August 7, 2018
Brent J. Fields
Secretary
Securities and Exchange Commission
100 F St., NE
Washington, DC 20549

RE: "Regulation Best Interest"
File Number S7-07-18, Release No. 34-83062, RIN 3235-AM35

Dear Mr. Fields:

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 this opportunity to comment on proposed rule "Regulation Best Interest" ("Reg BI").[5] In addition to this comment letter, the Coalition simultaneously is submitting comment letters addressing (i) the proposed IA Interpretative Guidance[6] and (ii) the proposed Form CRS,[7] respectively.

Released as a package, the three proposals are intended to: (i) raise the standard of conduct for broker-dealers; (ii) reaffirm the fiduciary obligation of investment advisers; (iii)

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[1] The Financial Planning Coalition is a collaboration of the leading national organizations representing the development and advancement of the financial planning profession. Together, the Coalition seeks to educate policymakers about the financial planning profession, to advocate for policy measures that ensure financial planning services are delivered in the best interests of the public, and to enable the public to identify trustworthy financial advisers. See, http://financialplanningcoalition.com
[2] CFP Board is a non-profit certification and standard-setting organization, which sets competency and ethical standards for more than 81,000 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 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] Regulation Best Interest, 83 FR. 21574 (May 9, 2018) (to be codified at 17 CFR Part 24 available at https://www.federalregister.gov/documents/2018/05/09/2018-08582/regulation-best-interest.
[6] Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 83 FR 21203 (May 9, 2018) available at https://www.sec.gov/rules/proposed/2018/ia-4889.pdf.
[7] Form CRS Relationship Summary, 83 FR 21416 (May 9, 2018) available at https://www.sec.gov/rules/proposed/2018/34-83063.pdf.

enhance investor understanding by requiring both broker-dealers and investment advisers to deliver a relationship summary document to retail investors; and (iv) reduce investor confusion by restricting the use of certain titles by broker-dealers.

This package of proposals provides the Securities and Exchange Commission (the "SEC" or "Commission") the long-awaited opportunity to raise the standard of conduct applicable to broker-dealers who provide personalized investment advice from the current "suitability" standard to a Fiduciary Standard of Conduct. As described later in this letter, a uniform Fiduciary Standard of Conduct for personalized investment advice, as authorized by Congress, would substantially enhance protections for "Main Street" retail investors and the public without imposing undue regulatory burdens and compliance costs on financial firms and professionals that provide those services.[8]

We are concerned, however, that this package of rule proposals may offer the appearance, but not the reality, of increased investor protection. If the proposed rules are improved and strengthened, as recommended in this comment letter, and with appropriate implementation, we believe the Commission can realize its goal of increasing investor protection and enhancing the quality of investment advice provided to the public.

Based upon the real-world business experience of the more than 81,000 CFP® professionals who are stakeholders and members of the Coalition organizations, the Coalition believes that any final rule based on this proposal must include robust and explicit fiduciary protections for retail investors, regardless of the business model under which that advice is provided. Without these critical safeguards, Reg BI not only will fail to increase protections for retail investors, but also may unintentionally mislead the public by implying that compliance with the final rule will cause financial firms and professionals to recommend only those investments that are truly in a retail investor's "best interest."

To illustrate how the Commission can promulgate a final rule that promotes and supports its policy objectives, the Coalition offers as resources: (i) the in-depth experience of its members and stakeholders in applying the fiduciary standard across various business models; and (ii) CFP Board's practical approach to a fiduciary standard that accommodates various business models, as described in its *Code of Ethics and Standards of Conduct* ("CFP Board *Standards*").[9]

I. <u>The Coalition's Longstanding Support for a Fiduciary Standard for Investment Advice</u>

Since its inception in 2007, the Coalition has been an unwavering advocate in support of regulatory reforms to increase protections for "Main Street" retail investors, in particular by advocating for a fiduciary standard for investment advice. The Coalition actively supported Congressional adoption of Section 913(g) of the Dodd-Frank Act[10] and for nearly a decade has urged the SEC to move forward in rulemaking to accomplish what that provision contemplates. While we waited for the SEC to act, the Coalition supported the Department of Labor's ("DOL")

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[8] Coalition, "Financial Planning Coalition Statement Following SEC Meeting on Fiduciary Standards" (Apr. 18, 2018), *available at* http://financialplanningcoalition.com/news-room/.

[9] On March 29, 2018, CFP Board announced that its Board of Directors unanimously approved a new *Code of Ethics and Standards of Conduct* which sets forth the ethical standards for CFP® professionals. The new *Code and Standards* replaces CFP Board's current *Code of Ethics, Rules of Conduct and Financial Planning Practice Standards*, and becomes effective on October 1, 2019. The CFP Board *Standards* and commentary are available at https://www.cfp.net/about-cfp-board/code-and-standards.

[10] Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203)

2016 Fiduciary Rule for retirement investment advice.[11] The Coalition also advocated for a robust fiduciary standard in comments submitted to the SEC in response to the agency's 2013 and 2017 requests for information (RFI) concerning a potential broker-dealer fiduciary rule.

The Coalition, in its 2013[12] and 2017[13] RFI responses, urged the SEC to adopt a uniform fiduciary standard that would apply to both broker-dealers and investment advisers, when providing personalized investment advice to retail investors, that is no less stringent than the existing fiduciary standard under the Investment Advisers Act of 1940 (the "Advisers Act").[14] The Coalition emphasized that "disclosure alone" is not sufficient to reduce retail investors' confusion and harm, and that a "best interest" standard should integrate the duties of loyalty and care as they are articulated in the Advisers Act and subsequent case law. In other words, the Coalition contends that the Commission's reliance on FINRA Rule 2111[15] (the "suitability rule"), which generally requires that a broker-dealer have a reasonable basis to believe that a securities transaction or investment strategy is suitable for a customer, does not result in retail investors' best interests being served.

In addition, the Coalition stated that any rulemaking should address the Commission's interpretation of the broker-dealer exclusion in the Advisers Act which, during the last seven decades, has expanded to encompass brokerage activities and compensation methods outside of the plain language and original intent of the Advisers Act exclusion. Today, brokerage activities deemed by the Commission to be (i) "solely incidental" or (ii) excluded from the definition of "special compensation" permit brokers to hold themselves out as "trusted advisors" who can tout advisory services totally free from fiduciary obligations that otherwise would apply under the Advisers Act.

The Coalition has collaborated with a number of other organizations to advocate for a robust broker-dealer fiduciary standard. For example, Coalition organizations CFP Board, FPA, and NAPFA each signed a 2010 letter[16] with other consumer advocacy organizations presenting results of an investor survey in advance of the SEC's 2011 Dodd-Frank Act study.[17] Among key findings, the survey revealed that investors overwhelmingly believe that those who give investment advice should be required to act in the best interests of their customers and to disclose conflicts of interest. Notably, 91% of American investors who were surveyed agreed that "a stockbroker and an investment adviser [who] provide the same kind of investment

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[11] 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-interestrule-retirement-investment-advice.

[12] Letter from Coalition to SEC, "Re: SEC Request for Data and Other Information, Duties of Brokers, Dealers and Investment Advisers, File No. 4-606" (July 5, 2013), *available at* https://www.sec.gov/comments/4-606/4606-3126.pdf *and* http://financialplanningcoalition.com/category/press-releases-and-statements/page/9/.

[13] Letter from Coalition to SEC, "RE: Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers (June 1, 2017)" (Nov. 7, 2018), available at https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2674105-161456.pdf.

