FINANCIAL PLANNING COALITION

November 7, 2017

The Honorable Jay Clayton
Chairman, Securities and Exchange Commission
100 F St., NE
Washington, DC 20549
rule-comments@sec.gov

RE: Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers (June 1, 2017)

Dear Chairman Clayton, SEC Commissioners, and SEC Staff:

The Financial Planning Coalition (Coalition)[1] – comprised of Certified Financial Planner Board of Standards (CFP Board),[2] the Financial Planning Association® (FPA®),[3] and the National Association of Personal Financial Advisors (NAPFA)[4] – appreciates the opportunity to comment in response to the Commission's request for information (RFI) regarding standards of conduct for investment advisers and broker-dealers.[5] The Coalition holds a longstanding interest in this issue and in numerous comment letters over the last several years has expressed its support for a fiduciary standard of care for all financial professionals who offer personalized investment advice to retail investors.

Investment advisers traditionally have had to register under the Investment Advisers Act of 1940 (Advisers Act) and are subject to a fiduciary standard. However, the Advisers Act exempts broker-dealers from this standard so long as 1) any advice the broker-dealer gives to clients is "solely incidental" to its broker-dealer business; and 2) the broker-dealer does not receive any "special compensation" for rendering such advice. Over the years, this exemptive relief has become much broader to the point where "[t]he range and scope of what is considered 'solely incidental' has been stretched [over the years] to the breaking point."[6]

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[1] The Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession.
[2] CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for over 80,000 CERTIFIED FINANCIAL PLANNER™ professionals throughout the country. CFP® professionals voluntarily agree to comply with CFP Board's rigorous standards including education, examination, experience and ethics, and subject themselves to disciplinary oversight of CFP Board.
[3] FPA® is the largest membership organization for CFP® professionals and those who support the financial planning process in the U.S. with over 23,000 members nationwide. With a national network of 88 chapters and state councils, FPA® represents tens of thousands of financial planners, educators and allied professionals involved in all facets of providing financial planning services. FPA® works in alliance with academic leaders, legislative and regulatory bodies, financial services firms and consumer interest organizations to represent its members.
[4] NAPFA is the nation's leading organization of fee-only comprehensive financial planning advisors with more than 3,000 members nationwide. NAPFA members are highly trained professionals who adhere to high professional standards. Each NAPFA advisor annually must sign and renew a Fiduciary Oath and subscribe to NAPFA's Code of Ethics.
[5] 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.
[6] Jim Pasztor, "Embracing the Future: Implications of the DOL Fiduciary Standard for the Financial Services Industry,"

As a result, SEC action to properly apply a fiduciary standard to all personalized investment advice is long overdue. Any SEC rulemaking on standards of conduct for broker-dealers providing personalized investment advice to retail investors should not serve as a replacement of the DOL's 2016 fiduciary rule (DOL Rule), but rather as a complement to it.[7] The SEC should coordinate with the DOL to ensure that fiduciary rulemaking is ***consistent with*** the strong requirements mandated by the Employee Retirement Income Security Act of 1974 and captured in DOL rulemaking. The SEC should promote a fiduciary standard under the securities laws for financial services professionals that puts the interests of American retail investors ahead of their own and includes the duties of care and loyalty. Rulemaking requiring a fiduciary standard for broker-dealers offering personalized investment advice to retail investors should be no less stringent than the existing fiduciary duty standard under the Advisers Act.

As the Coalition previously communicated to the SEC,[8] a meaningful, legally enforceable uniform fiduciary standard of care that puts investors' interests first is the best way to strengthen investor protection when personalized investment advice is dispensed.[9] It takes decades for people to save for a comfortable and secure retirement, to save for their first home purchase, or to save enough to send their children to college during a period of rising tuition costs. These savers – "Mr. and Ms. 401(k),"[10] as Chairman Clayton recently put it – deserve advice on growing their hard-earned assets under a fiduciary obligation. Indeed, SEC Chairmen since 2009 have acknowledged the need for a fiduciary standard.[11]

The Coalition recognizes that firms have clients whose assets are held in both brokerage and advisory accounts, as well as in retirement and non-retirement accounts, but are administered by the same financial services professional. Keeping in mind these situations where brokerage and advisory accounts are administered by dually registered professionals, the Coalition recommends that the SEC develop a business model-neutral solution that protects American investors. This standard should be based upon the core principle that, when providing personalized investment

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College for Financial Planning (Mar. 17, 2016), *available at* https://www.cffpinfo.com/download/white-papers/Embracing-the-Future-DOL-Fiduciary-Standard.pdf.

[7] Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20945 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550), *available at* https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice.

[8] *See generally* Meeting between Coalition and SEC, File No. 4-606 (Oct. 27, 2010); Meeting between Coalition and SEC Commissioner Luis Aguilar, File No. 4-606 (Nov. 15, 2010); Letter from Coalition to Elizabeth Murphy, Secretary, SEC (Nov. 30, 2010); Meeting between Coalition and SEC Commissioner Elisse Walter (Dec. 14, 2010); Meeting between Coalition and SEC Commissioner Troy Paredes (Dec. 17, 2010); Meeting between Coalition and SEC Chairman Mary Schapiro, File No. 4-606 (May 17, 2011); Letter from Coalition to SEC Chairman Mary Schapiro (June 23, 2011); Letter from Coalition to Elizabeth Murphy, Secretary, SEC (July 5, 2013).

[9] SEC, "What We Do," *available at* https://www.sec.gov/Article/whatwedo.html ("The mission of the U.S. Securities and Exchange Commission is to ***protect investors***, maintain fair, orderly, and efficient markets, and facilitate capital formation.") (emphasis added).

[10] Speech by SEC Chairman Jay Clayton, "Remarks at the Economic Club of New York," New York, NY (July 12, 2017), *available at* https://www.sec.gov/news/speech/remarks-economic-club-new-york ("How does the SEC assess whether we are being true to our three-part mission? The answer: the long-term interests of the Main Street investor. Or, as I say when I walk the halls of the agency, how does what we propose to do affect the long-term interests of Mr. and Ms. 401(k)?").

