advisor) will only cause confusion. Recognizing that other investment entities may technically fall within Form CRS's delivery requirements, the final rule should explicitly allow SEC staff to grant exemptions from the Form CRS requirement on a delegated basis.

#### **IV. RESTRICTIONS ON THE USE OF CERTAIN TITLES**

The Restrictions on the Use of Certain Titles proposal would require broker-dealers and investment advisers to be direct and clear about their legal form in communications with investors and prospective investors, and would restrict standalone broker-dealers and their

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<sup>40</sup> Notably, in the SEC's original release on the use of electronic media to deliver information to investors, written consent to electronic delivery was not required. See Securities Act Release No. 7233, 60 FR 53458 (Oct. 6, 1995).

financial professionals from using the terms “adviser” and “advisor” as part of their names or title.

***A. General Comments***

We are concerned that the proposed restrictions on the use of certain titles may prove to be unnecessarily complicated and fail to dispel investor confusion. Particularly in light of the convergence of the standards of conduct for broker-dealers and investment advisers, as further discussed above, the titling restrictions may be unnecessary to protect investors.

Broker-dealers should be permitted to use the terms “adviser” and “advisor” because they provide advice and Proposed Regulation Best Interest brings a broker’s duty of care to a level comparable to that of an investment adviser, as further discussed above. Any lingering investor confusion regarding the differences between broker-dealers and investment advisers is adequately addressed through Form CRS, which describes the nature and scope of the relationship between the firm and the investor, the duties owed, and the manner in which retail investors will be charged for brokerage and advisory services.

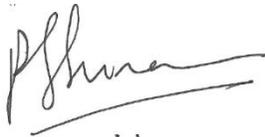
***B. Dual Registered Firms vs. Dually-Registered Representatives***

As noted in our discussion of Proposed Form CRS and Regulation Best Interest, the proposed restrictions on the use of titles do not contemplate all business models. Specifically, it is unclear how the proposed rule would apply to a dually registered representative providing recommendations on behalf of both a broker-dealer and its affiliated investment adviser. We ask the SEC to confirm that the titling restriction applies to a broker-dealer representative who is also not registered with any investment adviser, but not to dual-registered representatives whether the adviser is the same entity or an affiliate of the broker-dealer.

\* \* \*

Fidelity would be pleased to provide further information, participate in any direct outreach efforts the Commission undertakes, or respond to questions the Commission may have about our comments.

Sincerely,



Ram Subramaniam  
Head of Brokerage and Investment  
Solutions  
Fidelity Investments



David Forman  
Chief Legal Officer  
Fidelity Brokerage Services LLC



Enclosure: APPENDIX - Redesigned Form CRS

cc: The Honorable Jay Clayton, Chair  
The Honorable Kara M. Stein, Commissioner  
The Honorable Robert J. Jackson Jr., Commissioner  
The Honorable Hester M. Peirce, Commissioner

Dalia Blass, Director, Division of Investment Management  
Brett Redfearn, Director, Division of Trading and Markets



# Which types of investment services are right for you?

## BROKERAGE & INVESTMENT ADVISORY

### What investment services & advice will I receive?

#### BROKERAGE

Brokerage services can help you manage your investments yourself or we can help you with your investments, including recommending whether to buy or sell securities (such as stocks, bonds, mutual funds, or exchange-traded funds). **Either way, you decide which securities to buy and sell.**

When we provide advice to you, we consider a limited selection of investments. Other firms could consider a different range of choices, some of which might have lower costs.

#### INVESTMENT ADVISORY

Advisory services can provide you advice on which securities to buy or sell and you make your investment decisions, or we can make investment recommendations, monitor your accounts, and can manage your investments on an ongoing basis **through selecting, buying and selling securities on your behalf.**

Our investment advice and management cover a limited selection of investments. Other firms could cover a different range of choices, some of which might have lower costs.

### How will I pay for your investment advice?

#### BROKERAGE

In a brokerage relationship, there is no separate fee for advice. Instead, brokerage services typically result in a variable fee based on the investments you choose. Often, **a transaction based fee (i.e., a "commission") will apply when you buy or sell securities.** In other cases, we will receive payments from the investment providers of the investments you choose instead of or in addition to commissions.

#### INVESTMENT ADVISORY

In an advisory relationship, you pay a separate advisory fee for the advice itself, for making recommendations, and for managing your account for you. For example, you may pay an annual fee based on the value of your investments. **This fee is in addition to the cost of any investments you hold in your account** and applies even if you don't follow our recommendations. However, the fee typically does not vary based on the investments you choose or that we invest in for you.

### What is your obligation to me?

#### BROKERAGE

We must act in your best interest and not place our interests ahead of yours when we recommend an investment or investment strategy.

If our interest in making a recommendation conflicts with your interest, we must tell you about the conflict and either get your consent to it or take action to protect you from the conflict in some other way. Then, you can decide what action to take.

#### INVESTMENT ADVISORY

We must act in your best interest and are held to a fiduciary standard when providing investment advisory services.

We must also disclose any conflicts between our interest and yours and obtain your consent to them or eliminate them.

### What is an example of a conflict of interest, and how might it affect our relationship?

Our interests can conflict with yours if we have a financial or other incentive to make a decision for our benefit instead of yours. In general, the money we earn varies based on your choice of products and services, and how much you choose to invest or maintain in accounts we service. Typically, the more you buy and invest, the more we earn.

Also, Fidelity earns more if you purchase a Fidelity exchange-traded fund, Fidelity mutual fund, or a fund that shares its revenue with us than if you purchase one managed by another company.

### What else should I ask my Fidelity representative?

Which investment and advice services are right for me, given my goals and preferences?

What other potential conflicts of interests and additional fees might I encounter in each type of service?

What is your experience managing investments, and where can I find information about your professionals?

For more information, please use your smart phone to scan these codes or visit these sites:



fidelity.com



investor.gov

**For additional assistance, please call 1.800.123.4567.**