[14] Letter from Coalition to SEC, "Re: SEC Request for Data and Other Information, Duties of Brokers, Dealers and Investment Advisers, File No. 4-606" (July 5, 2013), *available at* https://www.sec.gov/comments/4-606/4606-3126.pdf *and* http://financialplanningcoalition.com/category/press-releases-and-statements/page/9/.

[15] FINRA Rule 2111, Suitability

[16] Group Letter to the Hon. Mary L. Schapiro, "Survey: Vast Majority of U.S. Investors Support Clear "Fiduciary Standard" for Financial Professionals; Widespread Confusion Seen Linked to Current SEC Rules" (dated Sep. 15, 2010), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/home/100915cmnt.pdf.

[17] SEC, "Study on Investment Advisers and Broker-Dealers" (Jan. 2011), *available at* https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

advisory services … should have to follow the same investor protection rules." Surveys of investors on this question have been consistent over time; an overwhelming majority of investors continue to believe that any financial professional who provides investment advice should be held to a fiduciary standard.[18]

II. CFP Board *Standards*: A Business-Model Neutral Fiduciary Standard

CFP Board is a professional body that sets and enforces education, examination, experience and ethics requirements for CFP® professionals. Today, 81,000 CFP® professionals agree to abide by high standards for competency and ethics, which CFP Board periodically reviews and updates to maintain the value, integrity and relevance of CFP® certification. As a professional standard-setting organization, CFP Board develops and enforces business conduct standards that are consistent with, and in certain instances may exceed, existing legal and regulatory requirements.

All CFP® professionals agree to abide by CFP Board's *Code of Ethics and Standards of Conduct,* which will go into effect in October 2019. The purpose and effect of the *Code of Ethics and Standards of Conduct*, is captured in the preamble thereto:

> *CFP Board's Code of Ethics and Standards of Conduct reflects the commitment that all CFP® professionals make to high standards of competency and ethics. CFP Board's Code and Standards benefits and protects the public, provides standards for delivering financial planning, and advances financial planning as a distinct and valuable profession. Compliance with the Code and Standards is a requirement of CFP® certification that is critical to the integrity of the CFP® marks. Violations of the Code and Standards may subject a CFP® professional to discipline.*

CFP Board *Standards*, complete with fiduciary obligations, apply across a wide variety of business models: CFP® professionals work at independent broker-dealers, wirehouses, registered investment advisers, insurance companies, and other stand-alone business models or dual registrants. Wherever CFP® professionals are employed, they are required to provide professional services under the fiduciary standard articulated in CFP Board *Standards.*

A. CFP Board *Standards* Adopted in 2007 Limited the Fiduciary Obligations To Financial Planning Services

CFP Board first addressed a fiduciary standard for CFP® professionals in 2007 when it issued revised CFP Board *Standards* providing that a CFP® professional owes to the client a fiduciary duty when providing financial planning or material elements of financial planning.[19] Notably, "CFP Board's embrace of the fiduciary standard in 2007 wasn't greeted with fanfare."[20]

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[18] See for example, Jeremy Burke and Angela A. Hung, Trust and Financial Advice, RAND Working Paper, January 2015, at 14, http://bit.ly/2j3GHZC; Personal Capital, 2017 Personal Capital Financial Trust Report, http://bit.ly/2rUJOpU; Press Release, Jefferson National, "Third Annual Advisor Authority Study Shows Investors and Advisors Aligned on Importance of Fiduciary Standard--Regardless of DOL Fiduciary Rule," June 27, 2017, http://prn.to/2valhhr; and 2017 Financial Engines survey, "In Whose Best Interest, April 2017, https://financialengines.com/docs/financial-engines-best-interest-report-2-041817.pdf

[19] COMMENTARY TO CODE OF ETHICS AND STANDARDS OF CONDUCT, MARCH 2018, at p. 3, https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/CFP-Board-Code-and-Standards-with-Commentary

[20] Kevin R. Keller, "A fiduciary standard is good, old-fashioned common sense," Investment News (Oct. 10, 2011), *available at* https://www.cfp.net/docs/press-kit/investmentnews-(oct2011).pdf?sfvrsn=2.

At that time, major financial services firms, as well as industry organizations representing the brokerage and insurance industries, raised significant concerns, asserting that CFP Board's fiduciary requirement was unworkable with their business models and that CFP® professionals would be forced to rescind their certification if required to operate under a Fiduciary Standard of Conduct.[21]

Contrary to these predictions, the number of CFP® professionals has grown by nearly 50 percent to more than 81,000 since 2007. CFP® professionals, many of whom work at large financial services firms that represent a cross-section of business models, proudly promote that they deliver fiduciary-level services when providing financial planning.

A 2013 Aite survey found that most registered representatives and registered investment advisers agree that a Fiduciary Standard of Conduct is appropriate for financial services providers who deliver personalized investment advice.[22] This finding cuts across a multitude of business models subject to different regulatory provisions. The Aite study surveyed financial 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.

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 Conduct for broker-dealers and investment advisers when they provide personalized investment advice to retail customers. The study[23] surveyed 1,852 stakeholders from Coalition organizations, including professionals from broker-dealers, registered investment advisers, and insurance companies. The study found that almost nine out of 10 respondents agree with the statement that "a Fiduciary Standard of Conduct 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 Conduct to broker-dealers would have a positive impact on investors.

B. Revised CFP Board *Standards* Expand the Fiduciary Obligation in 2019

In December 2015, CFP Board announced the formation of a Commission on Standards to review and recommend to the Directors of the CFP Board proposed changes to the *Terminology*, *Code of Ethics and Professional Responsibility*, *Rules of Conduct*, and *Financial Planning Practice Standards* sections of the CFP Board *Standards*. Commission members included CFP® professionals and other financial services professionals operating under diverse business models, regulatory experts, an investor advocate, and a public representative.

Before the Commission on Standards began its work, CFP Board sought input from CFP® professionals and the public on the issues that should be addressed in the process of

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[21] Coalition Letter to the Department of Labor, "RE: Proposed Conflict of Interest Rule and Related Proposals, RIN-1210-AB32" (July 21, 2015), available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00702.pdf.
[22] Aite, "Fiduciary Study Findings for CFP® Board" (June 2013), available at http://www.cfp.net/docs/public-policy/aitefiduciary-study-june-2013.pdf.
[23] Financial Planning Coalition, "Fiduciary Standard Survey," Prepared by Princeton Survey Research Associates International (Revised July 2015), available at http://financialplanningcoalition.com/wp-content/uploads/2015/07/Princeton-ResearchFiduciary-Study-Final.pdf.

updating the CFP Board *Standards.* Public forums were held across the country in the first quarter of 2016 to gather comments. The Commission then met to review the initial comments and to begin the process of developing updated and revised CFP Board *Standards* to be presented to the Directors of the CFP Board.

CFP Board released a draft of the proposed revisions on June 20, 2017, and announced a 60-day public comment period. In addition to accepting written comments through August 21, 2017, CFP Board received comments on the proposed revised CFP Board *Standards* during eight public forums held across the country in July 2017. In November 2017, CFP Board announced a second comment period running from January 2, 2018 to February 2, 2018. In addition to information received in these public forums, CFP Board met with FPA, NAPFA, the Securities Industry and Financial Markets Association ("SIFMA"), the Financial Services Institute ("FSI"), CFP Board's Business Model Council (which is comprised of firm representatives from various business models), and many other stakeholders, including CFP® professionals and the firms at which they work. CFP Board also considered more than 1500 written comments and hundreds of oral comments.