[11] *See* SEC Speech by Chairman Mary L. Schapiro, "The Consumer in the Financial Services Revolution" (Dec. 3, 2009), *available at* https://www.sec.gov/news/speech/2009/spch120309mls.htm ("We need to have a strong fiduciary standard for all securities professionals"); *See also* SEC Speech by Chairman Mary Jo White, "Remarks Before the SEC Historical Society" (June 4, 2015), *available at* https://www.sec.gov/news/speech/remarks-before-the-sec-historical-society.html ("I believe that broker-dealers and investment advisers should be subject to a uniform fiduciary standard of conduct that requires acting in the best interests of their clients when providing personalized securities advice to retail investors […]").

advice to retail customers, financial advisors (however registered) must put the client's interest first without regard to his/her own compensation or other interest, and pursuant to duties of care and loyalty. A disclosure-only regime is insufficient; a financial advisor must either eliminate, or properly manage and adequately disclose, all actual and potential conflicts of interest. In the Coalition's experience, adopting a true fiduciary standard is workable across business models and does not limit a firm's profitability.

The Coalition brings a unique perspective to this discussion. Coalition stakeholders and members have committed to provide financial planning services under a fiduciary standard of conduct.[12] CFP® professionals hold registrations and licenses across business models as investment adviser representatives, as registered representatives of broker-dealers, and as insurance agents; and in many instances hold dual or multiple registrations or licenses. Regardless of business model, or compensation model, they are obligated to provide financial planning services under a fiduciary standard of conduct. The views stated in this comment letter are based on the real-world experience of the Coalition in applying the fiduciary standard across business and compensation models.

I. Fiduciary Standard Crucial to American Retail Investors Facing Self-Directed Investment Market

Enhancing the standard of care for financial professionals who work with the retail investors reflects the growing importance of investor-directed decisions, increased individual responsibility, and consumer dependence on the expertise of financial professionals in the modern investment landscape. For example, with the uncertainty of relying on fully funded Social Security benefits and a shift away from employer-sponsored defined benefit plans, American retirement savers increasingly rely on 401(k)s and IRAs to meet retirement investment goals and maintain a decent standard of living and dignity in old age. As a result, most Main Street investors have few choices but to take advantage of investment vehicles that are self-managed over a long period of time.

Unfortunately, in this do-it-yourself marketplace, many retail investors lack financial literacy, face dangerously inadequate disclosures, or are confused by the myriad investment products, services, and job titles that today dominate the financial services marketplace. One of their most important decisions will be selecting a high caliber financial professional subject to the highest standard of care to help them resolve these issues and manage their accounts. A strong and enforceable fiduciary standard of care is crucial to preserve the trust and hard-earned savings of American retail investors.

A. The Industry and Investors Recognize the Trend of a True Fiduciary Standard

Creating a fiduciary standard not only would help fulfill a core mission of the SEC, namely, investor protection, but also would align the SEC with the growing public demand for fiduciary-level investment advice. A 2013 Aite survey found that most registered representatives and registered investment advisers agree that a fiduciary standard of care is appropriate for financial services providers who deliver personalized investment advice.[13] This finding cuts across a multitude of business models subject to different regulatory provisions. The Aite study surveyed financial

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[12] *See* CFP Board Standards of Professional Conduct, Rule of Conduct 1.4, *available at* http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/rules-of-conduct; NAPFA, "Mission and Fiduciary Oath," *available at* https://www.napfa.org/about/FiduciaryOath.asp.

[13] Aite, "Fiduciary Study Findings for CFP® Board" (June 2013), *available at* http://www.cfp.net/docs/public-policy/aite-fiduciary-study-june-2013.pdf.

professionals at various firm types, including broker-dealers, wirehouses, independent registered investment advisers, and online brokerage firms.

Those surveyed cited *greater alignment among provider and investor interests* as the primary benefit of a uniform fiduciary standard. Additionally, the Aite study found that fiduciary-level registered investment advisers experienced stronger client asset growth in the previous five years than registered representatives who did not deliver fiduciary services to a majority of clients. More than half of registered representatives who were financial planning fiduciaries generated double-digit asset growth and revenue growth in the previous five years.

In July 2015, Princeton Survey Research Associates International (PSRAI) conducted research for the Coalition in response to an SEC request for information regarding whether it should adopt a uniform fiduciary standard of care for broker-dealers and investment advisers when they provide personalized investment advice to retail customers.[14] The study surveyed 1,852 stakeholders from Coalition organizations, including professionals from broker-dealers, registered investment advisers, and insurance companies.[15] The study found that almost nine out of 10 respondents agree with the statement that "a fiduciary standard of care is appropriate for all financial professionals who deliver personalized investment advice to retail investors" and two-thirds believe that a change to extend the fiduciary standard of care to broker-dealers would have a positive impact on investors.[16] Most recently, a 2017 survey of CFP® professionals showed high levels of satisfaction with their work and a strong agreement about the rising fiduciary trend. A full 88% of respondents agreed with the statement, "A fiduciary standard of care is appropriate for all financial service providers who deliver personalized investment advice to retail investors" – a six-percentage point increase from 2015.

Today more than ever, investors demand that financial advice be provided under a fiduciary standard that puts their needs above the compensation needs of the financial professional. One survey in 2016 estimated that 93% of Americans "said it is important that all financial advisors be legally required to put their clients' best interests first when providing retirement investment advice."[17] In a 2017 industry-sponsored survey, individual investors consistently rated "a fiduciary standard as one of the top three drivers when choosing an advisor."[18] Even though only 38% of all investors are aware of the DOL Rule,[19] and although the full implementation of the DOL Rule has not yet been realized, investors have become more cognizant of the types and amounts of