In March 2018, the Directors of CFP Board updated the CFP Board *Standards* by adopting additional revisions which become effective in October 2019. Consistent with CFP Board's vision and mission, and in furtherance of its strategic plan committed to a fiduciary standard, the newly-revised CFP Board *Standards* extend the application of the fiduciary duty to all "Financial Advice"[24] provided by a CFP® professional. This is in contrast to the CFP Board *Standards* adopted in 2007, which remain in effect until October 2019, that impose a fiduciary duty on CFP® professionals only when providing "Financial Planning" services.

The expanded fiduciary obligation effective in 2019 is "the crown jewel" that animates a CFP® professional's commitment to high professional standards. Under CFP Board *Standards,* the public will know that a CFP® professional is committed to acting as a fiduciary at all times when providing Financial Advice. As a result, CFP® professionals will owe their clients the same fiduciary duty both when providing Financial Planning services and when providing Financial Advice, thereby eliminating potential client confusion about the CFP® professional's obligations to a client when providing both types of services.

This development enjoys strong support among CFP® professionals and their membership organizations. More than 96 percent of CFP® professionals who responded to a recent survey agreed that a CFP® professional should be required to act in the client's best interest when providing "Financial Advice."[25] Likewise, FPA and NAPFA support the expanded CFP Board fiduciary obligation. FPA applauded CFP Board "for taking the bold and necessary step in expanding the fiduciary standard for CFP® professionals."[26] NAPFA commented that the proposal "supports CFP Board's efforts to [broaden] fiduciary requirements for CFP® professionals. Working under fiduciary principles is the most transparent – and we believe the most objective – way of serving the public. Consumers have come to expect advice delivered in their best interest and will now be able to count on a CFP® professional to provide it at all times when giving financial advice."[27]

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[24] CODE OF ETHICS AND STANDARDS OF CONDUCT, adopted March 2018 and COMMENTARY, at https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/CFP-Board-Code-and-Standards and https://www.cfp.net/docs/default-source/for-cfp-pros---professional-standards-enforcement/CFP-Board-Code-and-Standards-with-Commentary, respectively.

[25] COMMENTARY, p. 4.

[26] *Id.*

[27] *Id.*

III. CFP Board *Standards*: A Roadmap for SEC Rulemaking

The Coalition has compared the Commission's proposed Reg BI to the newly revised CFP Board *Standards*. While there are important similarities in some areas, there are significant differences in others. Key similarities and differences, from the Coalition's perspective, are discussed below. Please note that the Coalition's responses to certain other questions raised in the rule proposal appear in a subsequent section of this comment letter.

1. Similarities

a. Duty of Care

Both Reg BI and the newly revised CFP Board *Standards* describe the duty of care in terms of acting with care, skill, prudence and diligence. These are common concepts found in traditional trust law, case law under the Advisers Act, and existing self-regulatory regimes. For example, "diligence" is a component of the suitability standard in FINRA Rule 2111. Together, care, skill, prudence, and diligence signify that a financial professional must use reasonable efforts in gathering information about the retail investor. The financial professional also must understand the risks and rewards associated with the recommended security or strategy. Both CFP Board *Standards* and Reg BI contemplate careful inquiry and evaluation on the part of the financial professional as to the investor's goals, risk tolerance, objectives, and financial and personal needs and circumstances. These factors are part of the broader idea of a retail investor's "investment profile" common to FINRA's suitability requirements under Rule 2111.

The duty of care, as described by both Reg BI and CFP Board *Standards*, echoes elements found in the common law "prudent person rule" which can serve to measure the reasonableness of a prudent professional's actions concerning the funds with which he or she is entrusted. The prudent professional's reasonableness is measured against the care that a prudent person would take with respect to the management of his or her own property.

Satisfying a prudent person rule requires, at a minimum, making appropriate judgments about investment options, products and their associated risks. The Commission has stated in the rule proposal that "prudence" "…conveys the fundamental importance of conducting a proper evaluation of any securities recommendation in accordance with an objective standard of conduct…."[28] Likewise, a CFP® professional's decisions are evaluated under CFP Board *Standards*, which are based on how a prudent professional would act in a similar situation. These approaches align with the broader interpretation of the prudent person rule, which implies that a fiduciary should perform sufficient due diligence on the products or services offered to ensure that they meet the needs of the client and to properly evaluate associated risks. The prudent person rule has thus evolved to include assessments of diversification in addition to evaluations of individual assets.

It is important to note that Reg BI does not establish a Fiduciary Standard of Conduct and therefore does not include a clear, stand-alone duty of loyalty. As explained above, CFP Board *Standards* impose a fiduciary standard that includes a duty of loyalty. In that respect, CFP Board *Standards* more closely reflect the scope and spirit of the prudent person rule. This contrasts with Reg BI, which aligns with only a portion of the prudent person rule through its

[28] Proposed Reg BI, at p. 134.

duty of care obligations, such as due diligence when choosing investment products and evaluating risks.

b. Providing Firms Leeway in Developing and Implementing Policies and Procedures

Both the Reg BI proposal and CFP Board *Standards* acknowledge the importance of firms' policies and procedures. In addition to having duties to their clients, CFP® professionals have duties to their firms, one of which is complying with internal firm policies and procedures, so long as the policy or procedure does not conflict with CFP Board *Standards*. CFP Board *Standards* also make clear that the firm's policies and procedures are relevant to what information a CFP® professional must document when providing financial planning to act in the Client's best interest.

Firms' written policies and procedures play a large part in Reg BI's conflict of interest obligations. Under proposed Reg BI, firms would be required to establish, maintain, and enforce written policies and procedures reasonably designed to comply with Reg BI's framework of dealing with conflicts of interest. The SEC believes "there is no one-size-fits-all framework, and broker-dealers should have flexibility to tailor the policies and procedures to account for, among other things, business practices, size and complexity of the broker-dealer, range of services and products offered and associated conflicts presented."[29]

As with the CFP Board *Standards*, Reg BI gives firms and associated persons some latitude to tailor and depend on their own written guidelines that fit their business, so long as certain required parameters are met. Firms' written policies and procedures must be reasonably designed to comply with the conflicts of interest obligations of Reg BI. In drafting and applying these written policies and procedures, broker-dealers would be permitted to exercise their judgment to account for unique aspects of their business. The SEC envisions a risk-based compliance and supervisory system to accommodate a variety of different business models and to allow for a facts-and-circumstances evaluation of any given situation. CFP Board envisions the same business model-neutral, risk-based approach in its *Standards*, in particular by examining the conflict's potential for harm in determining whether there was informed consent to the conflict.

c. Similar Approaches to Documentation of the Decision-Making Process

Both CFP Board *Standards* and Reg BI allow for principles-based documentation of the process leading up to the final advisory decision. The CFP Board *Standards* do not have a specific documentation standard that applies to all financial advice. However, during the financial planning process, the CFP Board *Standards* require "a CFP® professional to act prudently in documenting information as the facts and circumstances require, and expressly takes into account the [firm's] policies and procedures."[30] Gathering and maintaining documents to evidence the formation of a basis for decisions made during the financial planning process is a flexible activity. Because this is a facts-and-circumstances-based inquiry, the process already may be covered by the firm's own internal policies and procedures. The CFP Board *Standards* provide leeway to incorporate the firm's own guidelines in this activity "because a CFP® professional may have several appropriate options available."[31] Consistent

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[29] Proposed Reg BI, at p. 171.
[30] COMMENTARY, at p. 19.
[31] *Id.*

with the letter and spirit of the CFP Board *Standards*, CFP® professionals must use sound judgment to determine whether a specific situation warrants the keeping of documentation related to their decision-making process. CFP Board will issue guidance materials in the near future to more clearly illustrate how the CFP Board *Standards* will be applied in certain situations with differing fact patterns.[32]

Similarly, Reg BI does not prescribe hard-and-fast rules on creating and maintaining documents on a registered representative's decision-making process. Reg BI requires that the broker-dealer or registered representative have a "reasonable basis" for recommending a transaction that would be in the best interest of at least some customers, or of a particular customer, or that a series of recommendations would be in the customer's best interest. Reg BI does not mandate the method that documents to support this reasonable basis must be drafted or kept, but rather relies on already established practices governing the creation and retention of such documentation during the decision-making process.

d. Educational Materials Exception

The SEC's Reg BI proposal and CFP Board *Standards* appropriately carve out exceptions to the best interest requirement for educational materials and other client-facing documents that do not provide specific recommendations or advice. For example, the definition of "Financial Advice" under CFP Board *Standards* "excludes the provision of services or the furnishing or making available of marketing materials, general financial education materials, or general financial communications that a reasonable CFP® professional would not view as "Financial Advice."[33] Reg BI excludes from the meaning of "recommendation" communications that would include "providing general investor education (e.g., a brochure discussing asset allocation strategies) or limited investment analysis tools (e.g., a retirement savings calculator)."[34]

2. Differences

While proposed Reg BI and the CFP Board *Standards* share important similarities, as noted above, certain obligations outlined under each are quite different. The CFP Board *Standards* provide a consistent and robust set of fiduciary principles that translate into an effective investor protection standard. In contrast, certain components of proposed Reg BI remain ill-defined and overly reliant on disclosure. The Coalition is concerned that these key differences will result in a diluted investor protection standard under Reg BI that will not meet the Commission's objectives with respect to retail investors.

a. Definition of "Best Interest"

Under CFP Board *Standards,* "best interest" clearly and unambiguously means a fiduciary duty. The fiduciary duty encompasses both a duty of loyalty and a duty of care. The duty of loyalty and duty of care flow directly from traditional fiduciary duty concepts applicable to investment advisers under the Advisers Act. The fiduciary duty is clearly stated and defined, and must be satisfied through the management of conflicts, and not through disclosures, policies or procedures. All CFP® professionals owe the fiduciary duty to their clients whenever

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[32] CFP Board plans to assemble a Standards Resource Commission that will develop and issue guidance materials in the near future to more clearly illustrate in detail how the revised *Standards* would apply in certain situations with differing fact patterns.
[33] COMMENTARY, at p. 3.
[34] Reg BI, at p. 76.

providing Financial Advice, regardless of the business model under which they operate. By contrast, under Reg BI only a duty of care is required and the SEC notes in the rulemaking package, it "[is] not proposing to define 'best interest' at this time."[35]

The duty of loyalty requires a CFP® professional to: (1) place the interests of the Client above the interests of the CFP® professional and the CFP® Professional's Firm; (2) 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; and (3) act without regard to the financial or other interests of the CFP® professional, the CFP® Professional's Firm, or any other individual or entity other than the Client. Thus, a CFP® professional acting under a Conflict of Interest continues to have a duty to act in the best interests of the Client and place the Client's interest above the CFP® professional's.

The duty of care requires a CFP® professional to act with the care, skill, prudence and diligence that a prudent professional would exercise in light of the Client's goals, risk tolerance, objectives, and financial and personal circumstances.

The duty to follow client instructions requires a CFP® professional to comply with all objectives, policies, restrictions, and other terms of the Engagement and all reasonable and lawful directions of the Client.

This three-part fiduciary duty brings clarity to what is expected of the CFP® professional. This aligns with retail investors' reasonable expectation that they should always receive advice that is "in their best interests."

b. CFP Board *Standards*' Fiduciary Duty Includes a Distinct and Separate Duty of Loyalty

CFP Board *Standards* prominently feature a duty of loyalty that reflects fiduciary language promulgated by Congress under Section 913(g) of Dodd-Frank. By incorporating the "without regard to" language found in Section 913(g) of Dodd-Frank, CFP Board *Standards*' duty of loyalty places an affirmative requirement on the CFP® professional to act in the best interest of the Client when conflicts arise. This requirement mandates that the CFP® professional be proactive in placing the Client's interests above his or her own interests or the firm's interests. These interests may be financial or non-financial. If a conflict cannot be avoided, the CFP® professional must fully disclose the material conflict, obtain the Client's informed consent, and properly manage the conflict. This step-by-step process is similar to what is required under the Advisers Act and makes clear that disclosure alone is insufficient to satisfy the duty of loyalty under CFP Board *Standards.*

In contrast, Reg BI, as proposed, lacks a separate, distinct, and well-defined duty of loyalty. Instead, Reg BI attempts to incorporate the concept of loyalty in the requirement to put customers' interests "ahead of" those of the broker-dealer. But the term "ahead of" is likewise undefined. It appears that "best interest" will be satisfied *primarily* through disclosures, firms' written policies and procedures as to conflicts of interest, and the duty of care."[36]

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[35] Reg BI, at p. 52. The SEC went on to say, "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 Reg BI are satisfied."

[36] The SEC explained that its choice of the term "ahead of" stemmed from its concern that "inclusion of the 'without regard to' language [as mandated by Section 913(g) of Dodd-Frank] could be inappropriately construed to require a

However, as stated above, the CFP Board *Standards* directly address that concern by establishing a system of managing conflicts that consistently favors the interests of the Client. CFP Board *Standards* are not meant as a way to eliminate every conflict. That would be unrealistic. Rather, the CFP Board *Standards* provide a concrete way of prioritizing the interests of the Client over the interests of the CFP® professional or the CFP® professional's firm. CFP Board certifies individuals, not firms, and therefore the CFP Board *Standards* focus on an individual CFP® professional's responsibility to manage conflicts. While many conflicts can be avoided, there are some conflicts that, as a practical matter, cannot be avoided. The CFP Board *Standards* step in to address these situations and provide a consistent method for each CFP® professional to continue to maintain his loyalty to his Client.

c. Conflicts of Interest

CFP Board *Standards* have a single, uniform method of dealing with conflicts of interest, regardless of how they originate. Reg BI, however, distinguishes between different types of conflicts of interest and applies different approaches to handling them, depending on whether they stem from financial incentives or the recommendations themselves.

Rather than relying solely on firms' written policies and procedures, the CFP Board Standards direct CFP® professionals to take affirmative steps and concrete actions to rein in conflicts of interest. All CFP® professionals must "avoid or disclose and **manage** conflicts of interest." CFP® professionals have two choices when it comes to handling conflicts: either (i) avoid the conflict or (ii) fully disclose the conflict to the client, obtain the client's informed consent, and properly **manage** the conflict. This applies to all Financial Advice and remains true whether the conflict originates from a recommendation or the advice itself, or an incentive linked to that recommendation or advice.

CFP Board *Standards* use the terms "avoid" and "manage." CFP Board recognized that many conflicts operate at the firm level and are outside the direct control of the CFP® professional. In explaining this approach, CFP Board has stated, "[w]hile many conflicts can be avoided, at least in theory, there are some conflicts that, as a practical matter, cannot be avoided"[37] and as a result must be managed.