[14] Coalition, "Fiduciary Standard Survey," Prepared by Princeton Survey Research Associates International (Revised July 2015), at p. 5, *available at* http://financialplanningcoalition.com/wp-content/uploads/2015/07/Princeton-Research-Fiduciary-Study-Final.pdf.
[15] *Id*., at p. 8.
[16] *Id*., at p. 6.
[17] Financial Engines, "In Whose Best Interest?" at pp. 1, 8 (March 2016), *available at* https://financialengines.com/docs/financial-engines-best-interest-report-040416.pdf (Financial Engines Study); *See also* Pam Krueger, "What Protects Investors More Than The Fiduciary Rule," Forbes (June 9, 2017), *available at* https://www.forbes.com/sites/nextavenue/2017/06/09/what-protects-investors-more-than-the-fiduciary-rule/#6c24ffd874b9 ("But here's the thing: It's not the federal Fiduciary Rule for investors in IRAs and 401(k)s that matters. It's the *fiduciary standard* for *all* investors. Financial advisers who meet the fiduciary standard *must* put their clients' loyalties first. All their clients. The irony is, this standard doesn't apply to the vast majority of financial advisers. That's because most financial advisers in America aren't independent advisers. They work for brokerage firms and those firms aren't required to meet the fiduciary standard.") (emphasis in original).
[18] Jefferson National (Nationwide), "Advisor Authority 2017: DOL Fiduciary Rule" (June 27, 2017), *available at* https://www.jeffnat.com/knowledge-bank/press-releases-and-alerts/press-releases/third-annual-advisor-authority-study-shows-investors-and-advisors-aligned-on-importance-of-fiduciary-standard-regardless-of-dol-fiduciary-rule/.
[19] *Id*.

fees associated with their investment vehicles. "[T]he debate already has brought a lot of attention to the industry's confusing payment structure."[20]

II. CFP Board's *Standards* Can Complement SEC Rulemaking

The Coalition believes the approach of the CFP Board's *Standards of Professional Conduct* (*Standards*) can provide a practical template for the SEC's rulemaking. To receive CFP® certification from CFP Board, a financial professional must agree to meet high standards for competency and ethics. CFP Board's *Standards* benefit and protect the public, provide standards for delivering financial planning, and advance financial planning as a distinct and valuable profession. Compliance with the CFP Board's *Standards* is a requirement of CFP® certification that is critical to the integrity of the CFP® mark.

A decade ago, CFP Board's decision to implement a fiduciary standard for CFP® certificants during the provision of financial planning services was met with considerable opposition from the industry.[21] Many opponents were concerned that "brokerage and insurance business models were going to be disrupted and compensation structures would suffer"[22] – reminiscent of arguments made by the industry in response to the DOL Rule. However, CFP Board was extremely conscious of creating a fiduciary standard that was principles-based and business model-neutral.

In the wake of these changes, CFP Board has seen an approximate 30% growth in the number of CFP® certificants.[23] Five years after adopting the fiduciary standard, these certificants reported higher client asset growth than their non-fiduciary counterparts.[24] Today, approximately 80,000 CFP® certificants nationwide continue to adhere to these high standards and serve clients under a fiduciary standard of care, whether they work at an insurance company, brokerage firm, or registered investment adviser – demonstrating that the fiduciary standard is both workable and protects investors from conflicts of interest. The current *Standards* require CFP® professionals to act in a fiduciary capacity when providing financial planning services.[25]

III. Lack of a Uniform Fiduciary Standard Exacerbates Investor Confusion and Causes Investor Harm

Absent a uniform fiduciary standard, confusion persists among retail investors seeking investment advice. Multiple studies have confirmed that investors harbor a wide variety of misconceptions about the duties owed to them by financial services professionals. Facing growing responsibility for their own investment decisions and an increasingly complex universe of financial products and services, Americans today must depend on competent and ethical advisors to help make

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[20] Jared M. Elson, "Even if Fiduciary Rule Gets Killed Under Trump, Investors Have Wised Up," Kiplinger (March 2017), *available at* http://www.kiplinger.com/article/retirement/T023-C032-S014-even-if-fiduciary-rule-gets-killed-investors-have.html ("Because of the clamor both for and against the Department of Labor's fiduciary rule, many people know more about this topic than their advisers ever expected they would.").
[21] Kevin R. Keller, "A fiduciary standard is good, old-fashioned common sense," InvestmentNews (Oct. 10, 2011), *available at* https://www.cfp.net/docs/press-kit/investmentnews-(oct2011).pdf?sfvrsn=2.
[22] *Id*.
[23] Statement of the Coalition before the U.S. House of Representatives Education and the Workforce Committee, Subcommittee on Health, Employment, Labor, & Pensions, Hearing on "Principles for Ensuring Retirement Advice Serves the Best Interests of Working Families and Retirees," (Dec. 2, 2015), at p. 3, *available at* https://edworkforce.house.gov/uploadedfiles/marilyn_mohrman-gillis_testimony.pdf
[24] *See* n. 13, *supra*.
[25] In June 2017 CFP Board of Standards issued for public comment proposed revisions to its *Standards.* The comment period closed August 21, 2017. If adopted, the proposed draft revision would broaden the application of the fiduciary standard, effectively requiring CFP® professionals to put a client's interest first at all times.

decisions critical to their financial security. When they seek financial advice, however, they face a marketplace in which it is virtually impossible to distinguish a salesperson from an advisor, or between those advisors who are legally obligated to provide advice in the investor's best interest versus those who are not. A clear fiduciary standard equally applicable to all financial advisors, including broker-dealers, would help clarify the investment decisions Americans face every day.

A. Studies Illustrate the Magnitude of Investor Confusion Over the Standard of Care and Legal Obligations of Financial Services Professionals

Numerous studies, including those sponsored by the SEC, have found that investors want consistent fiduciary-level advice but encounter confusing information, misinformation, or omissions about compensation structures and obligations of financial services professionals. A landmark 2008 study sponsored by the SEC and conducted by the RAND Center for Corporate Ethics, Law, and Governance revealed 62% of survey takers believed that investment advisers are required by law to disclose any conflicts of interest and 58% believed that brokers were legally required to do so.[26] Many respondents also believed they did not pay anything for brokerage or adviser services and still others reported not knowing how much they pay.[27]

Subsequent studies confirm persistent and pervasive consumer confusion about financial standards of conduct. A 2010 study conducted by InfoGroup,[28] on behalf of the Coalition, Consumer Federation of America (CFA), AARP, and the North American Securities Administrators Association (NASAA), found that 75 percent of investors incorrectly believed that the fiduciary standard is already in place for "financial planners." Despite greater public attention focused on the obligations of financial professionals, many investors still are confused about details and distinctions. A 2016 Financial Engines study indicated that 46 percent of Americans "mistakenly believe that all financial advisors are already required to put their clients' interests first when it comes to retirement."[29]

B. Opaque Industry Titles and Ambiguous Marketing Intensify Investor Confusion

There is good reason American investors are confused: opaque titles and distorted advertising blur lines between "salespersons" and "advisors." Due to misleading titles and marketing materials, the distinction between services offered by investment advisers and those offered by broker-dealers has only become more confusing over time. In the past 20 years, "broker-dealers have begun to drift subtly into a domain of activities that (at least under the regulatory regime) have historically been the province of investment advisers."[30] Bundling of advice and sales, the development of the "financial planner" title and the emergence of various types of brokerage accounts, such as "discount" and "fee-based," for the most part has remained unchecked by regulators and obscured from clients the true impact of compensation structures.