Reg BI provides different avenues for handling conflicts related to recommendations and conflicts linked to financial incentives. If the material conflict has to do with the recommendation itself, then it either must be eliminated or disclosed. Material conflicts relating to financial incentives must be eliminated or disclosed and mitigated. Mitigation is undefined because the SEC does not seek a one-size-fits-all solution and gives firms the flexibility to develop their own mitigation procedures. Financial incentives are undefined but broadly interpreted to cover compensation incentives, sales of proprietary products, sales contests, and transactions in a principal capacity. Reg BI's conflict of interest obligations are anchored to the written policies and procedures that the broker-dealer reasonably designs, establishes and maintains, rather than on the words, actions, and behaviors of associated persons.

As discussed later in this comment, perhaps the most powerful aspect of the Reg BI proposal is the requirement for firms to mitigate conflicts of interest that arise from financial

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broker-dealer to eliminate all of its conflicts (i.e., require recommendations that are conflict free). See Reg BI, at pp. 47-48.

[37] COMMENTARY, at p. 5.

incentives. However, it is unclear what conflict mitigation practices are required and what practices are restricted.

Reg BI uses the terms “eliminate” and “mitigate.” Despite its use of “eliminate”, the SEC does not mandate the absolute elimination of any particular conflict. The proposal indicates that the broker-dealer firm may choose to eliminate certain conflicts on its own. Alternatively, the broker-dealer could satisfy the obligation to eliminate by negating the effect of the conflict, such as, “in the case of conflicts related to affiliated mutual funds, crediting fund advisory fees against other broker-dealer charges – thus effectively eliminating the material conflict of interest.”[38] The SEC clarified that certain conflicts, if not eliminated, at a minimum must be disclosed, meaning that a broker-dealer may choose to issue and implement written policies and procedures outlining additional steps above and beyond disclosure.

d. “Client” v. “Retail Customer” v. “Retail Investor”

CFP Board *Standards* provide inclusive definitions that capture a broader segment of the population seeking investment advisory services. A “Client” is defined as “Any person, including a natural person, business organization, or legal entity, to whom the CFP® professional provides or agrees to provide Professional Services pursuant to an Engagement.”[39] This definition encompasses a variety of individuals and organizations, regardless of their accredited investor or similar status, and regardless of the purpose for which they seek the services of a CFP® professional. It is more comprehensive than either the “retail customer” definition in proposed Reg BI or the “retail investor” definition in the Form CRS proposal.

Reg BI defines “Retail Customer” as:

a person, or the legal representative of such person, who:
(A) Receives a recommendation of any securities transaction or investment strategy involving securities from a broker, dealer, or a natural person who is an associated person of a broker or dealer; **and**
(B) Uses the recommendation primarily for personal, family, or household purposes.[40]

The SEC acknowledges that its definition of “retail customer” in Reg BI extends beyond the definition applying only to “natural” persons contemplated by Section 913 of Dodd-Frank. Reg BI also would cover non-natural persons, such as trusts that represent natural persons. However, Reg BI would not apply to business organizations or legal entities. It would also be limited to personal, family, or household purposes.

Moreover, we believe this coverage gap is a serious omission that potentially leaves smaller businesses’ employee benefit plans without viable options to ensure that they receive sound and unbiased advice. Importantly, Section 913 of Dodd-Frank gave the SEC authority to expand the definition of retail customer: “The Commission may promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (**and such other customers as the Commission may by rule provide**), shall be to act in the best interest of the customer…” We fundamentally disagree with a “purpose test” (i.e., personal, family or

[38] Reg BI, at p. 175.
[39] *Standards,* at p. 13.
[40] Reg BI, at p. 406 (emphasis added).

household purpose) and believe that those smaller organizations that are, in turn, responsible for the welfare of their retail beneficiaries should also have the benefit of robust investor protections. We recommend that the Commission adopt the approach reflected in the CFP Board *Standards* and harmonize the definition of "retail investor" across all applications.

Finally, a further distinction is made between what Reg BI deems to be "retail customers" and what Form CRS considers to be "retail investors." A "retail customer" is more limited in scope and has already sought and chosen to engage the services of a broker-dealer. A "retail investor" is a prospective or existing client or customer who is a natural person, regardless of the individual's net worth or income, and regardless of the purpose of the financial services sought. Form CRS, therefore, "is intended for a broader range of investors, before or at the time they first engage the services of a broker-dealer, to provide important information for them to consider when choosing a firm and a financial professional." The Coalition recommends that the Commission conform these various definitions to the extent possible to avoid further investor confusion.

IV. **The Need for a Bright Line: The Broker-Dealer Exclusion of the Advisers Act**

When the federal securities laws were enacted, Congress drew a distinction between broker-dealers, who were regulated as salespeople under the Securities Exchange Act of 1934, and investment advisers, who were regulated as advisers under the Investment Advisers Act of 1940. Brokers were excluded from regulation under the Advisers Act only to the extent that they limited themselves to a sales function and provided advice "solely incidental" to such sales without receiving "special compensation" for such advice.[41]

Over the last several decades, however, the roles of broker-dealers and investment advisers have largely converged. While differences remain, many broker-dealers today offer advisory services, such as investment planning and retirement planning, that are similar to the services offered by investment advisers. In addition, many broker-dealers use titles such as "financial adviser" for their registered representatives and market themselves in ways that highlight the advisory aspect of their services. The original broker-dealer exclusion from the Advisers Act has broadened beyond its original intent to allow incidental advice to include a wider range of investment services.

Because federal regulations have not kept pace with changes in business practices, broker-dealers and investment advisers are subject to different legal standards when they offer advisory services. Those legal standards – a suitability standard for broker-dealers and a fiduciary duty for investment advisers – afford different levels of protection to the investors who rely on those services. Key differences include the requirements that investment advisers, as fiduciaries, act in the best interests of their clients and appropriately manage and fully disclose conflicts of interest that could bias their recommendations.

Investors typically make no distinction between broker-dealers and investment advisers, and most are unaware of the different legal standards that apply to their advice and recommendations. Although many investors don't understand the meaning of "fiduciary duty," or know whether it or suitability represents the higher standard, investors generally treat their relationships with both broker-dealers and investment advisers as relationships of trust and expect that the recommendations they receive will be in their best interests.

[41] Investment Advisers Act Section 202(a)(11)(C).

Given the realities of the financial markets today, the Coalition supports a uniform fiduciary standard for personalized investment advice, as articulated in section 913(g) of Dodd-Frank. This would ensure that, regardless of who provides advice, a fiduciary standard would apply. Obviously, how the duty is applied would vary based on the differences in the two business models. This would follow the will of Congress by treating functionally equivalent activity the same by applying a fiduciary standard that is no less stringent than the Advisers Act standard, to investment advice, no matter who provides that advice. What is unsustainable is to allow broker-dealers to continue to act and function as advisers but to be regulated as salespeople.

The goal of the proposed Reg BI is an attempt to fix the inequities that exist in the standards that apply to broker-dealers and investment advisers, both of whom are providing personalized investment advice. However, it falls short of ensuring that investment advice – whether provided by a broker-dealer or investment adviser – is subject to the same high fiduciary standard.