Additionally, most marketing and advertising geared toward retail investors conceals the difference between investment advisers who are subject to a fiduciary standard and salespersons

[26] *See generally* Angela Hung, et al., RAND Corp., "Investor and Industry Perspectives on Investment Advisers and Broker-Dealers," Sponsored by the United States Securities and Exchange Commission, at p. 89 (2008), *available at* https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf (2008 RAND Study).
[27] *Id*., at pp. 96-97.
[28] InfoGroup, "U.S. Investors and the Fiduciary Standard" (Sept. 15, 2010), *available at* http://www.hastingsgroup.com/fiduciarysurvey/docs/091510%20Fiduciary%20survey%20report%20FINAL2.pdf.
[29] *See* Financial Engines Study, at p. 1, *supra*, n. 17.
[30] *See* 2008 RAND Study, at p. 14, *supra*, n. 26.

who are not. A 2015 study by the Public Investors Arbitration Bar Association (PIABA) showed that

> Firms routinely advertise themselves as giving personalized, ongoing, non-conflicted advice that puts the customer first. Brokerage firms have also taken the position publicly with the regulators that such a duty should exist. But, when called to account for their actions [during arbitration proceedings], these same brokerage firms litigate like they have no such duty.[31]

Building on PIABA's 2015 Study, the Consumer Federation of America and Americans for Financial Reform issued a 2017 comparison of firms' marketing representations on public websites and their legal arguments in court. The 2017 study results showed that firms "routinely refer to their financial professionals not as sales representatives or agents but as 'financial advisors' and indicate that they have a level of expertise that can and should be relied upon by their less sophisticated clients."[32] Yet when these same firms are litigating in court, they claim "that broker-dealer reps and insurance agents are not true advisors because they do not actually provide unbiased advice and are not engaged in relationships of trust and confidence with their clients."[33] Rather, they are salespeople.

C. The Need for Truth in Titleage

The SEC repeatedly has recognized and warned against simply trusting titles to clarify the applicable standard of care. A 2011 SEC study showed that many investors "did not understand the standards of care applicable to investment advisers and broker-dealers, found the standards of care confusing, *and in particular, were uncertain about the meaning of the multiple titles used by investment advisers and broker-dealers*."[34]

A 2012 investor publication pointed out that titles can be misleading, indicating that some investment professionals "call themselves financial planners, but they may only be able to recommend that you invest in a narrow range of products, and sometimes products that aren't securities."[35] The SEC's Office of Investor Education and Advocacy, along with NASAA, issued an investor bulletin specifically warning consumers about potentially deceptive titles used by financial service professionals, writing that some titles "may be simply purchased, or even made up by financial professionals hoping to imply that they have certain expertise or qualifications; **such titles are generally marketing tools and are not granted by a regulator.**"[36]

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[31] Joseph C. Peiffer and Christine Lazaro, "Major Investor Losses Due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty," at p. 3, PIABA (Mar. 25, 2015), *available at* https://piaba.org/system/files/pdfs/PIABA%20Conflicted%20Advice%20Report.pdf.

[32] Micah Hauptman and Barbara Roper, "Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways," at p. 3, Consumer Federation of America and Americans for Financial Reform (Jan. 18, 2017), *available at* http://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf.

[33] *Id*.

[34] SEC, "Study on Investment Advisers and Broker-Dealers," at p. 94 (January 2011), *available at* https://www.sec.gov/news/studies/2011/913studyfinal.pdf (2011 SEC Study) (emphasis added).

[35] SEC, "Investment Advisers: What You Need to Know Before Choosing One" (Aug. 7, 2012), *available at* https://www.sec.gov/reportspubs/investor-publications/investorpubsinvadvisershtm.html.

[36] SEC, Office of Investor Education and Advocacy, "SEC-NASAA Investor Bulletin: Making Sense of Financial Professional Titles," at p. 2, SEC Pub. No. 160 (9/13), *available at* https://www.sec.gov/files/ib_making_sense.pdf (emphasis in original).

As recently as March 2017, Commissioner Michael Piwowar expressed concern about investors' confusion over the various titles that industry professionals use.[37] The Coalition shares these concerns and welcomes the opportunity to work with Commissioner Piwowar and the full SEC on this very important issue. We envision any action on "truth in titling" or "holding out" as a complement to, rather than a substitute for, SEC fiduciary rulemaking.

As increasing numbers of American consumers are exposed to misleading titles, designations, and marketing materials, the need for a true fiduciary standard becomes ever more critical. The SEC should act promptly to extend the fiduciary standard to broker-dealers who offer personalized investment advice to retail investors.

D. Conflicts Measurably and Tangibly Harm Retail Investors

Whether investors are confused about the legal obligations owed to them or about how financial professionals hold themselves out, conflicts do exist and tangibly influence investors. As FINRA explained in 2013, conflicts "relate mostly to the pursuit of revenue by the firm or its registered representatives at a client's expense."[38] Such conflicts come in the form of product offerings tied to revenue sharing and other profit potential for the firm or registered representative, or transaction recommendations that generate revenue for the registered representative but fall outside of the suitability standard.

Retirement investors are losing billions of dollars in retirement assets due to conflicted advice. The White House Council of Economic Advisers has estimated that the cost of conflicted advice costs retirement investors approximately $17 billion per year.[39] Underperformance associated with conflicts of interest – in the mutual fund segment alone – could cost IRA investors between $95 billion and $189 billion over the next 10 years and between $202 billion and $404 billion over the next 20 years.[40] Retirement investors "could lose 6 to 12 and as much as 23 percent of the value of their savings by accepting conflicted advice."[41] As AARP testified in Congress recently, "[c]onflicted advice is not free."[42]

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[37] *See generally* Barron's, "Acting SEC Chair Blasts DOL Rule" (Mar. 3, 2017), *available at* http://www.barrons.com/articles/acting-sec-chair-blasts-dol-rule-1488579992; *See also* Mark Schoeff Jr., "Piwowar blasts DOL fiduciary rule, says SEC should have 'comprehensive discussion' of advice standards," Investment News (Mar. 2, 2017), *available at* http://www.investmentnews.com/article/20170302/free/170309975/piwowar-blasts-dol-fiduciary-rule-says-sec-should-have-comprehensive.