A. Comparison of Obligations under Advisers Act and Securities Exchange Act of 1934

Under the Advisers Act and subsequent case law,[42] investment advisers are held to a broad fiduciary duty.[43] Federal courts have established that this two-part fiduciary duty consists of (i) the duty of loyalty and (ii) the duty of care. The duty of loyalty mandates that investment advisers have an affirmative duty of utmost good faith to place their clients' interests above their own. The duty of care requires investment advisers to act with prudence; that is, with the skill, diligence and good judgment of a professional to make reasonable investigation to determine that recommendations are not based on materially inaccurate or incomplete information that are misleading to the client or prospective client.[44] Additionally, investment advisers must avoid conflicts of interest or, if a conflict is unavoidable, must fully disclose and fairly manage (in the client's favor) any material conflicts that are actual or potential so that the client can give informed consent.[45]

Advisers Act obligations differ significantly from and entail higher standards than Exchange Act obligations and FINRA suitability requirements that apply to broker-dealers. The Exchange Act does not impose a fiduciary duty on brokers, but rather institutes an arms-length, transaction-based relationship under general anti-fraud provisions.[46] Additionally, broker-dealers have duties to (i) deal fairly with customers, (ii) make suitability determinations on a reasonable basis, (iii) effect best execution, and (iv) disclose conflicts in certain situations.[47] For example, under FINRA Rule 2111, a broker-dealer must satisfy (i) reasonable-basis suitability, (ii) customer-specific suitability, and (iii) quantitative suitability. Reasonable-basis suitability

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[42] A more detailed discussion of the interpretation of obligations under the Advisers Act can be found in the Coalition's letter to the SEC on the IA Interpretation.
[43] *See generally*, SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963).
[44] Ron A. Rhoades, "The Specific Fiduciary Duties of Investment Advisers," at pp. 85-86 (2011), *available at* https://www.fi360.com/uploads/media/2011_rhoades1_supplemental.pdf.
[45] SEC, "Regulation of Investment Advisers," at pp. 22-28 (Mar. 2013), *available at* https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf.
[46] Exchange Act §10b; 15 U.S.C. §78j ("It shall be unlawful […] to use or employ, in connection with the purchase or sale of any security […] any manipulative or deceptive device or contrivance" that contravenes SEC rules and regulations prescribed as "necessary or appropriate in the public interest or for the protection of investors.")
[47] David C. Kaleda, A Matter of Trust: Standards of Conduct under ERISA, the Exchange Act, and the Advisers Act: Part 1 of 2," at pp. 5-6, The Investment Lawyer, Vol. 20, No. 2 (Feb. 2013), available at https://www.groom.com/wp-content/uploads/2017/09/1223_Kaleda_Matter_of_Trust-_Standards_of_Conduct.pdf.

requires the broker-dealer to have a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least some investors. Customer-specific suitability requires the broker-dealer to make a determination whether the recommendation is suitable for the specific customer, given the specific customer's investment profile. And quantitative suitability states that even if any single recommendation with respect to a securities transaction would satisfy customer-specific suitability, a broker-dealer who has actual or de facto control over a customer account must also have a reasonable basis for believing that a *series* of recommended transactions is not excessive or otherwise unsuitable for the customer based upon the customer's investment profile.

The legislative history of the Advisers Act is clear that one of the primary goals of the 1940 law was to rein in the largely unregulated practice of people marketing themselves as "investment counsel" without being subject to the Exchange Act or other laws, and charging specifically and solely for their advisory services rather than trading.[48] Upon the passage of the Advisers Act, including the broker-dealer exclusion in Section 202(a)(11)(C), the receipt of commissions became a major dividing line between broker-dealers and investment advisers:

> By enacting the broker-dealer exclusion, Congress distinguished between two groups of broker-dealers [...] The first comprised brokers that provided advice in the context of brokerage and were paid on commission. This group was excluded from the Advisers Act. The second consisted of brokers that provided advisory services separate from conventional brokerage and charged a separate fee. This group was deemed to receive "special compensation" and was ineligible for the exclusion.[49]

Yet, what was clear in 1940 had become increasingly opaque by the beginning of the 1980s, with the increased need for advisory services, the advent of new compensation trends, and the arrival of novel marketing schemes.

B. Responding to the Inappropriate Expansion of Broker-Dealer Exclusion

The Coalition recognizes that the motivation behind Reg BI is to protect retail investors and control the unrestrained expansion of the types of activities that have inappropriately fallen within the broker-dealer exclusion of the Advisers Act. The Coalition also recognizes that it was an accepted business practice for broker-dealers to provide advice as part of their execution and other core brokerage services since before the enactment of the Exchange Act in 1934. However, the broker-dealer exclusion has expanded to the breaking point in recent years.[50] This expansion is due not only to changes in the marketplace and business practices, but also to the regulators' inability to limit the types of advice provision and compensation that have fallen within the broker-dealer exclusion. Reg BI reinforces this ill-advised expansion of the broker-dealer exclusion by acknowledging the growing role advice plays in the "pay-as-you go" brokerage model, but at the same time refusing to draw distinct lines between brokerage and advisory activities and compensation.[51] This expansion is reminiscent of the 2005 SEC rule that

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[48] For a review of the evolution of the broker-dealer exclusion since 1940, *see generally*, Arthur Laby, "Reforming the Regulation of Broker-Dealers and Investment Advisers," The Business Lawyer; Vol. 65, February 2010.
[49] Laby at pp. 403-404
[50] *See generally*, Jim Pasztor, "Embracing the Future: Implications of the DOL Fiduciary Standard for the Financial Services Industry," College for Financial Planning (Mar. 17, 2016).
[51] Reg BI, at p. 9 ("Our goal in designing proposed Regulation Best Interest is to enhance investor protection, while preserving, to the extent possible, access and choice for investors who prefer the 'pay as you go' model for advice from broker-dealers").

was vacated by the DC Circuit Court of Appeals in 2007 because it found that the SEC exceeded its authority in promulgating a rule that expanded the broker-dealer exclusion of "solely incidental" to broker-dealers charging asset-based or fixed fees (rather than a commission, mark-up, or mark-down).[52] FPA argued that the final 2005 rule created:

> a dual standard for the provision of investment advice. First, there are investment advisers who are covered by the IAA [Advisers Act]; many FPA members are investment advisers, and must comply with the IAA. Second, there is a new group of broker-dealers who are exempted from the IAA even though their activities do not conform to the two-pronged requirements of [the broker-dealer exclusion]. The two groups compete for customers, and under the final rule one of them (including FPA members) must continue to comply with the IAA, while the other one (the broker-dealers in the new, exempt category) need not.[53]

Thus, the questions regarding where to draw the line between brokers and advisers were placed squarely back on the shoulders of the SEC, or of Congress."[54]

When broker-dealers enter the territory of advice not related to core brokerage business and charge fees that increasingly appear to be "special compensation," they should be held to the same fiduciary standard expected of traditional investment advisers under the Advisers Act. Therefore, an updated interpretation and application of the broker-dealer exclusion in Section 202(a)(11)(C) of the Advisers Act should unequivocally prohibit many advisory services that are now offered by most broker-dealers to retail customers.

V. IRA Rollovers

Reg BI appears to apply to Individual Retirement Account (IRA) rollovers[55] and therefore would have a substantial impact on billions of dollars in the retirement savings accounts of U.S. retail investors. However, the Coalition encourages the SEC to better define the parameters around the application to IRA rollovers. Given the trend towards self-funded retirement planning, the magnitude of this crucial issue is so substantial that additional regulatory guidance on this issue is critical.