[38] FINRA, "Report on Conflicts of Interest," at p. 42 (October 2013), *available at* http://www.finra.org/sites/default/files/Industry/p359971.pdf.

[39] White House Council of Economic Advisers, "The Effects of Conflicted Investment Advice on Retirement Savings" (February 2015), *available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf ("[T]he aggregate annual cost of conflicted advice is [estimated at] about $17 billion each year."); *See also* Heidi Shierholz and Ben Zipperer, "Here is what's at stake with the conflict of interest ("fiduciary") rule," Economic Policy Institute (May 30, 2017), *available at* http://www.epi.org/publication/here-is-whats-at-stake-with-the-conflict-of-interest-fiduciary-rule/.

[40] U.S. Dep't of Labor, *Regulating Advice Markets: Definition of the Term "Fiduciary" Conflicts of Interest – Retirement Investment Advice; Regulatory Impact Analysis for Final Rule and Exemptions*, at p. 9 (April 2016), *available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf.

[41] Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20945, at p. 20949 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550), *available at* https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice.

[42] U.S. House of Representatives, Financial Services Committee, Capital Markets, Securities, and Investment Subcommittee Hearing entitled, "Impact of the DOL Fiduciary Rule on the Capital Markets" (July 13, 2017), *available at* https://democrats-financialservices.house.gov/calendar/eventsingle.aspx?EventID=400645.

IV. Disclosure-Only Regime is Insufficient

In its RFI, the SEC asks whether conflicts can be appropriately addressed through disclosures. The Coalition believes that disclosures alone are insufficient to remedy investor confusion and harm stemming from conflicted advice. Although the Coalition agrees that disclosures can be a useful and important tool for investors, relying solely on disclosures is inconsistent with the SEC's mission of investor protection and contradicts substantial prior research demonstrating that disclosures alone are ineffective.[43] The Coalition opposes a disclosure-only regime and urges consideration of system based on either conflict avoidance or disclosures ***coupled with*** proper mitigation.

A. Experts Agree that Disclosure Alone Is Ineffective

As far back as 1995, the Tully Report confirmed that retail investors and financial services professionals are divided by a gap of knowledge regarding not only the "technical and financial management aspects of investing"[44] found in prospectuses, but also regarding a lack of disclosures about compensation practices involving investment professionals. Broker-dealers are obligated to disclose certain information under the anti-fraud provisions of federal securities laws, state statutes, and agency rules and regulations. But the SEC-commissioned 2008 RAND Study questioned the value of such disclosures. A majority of surveyed industry participants reported that "disclosures do not help protect or inform the investor, primarily because few investors actually read the disclosures."[45] Many industry stakeholders viewed disclosures as the root of the problem, indicating, "[t]he way they are written is not easily understandable to the average investor, and the information in disclosures is not sufficient."[46] A 2015 RAND Study confirmed that "disclosure in isolation may not improve investors' outcomes."[47]

At the state level, Massachusetts Commonwealth Secretary William Galvin, who oversees that state's Securities Division, agrees with the view that disclosures alone are not an adequate response. Citing "the real abuses in the area of retirement account rollovers," Galvin wrote that current boilerplate disclosures "have not protected retirement investors…"[48] He added that although "good disclosure is crucial for all participants in the financial markets," disclosure alone provides inadequate protection because "such disclosure is often written in ponderous, hard-to-understand language, so it often promotes confusion rather than well-informed investment decisions."[49]

B. Adequate Resolution of Conflicts of Interest Requires More than Disclosure

[43] *See* 2008 RAND Study, at p. 19, *supra*, n. 26 ("[T]he majority of interviewees expressed…that disclosures do not help protect or inform the investor, primarily because few investors actually read the disclosures…The way that they are written is not easily understandable to the average investor.").
[44] *See* SEC, Committee on Compensation Practices, "Report on the Committee on Compensation Practices," at p. 15 (Apr. 10, 1995), *available at* https://www.sec.gov/news/studies/bkrcomp.txt.
[45] *See* 2008 RAND Study, at p. 19, *supra*, n. 26.
[46] *Id*.
[47] Jeremy Burke, Angela A. Hung, Jack Clift, Steven Garber, and Joanne K. Yoong, "Impacts of Conflicts of Interest in the Financial Services Industry," RAND working paper, at p. 36 (February 2015), *available at* https://www.rand.org/content/dam/rand/pubs/working_papers/WR1000/WR1076/RAND_WR1076.pdf.
[48] Letter from William F. Galvin, Secretary of the Commonwealth, to Timothy D. Hauser, Deputy Assistant Secretary for Program Operations, Office of Exemption Determinations, EBSA, U.S. Dep't of Labor, at p. 2 (July 28, 2017), *available at* http://www.sec.state.ma.us/sct/sctpdf/Hauser0001.pdf.
[49] *Id*., at pp. 2-3.

It is worth noting that proposed revisions to CFP Board's *Standards (as* recommended by its Commission on Standards[50] and under consideration by CFP Board's Board of Directors) would require that CFP® professionals "avoid or disclose and manage conflicts of interest" as one of the very first tenets of the Code of Conduct.[51] The proposed strengthened fiduciary standard puts forth a duty of loyalty, in which the CFP® must "Seek to avoid Conflicts of Interest, or fully disclose Material Conflicts of Interest to the Client, obtain the Client's informed consent, and properly manage the conflict."[52] The proposed *Standards* further recommend methods of addressing conflicts:

> […] requires the CFP® professional to provide the Client with sufficiently specific facts so that the Client is able to understand the CFP® professional's Conflicts of Interest and the business practices that give rise to the conflicts, and give informed consent to such conflicts or reject them. A sincere belief by a CFP® professional with a Material conflict that he or she is acting in the best interest of the Client is insufficient to excuse failure to make full disclosure.[53]

The Coalition is not alone in believing that a disclosure-only regime is insufficient to protect investors. The SEC's Investor Advisory Committee (IAC) reached the same conclusion and indicated that a comprehensive approach could be applied across all business models. The IAC wrote, "[i]n order to ensure the continued availability of transaction-based recommendations, any standard adopted should be sufficiently flexible to permit the existence of certain sales-related conflicts of interest, <u>*subject to a requirement that any such conflicts be fully disclosed and appropriately managed.*</u>"[54]

V. Suitability is Not the Same as a Fiduciary Standard in the Best Interest of the Customer

Stark differences exist between the standards of conduct for broker-dealers[55] and investment advisers.[56] Only investment advisers are required to meet the fiduciary standard of care that compels them to put the best interests of clients ahead of their own. Broker-dealers only need to meet the lower suitability standard. Any uniform fiduciary standard proposed by the SEC must not equate the two standards, but rather promulgate a stringent best interest standard at a fiduciary level.

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[50] In December 2015, CFP Board announced the formation of a Commission on Standards to review and recommend to the Board of Directors proposed changes to the *Standards*. The Commission on Standards, which is comprised of 14 members drawn from the financial services industry and includes one former securities regulator and one investor advocate, revised the *Standards* based on public comments gathered through an online submission process and in-person forums across the country before presenting revisions to the Board of Directors. The public comment period ended August 31, 2017 and the Commission on Standards and the Board of Directors are reviewing the input. More information is available at https://www.cfp.net/about-cfp-board/commission-on-standards#members.

[51] CFP Board, Draft Proposal of "Code of Ethics and Standards of Conducts," at p. 1, *available at* https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/2017-proposed-standards/final-standards-for-public-comment.pdf?sfvrsn=2.

[52] *Id*.

[53] *Id*., at p. 4.

[54] SEC, "Recommendation of the Investor Advisory Committee: Broker-Dealer fiduciary Duty," at p. 7, *available at* https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation-2013.pdf (emphasis added).

[55] As defined under the Securities Exchange Act of 1934 (Exchange Act).

[56] As defined under the Advisers Act.

Under Section 202(a)(11)[57] of the Advisers Act an "investment adviser" is defined as a person who, in exchange for compensation, engages in the business of advising others (either directly or through writings) about the value of securities or about the advisability of buying, selling, or investing in securities.[58] Section 206 of the Advisers Act and long-settled case law establish a fiduciary duty under which investment advisers must operate. That duty mandates that investment advisers act for the benefit of their clients, and "exercise the utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients."[59] Importantly, this framework forces advisers to put their clients' interests above their own, including matters involving compensation. Investment advisers must also avoid conflicts of interest, and disclose to clients and properly manage any actual or potential conflict of interest.

By comparison, broker-dealers are required to comply with a much less rigorous suitability standard. FINRA Rule 2111 specifically addresses suitability, providing that broker-dealers registered with the self-regulatory organization "must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is ***suitable*** for the customer."[60] Information obtained by the registered representative through reasonable diligence based on a customer's investment profile drives the suitability decision. The customer's investment profile includes, but is not limited to, age, financial situation, tax status, investment objectives, risk tolerance, and any other information the customer *may* disclose, sometimes yielding an ambiguously and arbitrarily determined limited universe of facts on which to make a decision. FINRA Rule 2111 interprets the reasonable basis obligation as requiring broker-dealers to believe "that the recommendation is suitable for at least *some* investors." If the registered representative has discretionary control over a client's account, Rule 2111 evaluates quantitative suitability based on a series of transaction even if a single particular transaction, taken in isolation, is deemed suitable, thus theoretically prohibiting excessive trading activity like churning. Rule 2111 fails to mandate disclosure of actual or potential conflicts of interest, proscribe appropriate mitigation mechanisms, or require that broker-dealers put the client's interests above their own earned commissions.[61]

The dichotomy is incongruent, especially when broker-dealers and investment advisers increasingly provide the same type of service (recommendations in advisory capacities) or market themselves as providing similar services. A 2012 national survey of investment professionals providing personalized investment advice to retail investors found that "16 percent of registered representatives expected that their advice might be different if they were to operate under the fiduciary standard."[62] Thirty-five percent of these registered representatives "expected their ability

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[57] 15 U.S.C. §80b-2(a)(11).
[58] Section 202(a)(11) also includes anyone "who, for compensation as part of a regular business, issues or promulgates analyses or reports concerning securities."
[59] SEC v. Bolla, 401 F. Supp. 2d 43, 66 (D.D.C. 2005), aff'd in part and remanded sub nom. SEC v. Washington Inv. Network, 475 F.3d 392 (D.C. Cir. 2007); *See also* SEC v. Moran, 922 F. Supp. 867, 895-896 (S.D.N.Y. 1996); *And* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 17, 100 S.Ct. 242, 246, 62 L.Ed.2d 146 (1979).
[60] FINRA, Rule 2111. Suitability, *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9859 (emphasis added).
[61] *See generally* Peter Lazaroff, "The Difference Between Fiduciary And Suitability Standards," Forbes (Apr. 6, 2016), *available at* https://www.forbes.com/sites/peterlazaroff/2016/04/06/the-difference-between-fiduciary-and-suitability-standards/#76fe14342556; Wes Moss, "Fiduciary vs. Suitability: Why You Need To Know The Difference," the balance (Mar. 22, 2016), *available at* https://www.thebalance.com/difference-between-fiduciary-and-suitability-4010117; *and* Michael Chamberlain, "Suitability or Fiduciary Standard? - It's a Big Deal!," 401khelpcenter.com, *available at* http://www.401khelpcenter.com/401k/chamberlain_401k_suitability_fiduciary.html#.WaXLxLKGNhF.
[62] Joseph W. Goetz, Swarn Chatterjee, and Brenda J. Cude, "Suitability Versus Fiduciary Standard: The perceived impacts of changing one's standard of care," Journal of Financial Planning, *available at* https://www.onefpa.org/journal/Pages/Suitability-Versus-Fiduciary-Standard.aspx.

to act in the client's best interest would be greater under a fiduciary standard" and 53 percent "thought that under a uniform fiduciary standard they would likely spend more time with their clients."[63]