Since their creation by the Employee Retirement Income Security Act (ERISA) in 1974, IRA assets have grown dramatically.[56] A recent TIAA survey found that 33% of American adults already have an IRA and "41 percent of Americans who are not currently contributing to an IRA would consider one as part of their retirement strategy."[57] Unlike 401(k) plans, which are sponsored by employees, "[a]n IRA is the most basic form of retirement arrangement and is

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[52] Fin. Planning Ass'n v. SEC, 482 F.3d 481, 483 (D.C. Cir. 2007).
[53] *Id.*, at 486-487.
[54] Laby, at p. 398.
[55] Reg BI, at p. 83 ("We are not proposing at this time that the duty extend to recommendations of account types generally, unless the recommendation is tied to a securities transaction (e.g., to roll over or transfer assets such as IRA rollovers)."); *See also* Fred Reish, "Interesting Angles on the DOL's Fiduciary Rule #97" (July 10, 2018), *available at* http://fredreish.com/interesting-angles-on-the-dols-fiduciary-rule-97/ (With respect to recommendations to retail customers, as defined by Reg BI, "[b]oth the rollover recommendation and the recommended IRA investments would be covered by the best interest standard.").
[56] Investment Company Institute (ICI), "The Evolving Role of IRAs in U.S. Retirement Planning," Research Perspective (Nov. 2009), *available at* https://www.ici.org/pdf/per15-03.pdf.
[57] TIAA, "Most Americans Don't See a Difference Among IRAs" (June 29, 2016), *available at* https://www.tiaa.org/public/about-tiaa/news-press/press-releases/pressrelease647.html.

available to anyone regardless of employment status."[58] According to the Employee Benefit Research Institute (EBRI), IRAs "represent the largest single repository of U.S. retirement plan assets, holding more than one-quarter of all retirement plan assets in the nation."[59]

Given the widespread nature of IRAs and the amount of retirement savings that could be affected, it is critical for the Commission to clarify how Reg BI applies to IRA rollovers. Reg BI implies, but never clearly codifies in the text of the proposed rule, that it may apply to IRA rollovers if the rollover recommendation is tied to a securities transaction. The sheer impact of IRA rollovers on the U.S. economy and retail investors' retirement savings warrants an additional provision in Reg BI specifically for IRA rollovers. The decisions on applicability of Reg BI to IRA rollover situations should not be left to interpretation. Given that IRA rollovers represent a primary way workers save for retirement, the SEC should clearly and affirmatively state that IRA rollovers are covered by Reg BI and clearly explain the precise framework in the rule text.

VI. The Coalition's Responses to Specific Requests for Comment

The Coalition offers the following responses to certain questions raised in the Reg BI release where the Coalition has a particular interest or expertise and the issue has not previously been covered in this letter. We have not attempted to respond to all the questions raised in the release.

A. Definition of "Best Interest"

Questions:

- *Should the Commission define the term "best interest" in the rule text?* (Reg BI, p. 69)
- *To best capture this obligation, it is proposed that a broker-dealer must act in the best interest of the retail customer "without placing the financial or other interest of the [broker-dealer] making the recommendation ahead of the interest of the retail customer." Is this the right approach or should the Commission take an alternative approach, such as provide that to act in the best interest, a broker-dealer must act in the best interest of the retail customer "without regard to the financial or other interest of the [broker-dealer] making the recommendation" or "by placing the interest of the retail customer ahead of the broker-dealer"? What practical impact would the inclusion or exclusion of the Commission's proposed approach or the potential alternative approach have on the obligations of the proposed best interest obligation as described? Will it lead to retail customer confusion? Would courts interpret the standard differently? Is there different language that the Commission should consider?* (Reg BI, p. 68)

As recommended earlier in this letter, the SEC should define "best interest" and do so in a way that incorporates an affirmative duty of loyalty to the retail customer. In addition to the

[58] Federal Reserve Bank of San Francisco, "Are 401k and IRA contributions included in the national savings rate, and if so, how is this calculated?" (Aug. 2005), *available at* https://www.frbsf.org/education/publications/doctor-econ/2005/august/401k-ira-national-savings-rate/.
[59] EBRI, "Individual Retirement Account Balances, Contributions, Withdrawals, and Asset Allocation Longitudinal Results 2010–2014: The EBRI IRA Database" (Jan. 17, 2017), *available at* https://www.ebri.org/pdf/briefspdf/EBRI_IB_429_IRA-Long.17Jan17.pdf.

duty of care, disclosure obligations, and conflict of interest obligations, "best interest" should require a separate and distinct duty of loyalty that places the retail customer's interests, financial or otherwise, first every time. A major deficiency of the proposed Reg BI is that it inserts into the public discussion yet another term – best interest -- to describe the obligation of a financial professional to a client. It does this by essentially co-opting a term many investors associate with "fiduciary" and then defines that term in a way that doesn't obligate the financial professional to comply with a fiduciary obligation. As a result, investors now will have to understand the various obligations under three standards – suitability, best interest, and fiduciary – and know which one applies to their relationship. Such a scenario seems to fall far short of clarity and consistency.

As proposed, Reg BI is prone to the interpretation that a recommendation is permissible so long as the interests of the retail customer are not subordinated to those of the broker-dealer or its associated person. At first blush, the measurement appears to be whether the interests of the retail customer suffered a detriment, or whether the broker-dealer came out ahead at the expense of the customer. However, the current phrasing also opens itself up to scenarios where, for whatever reasons or decision-making processes, the interests of the retail customer and the interests of the broker-dealer coincide and result in a "tie." As explained by SEC Staff at Washington D.C. Bar's June 19, 2018, program,[60] it would seem that this situation would be permissible under Reg BI. In fact, Reg BI would be met as long as there is no material difference in the outcomes of the chosen recommendation as compared to the other contemplated recommendations, from the retail customer's perspective. In effect, simply not placing the broker-dealer's interests ahead of the customer's does not necessarily mean that the retail customer's interests will be placed ***first*** each and every single time, which is the only acceptable outcome.

This would not be so if "best interest" were defined in terms of the phrase, *"without regard to the financial or other interest of the [broker-dealer] making the recommendation"* or the phrase, *"by placing the interest of the retail customer ahead of the broker-dealer."* The former phrase has roots in traditional trust and agency law, where a fiduciary is required to act solely in the interest of the beneficiary. The latter phrase unambiguously directs the broker to affirmatively, intentionally, and consistently place the interests of the customer ahead of his or her own.

The Commission should unequivocally adopt the "without regard to" language of Section 913(g) of Dodd-Frank in its "best interest" standard and incorporate a separate and distinct duty of loyalty in the standard. The term "best interest," with the added duty of loyalty, should raise the standard of conduct for broker-dealers while following the Congressional directive found in Section 913(g) of Dodd-Frank. One of the elements of the fiduciary duty in CFP Board *Standards* is a requirement to "act *without regard to* the financial or other interests of the CFP® professional, the CFP® Professional's Firm, or any individual or entity other than the Client."[61]

[60] D.C. Bar Communities, "A Discussion of Regulation Best Interest and the SEC's Interpretation of Advisers' Fiduciary Duties" (June 19, 2018), *available at* https://join.dcbar.org/eweb/DynamicPage.aspx?webcode=EventInfo®_evt_key=6499B743-F73D-4259-9A7B-2E2B13D4DD9F&RegPath=EventRegFees&site=dcbar.

[61] *Standards*, at p. 2 (emphasis added).

B. Ongoing and Continuous Duty

Question:

- *Should Regulation Best Interest apply when broker-dealers agree to provide ongoing monitoring of the retail customer's investment for purposes of recommending changes in investments? Alternatively, should broker-dealers who provide ongoing monitoring be considered investment advisers?* (Reg BI, p. 70)

To the extent that a broker-dealer agrees to provide advisory services such as overall portfolio or account monitoring or review in addition to specific recommendations, that conduct would not be subject to Reg BI as proposed. There would be no obligation under the federal securities laws to act in that customer's best interest with respect to these additional advisory services, unless, for example, the broker-dealer charged a specific, separately-disclosed, fee for the monitoring or advisory services. This creates a significant gap in retail investor protection that should be addressed by the Commission.