To argue that investors currently are protected by anti-fraud provisions in federal securities laws misses the point. Retail investors confront imbalanced standards, against which broadly written anti-fraud statutes do not provide protection. Stating that Section 15(c)[64] of the Exchange Act or FINRA Rule 2020[65] requires disclosure of broker-dealer compensation, for example, is inaccurate. These laws and rules provide only blanket prohibitions against manipulative or deceptive practices; they do not obligate firms to *affirmatively* disclose material conflicts of interest that may pass muster under a suitability standard and yet fail under a fiduciary standard. Similarly, FINRA Rule 2010[66] provides only a broad ethical standard. FINRA's 2013 Report on Conflicts of Interest[67] was not a final rulemaking, but rather a guide to what firms can and should do to better protect clients against conflicts of interest. Reading certain disclosure requirements into these general prohibition frameworks is misguided. Of the FINRA Rules that do mandate disclosures, most, if not all, are tailored specifically to certain groups of registered representatives and types of trading activities, and not to retail investors at large.[68]

The Coalition recognizes the importance of the anti-fraud provisions of federal securities laws. However, these statutes do not resolve the issue of two standards of conduct that affect investors. In proposing a uniform fiduciary standard for broker-dealers, the SEC should apply the more stringent fiduciary standard, which requires financial professionals to act genuinely in the consumer's best interest.

VI. SEC Fiduciary Rulemaking Requires Further Consideration of a Variety of Issues

The SEC's RFI requests information concerning recent market developments and technological advancements that may affect its rulemaking, should it choose to pursue a proposal for a fiduciary standard that is flexible and business model-neutral. Whatever course of action the SEC pursues, the Coalition believes that a strong, principles-based fiduciary standard will help advance industry innovation.

A. Industry Innovation Continues

The investment industry continues to innovate in response to changing regulatory frameworks and investor demands. Many in the industry have already responded to DOL regulatory changes by issuing new products and offering revised services that benefit retail investors. Among the

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[63] *Id*.
[64] Section 15(c)(1)(A) states: "(c)(1)(A) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), or any security-based swap agreement, by means of any *manipulative, deceptive, or other fraudulent device or contrivance*." (emphasis added).
[65] In closely mirroring Section 15(c)(1)(A) of the Exchange Act, FINRA Rule 2020 states: "No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any *manipulative, deceptive or other fraudulent device or contrivance*." (emphasis added).
[66] FINRA Rule 2010 states, "A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."
[67] *See* n. 38, *supra*.
[68] *See generally* FINRA Rule 2262 (Disclosure of Control Relationship with Issuer); 2264 (Margin Disclosure Statement); *and* 2267 (Investor Education and Protection).

innovations spurred by the Final DOL Rule are T-shares and clean shares. These new investment vehicles "may reduce conflicted advice and therefore could also reduce other costs for investors and improve outcomes," and "potentially save some investors money on commissions" and "further enhance transparency for investors."[69] T-shares, which allow the sale of mutual funds on uniform commissions, "will likely save some investors money immediately" and could benefit low- and middle-income investors with less money to invest in IRAs because they would be more likely to pay the maximum front-end loads for T shares that are lower than most maximum loads associated with Class A shares, which traditionally have been purchased by most individual investors through a broker.[70] Similarly, clean shares leave to distributors the determination of how much to charge investors for any services rendered, and would allow firms to qualify as level fee fiduciaries so long as third-party payments of any kind are stripped away.[71]

In addition to innovative share classes, firms have been changing the way they do business in other ways. Technology firms have started rolling out new back-office software catering to financial services providers looking for accommodation, standardization and elimination of perceived conflicts of interest.[72] Further benefiting consumers who earlier may not have considered annuities due to long surrender periods, is the development of replacing "certain commission-based annuity products with fee-based variable annuities that have either no surrender periods or very short surrender periods (often with reduced surrender charges)."[73] The push to service smaller accounts has also risen. Despite an outcry from some industry stakeholders about regulatory changes that may lead to more orphan accounts, growing numbers of advisors appear eager to service smaller investor accounts.[74]

Early signs show that the industry is adjusting to the changed regulatory environment. A recent Aite Group survey[75] found that 71% of respondents' firms have done well or extremely well in deciding on a course of action to comply with recent regulatory changes. Approximately 71% of respondents said their firms did well or extremely well in making technology or automation improvements during compliance efforts, and 72% said their firms are doing well or extremely well in maintaining their product/pricing mix. About 76% of respondents said their firms are doing well or extremely well in keeping clients unaffected by fee changes.

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[69] Aron Szapiro and Paul Ellenbogen, "Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors," Morningstar (April 2017), *available at* https://corporate1.morningstar.com/ResearchLibrary/article/802119/early-evidence-on-the-department-of-labor-conflict-of-interest-rule/.
[70] *Id*., at p. 5.
[71] *Id*., at p. 7.
[72] *See e.g.* Insurance Technologies, "FIRELIGHT® DOL SALES SUPPORT SOLUTION," "Implement Compliance and Fiduciary Sales Automation," *available at* https://www.insurancetechnologies.com/DOL-Fiduciary-Rule/FireLight-DOL-Solution.shtml; and Informa Investment Solutions, "The DOL Fiduciary Standard Rule Change: Advisor Impact," *available at* http://www.informais.com/resources/dol-fiduciary-rule.
[73] William H. Byrnes and Robert Bloink, "Fiduciary Rule Is Squashing Annuity Surrender Charges" (Aug. 24, 2017), *available at* http://www.thinkadvisor.com/2017/08/24/fiduciary-rule-is-squashing-annuity-surrender-char?eNL=59a58436160ba014149f7ba1&utm_source=TA_RetirementReport&utm_medium=EMC-Email_editorial&utm_campaign=08292017.
[74] Bruce Kelly, "Plenty of advisers eager to scoop up 'orphaned' accounts," InvestmentNews (Aug. 17, 2017), *available at* http://www.investmentnews.com/article/20170817/FREE/170819947/plenty-of-advisers-eager-to-scoop-up-orphaned-accounts ("As part of its effort to shut down the fiduciary standard, the industry is making dire warnings about tens of thousands of so-called "orphaned accounts" resulting from the DOL's new rule. […] Soon, the country will be filled with sad little brokerage accounts, desperate for a home, bereft of financial advice and lost in the shadows, according to the industry's story line. […] Young reps and advisers starting out in the business would be desperate to pick up these orphans and provide them a home. And a robo-adviser like Betterment would be a logical place to park a small orphan of $5,000 to $10,000.").
[75] Aite Group, "DOL Fiduciary Rule: Survey on Financial Advisor Sentiment" (June 22, 2017), *available at* http://www.aitegroup.com/report/dol-fiduciary-rule-survey-financial-advisor-sentiment.

The Coalition anticipates SEC broker-dealer fiduciary rulemaking that encourages and supports the ongoing innovation in the financial services industry.

B. Robo-Advising Does Not Signal the Extinction of Human Advisors, but Rather a Democratization of Investment Advice

Contrary to the argument raised by fiduciary rule opponents that human advisors will be replaced by robo-advising services, knowledgeable industry observers indicate that is not the case. Concerning the argument that small accounts will be orphaned due to prohibitive costs of managing such accounts, robo-advising or hybrid models are addressing this need while still fulfilling fiduciary level obligations. Robo-advising, if adopted by traditional human advisors in revolutionary ways, may serve as a cost-effective, entry-level step to obtain accounts owned by lower-income investors who do not currently meet minimum asset requirements but who may surpass such thresholds in the future.[76]

A large number of newly established robo-advising companies cater specifically to women, based on women's strong interest in improving their financial literacy and demand for firms that better understand them and investment offerings better suited to their financial goals.[77] Legg Mason Global Asset Management's 2016 Global Investment Study estimated that "85% of UK-based millennials in the survey said they were comfortable with robo-advice, while 80% said they would trust their advice, ahead of all other investors around the world (except US Millennials – 82%)."[78] But, traditional advisers are not going anywhere, industry experts predict, because even digital natives surveyed in a 2017 Legg Mason study agreed that "personal customer service is important to them, and you can never replace that with technology."[79]

The rise of robo-advising and hybrid advising has democratized access to investment options previously unavailable to certain segments of retail investors. Firms can harness such new technology platforms to provide fiduciary level advice to retail investors across all business models. The SEC, in promulgating any uniform fiduciary rule, should capitalize on the increased access to advice technology offers and the benefits to low- and middle-income investors.

VII. Conclusion

The Coalition believes that requiring a fiduciary obligation for financial services professionals providing personalized investment advice to retail clients under various business models is an essential and long overdue reform. We believe that there is no justification for different standards of care for financial professionals who provide the same services to retail investors. A

[76] Michael Kitces, "How (Human) Advisors Might Adopt Robo-Advisors – Client Segmentation, Trading Tools And Indexing 2.0, And Full Stack Solutions," Nerd's Eye View (Apr. 13, 2015), *available at* https://www.kitces.com/blog/how-human-advisors-might-adopt-robo-advisors-client-segmentation-trading-tools-and-indexing-2-0-and-full-stack-solutions/.

[77] Richard Eisenberg, "The New Online Financial Planning Firms Just For Women," Forbes (Apr. 25, 2016), *available at* https://www.forbes.com/sites/nextavenue/2016/04/25/the-new-online-financial-planning-firms-just-for-women/#336601013764.

[78] Press Release, "UK millennials embrace robo-advice more than global peers," Legg Mason Global Asset Management (Apr. 12, 2016), *available at* https://www.leggmason.com/content/dam/legg-mason/documents/en/corporate-press-releases/market-perspective/2016/gis-uk-millennials-robo-advice.pdf.

[79] Press Release, "Global Investment Survey: The Human Touch: Irreplaceable," Legg Mason Global Asset Management (Jan.-Feb. 2017), *available at* https://ww2.leggmason.com/gis-articles/page.html?path=/en-us/insights/gis/uk/the-human-touch-irreplaceable.html.

strengthened fiduciary rule, encompassing the duties of care and loyalty, is both necessary and appropriate for SEC-registered firms and representatives to protect American investors.

While the Coalition agrees that a uniform fiduciary standard should be business-model neutral, the key is that the standard must genuinely reflect the "best interests of the customer" and must be no less stringent than the duty contemplated by the Advisers Act. This standard is inherently a "facts and circumstances" test, and, like any enforceable, principles-based standard, cannot be reduced to a set of definitive, hard and fast rules. As courts have held in fraud cases, too definitive a set of "hard and fast" rules would simply provide a roadmap for future violators.[80] The very strength of the fiduciary duty standard is its flexible and remedial nature.[81] The SEC should resist calls to abandon the case-by-case, facts-and-circumstances approach to fiduciary duty law in favor of specific, rigid rules.

Finally, a fiduciary standard proposed by the SEC should not include an accredited investor carve-out. Current monetary thresholds under the accredited investor definition adopted by the SEC are woefully outdated and do not reflect the rising inflation rates since they were first adopted in 1982.[82] Nor do these monetary thresholds serve as an accurate proxy for investors' sophistication, given that some investors who meet the requirements are not financially sophisticated, while others who do not meet these thresholds may have greater financial literacy.[83]

The Coalition appreciates the opportunity to comment on the SEC's proposed fiduciary rulemaking. We would be happy to meet with the Commission to discuss this important issue further. If you have any questions regarding this comment letter or the Coalition, please contact Maureen Thompson, Vice President of Public Policy, CFP Board, at (202) 379-2281 or mthompson@cfpboard.org.

Sincerely,

Kevin R. Keller, CAE
Chief Executive Officer
CFP Board

Lauren Schadle, CAE
Executive Director/CEO
FPA®

Geoffrey Brown, CAE
Chief Executive Officer
NAPFA

Cc: The Honorable Michael S. Piwowar
The Honorable Kara M. Stein
Dalia Blass, Director, Division of Investment Management

[80] "Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean form at will, were courts to cramp themselves by defining it with a hard and fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond the definition." Stonemets v. Head, 154 S.W. 108, 114 (Mo. 1913). But as the courts have consistently held, general principles such as those prohibiting breach of fiduciary duty or fraud are fully consistent with the requirements of fair notice. Valicenti Advisory Services, Inc. v. SEC, 198 F.3d 62, 66 (2d Cir. 1999).

[81] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963).

[82] SEC, "Recommendation of the Investor Advisory Committee: Accredited Investor Definition," at p. 4 (Oct. 9, 2014), available at https://www.sec.gov/spotlight/investor-advisory-committee-2012/investment-advisor-accredited-definition.pdf.

[83] *Id*., at p. 3.