The Coalition believes that broker-dealers that enter into agreements with retail customers to provide ongoing monitoring for purposes of recommending changes in investments should be considered investment advisers and subject to fiduciary obligations under the Advisers Act. Entering into an agreement to provide ongoing monitoring for purposes of recommending changes in investments goes beyond advice that is solely incidental to the conduct of business as a broker-dealer and should be regulated under the Advisers Act.

At the same time, even if the broker-dealer has not agreed to provide ongoing monitoring services, Reg BI should at the very least extend to order execution. Order execution is a substantial part of any recommendation and is a direct consequence of that recommendation. A broker-dealer should not be able to switch between the (heightened) Reg BI standard when providing recommendations to the retail customer and the (lower) suitability standard when executing the order stemming from those very same recommendations.

Importantly, the Coalition does *not* equate Reg BI with best execution. Reg BI should go *beyond* best execution obligations. Under SEC and FINRA regulations,[62] brokers are legally required to seek the best execution reasonably available for their customers' order. This includes taking into account available market quotes, routing options, and price improvement, among other considerations. But best execution should serve as the floor. Broker-dealers, of course, should still comply with best execution obligations but should also be held accountable under Reg BI, including its conflict of interest requirements and its prohibition on placing broker-dealers' own interests ahead of retail customers' interests.

[62] *See generally* FINRA Rule 5310; FINRA, "Report on FINRA Examination Findings," at p. 8 (Dec. 2017), *available at* http://www.finra.org/sites/default/files/2017-Report-FINRA-Examination-Findings.pdf; SEC, "Best Execution," Fast Answers, *available at* https://www.sec.gov/fast-answers/answersbestexhtm.html; and SEC, "Trade Execution," Investor Publications, *available at* https://www.sec.gov/reportspubs/investor-publications/investorpubstradexechtm.html.

C. Discretionary Authority and Solely Incidental

Question:

- *Should a broker-dealer's provision of unfettered discretionary investment advice be considered solely incidental to the conduct of its business as a broker-dealer?* (Reg BI, p. 206)

No, a broker-dealer's provision of unfettered discretionary investment advice should **never** be considered "solely incidental" to its business as a broker-dealer.

In its 2005 re-proposed, finalized, and now-vacated Rule 202(a)(11)-1 and the subsequent 2007 proposed interpretation, the SEC clarified that "the exception provided by section 202(a)(11)(C) of the Act is unavailable for any account over which a broker-dealer exercises investment discretion, regardless of the form of compensation and without regard to how the broker-dealer handles other accounts."[63] In other words, "a broker-dealer that exercises investment discretion with respect to an account or charges a separate fee, or separately contracts, for advisory services provides investment advice that is not 'solely incidental to' its business as a broker-dealer."[64] The SEC believed that:

> a broker-dealer's authority to effect a trade without first consulting a customer is qualitatively distinct from simply providing advice as part of a package of brokerage services. When a broker-dealer exercises investment discretion, it is not only the source of investment *advice*, it also has the authority to make the investment *decision* relating to the purchase or sale of securities on behalf of its client. This, in our view, warrants the protection of the Advisers Act because of the "special trust and confidence inherent" in such a relationship.[65]

In a 2007 comment letter, FPA, NAPFA, Investment Adviser Association (IAA), Consumer Federation of America (CFA), and other groups urged the SEC "to continue the position adopted in the vacated rule that discretionary management and financial planning services are not solely incidental to brokerage services."[66] IAA, consistent with its earlier recommendations, responded to SEC Chairman Clayton's request for information on June 1, 2017 by urging the Commission "to formally reaffirm that all persons who provide discretionary investment advice, regardless of the form of compensation they receive, are subject to the Advisers Act."[67]

The Coalition agrees and urges the SEC to draw this bright-line distinction. A broker-dealer's provision of unfettered discretionary management is the type of activity that falls outside the bounds of what traditionally was considered to be "solely incidental" to core brokerage services. The bright-line distinction should be interpreted though the lens of Section 3(a)(35) of the Exchange Act, which states:

> A person exercises ''investment discretion'' with respect to an account if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the

[63] 17 CFR Part 275, Release No. IA-2652, at p. 9.
[64] Id., at p. 1.
[65] Id., at pp. 8-9.
[66] Letter to SEC Chairman Christopher Cox, dated Apr. 24, 2007, at p. 1.
[67] IAA, "Re: Standards of Conduct for Investment Advisers and Broker-Dealers," at p. 8 (Aug. 31, 2017).

account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of this title and rules and regulations thereunder.[68]

The focus of Section 3(a)(35) is on the level of authority, decision-making ability, influence – and ultimately, control – an intermediary has over another's money. It has been shown that "[t]he more control intermediaries have over the investors' money and the greater the intermediaries' power to determine the investments, the higher the investors' risk is that the intermediaries will be tempted to use the money, securities, or power for other than the [investor's] sole interest."[69] It is this higher possibility of temptation and likelihood of mismanagement and abuse of another's money that necessitates the imposition of a fiduciary level of care on the intermediary, in this case, the broker-dealer. Moreover, in private litigation, multiple federal and state courts have recognized that once a broker crosses the line into establishing and maintaining discretion over an investor's account, he subjects himself to a fiduciary standard.[70]

The SEC should draw a line at "the exercise of discretionary authority." The SEC additionally should clearly and unambiguously enforce the original statutory text of the Adviser Act's broker-dealer exclusion and limit the types of advisory activities that brokers have developed over the past few decades that have come to qualify as "solely incidental" as well as compensation schemes that should be viewed as "special compensation."

D. Reg BI's proposed new Standard Overcomplicates the Regulatory Landscape

Questions:

- *The Commission asserts that Regulation Best Interest is limited to broker-dealers and is not intended to impact the fiduciary obligations under the Advisers Act. Are there concerns regarding the potential impact of this best interest obligation on the legal obligations under other standards? If so, what are these concerns? Are there suggestions on how to provide further clarification on this issue?* (Reg BI, p. 70)
- *Should we explicitly adopt FINRA's suitability standard, and then add any desired changed or enhancements to that standard, in order to simplify the best interest obligation? Are there specific benefits or problems with that approach?* (Reg BI, p. 71)

The Commission overcomplicates the regulations applying to broker-dealers providing

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[68] 15 U.S.C. § 78c(a)(35).

[69] Tamar Frankel, "The Failure of Investor Protection by Disclosure," at p. 425, University of Cincinnati Law Review, Volume 81, Issue 2 (May 30, 2013).

[70] As recently as 2017, a federal court in Houston found that "[i]n a discretionary investment account, in contrast to a nondiscretionary account, a broker is a 'fiduciary of his customer in a broad sense.'" The U.S. District Court for the Southern District of New York also has maintained that a general fiduciary duty is triggered when "a relationship of trust and confidence does exist between a broker and a customer with respect to those matters that have been entrusted to the broker[,]" including "when brokers have discretionary authority over their customers' accounts." Similarly, under Tennessee law, "[t]he scope of the broker's or investment advisor's fiduciary obligations depend on the degree of discretion the client has entrusted to the broker or advisor […] if the client has requested the broker or advisor to provide investment advice or has given the broker discretion to select his or her investments, the broker or advisor assumes broad fiduciary obligations that extend beyond the individual transactions."

investment advice by establishing yet another standard to this activity. A major objection to the Department of Labor's (DOL) 2016 Fiduciary Rule[71] was that it failed to achieve a consistent standard across all investment account types and across all advice providers. During consideration of the DOL Fiduciary Rule it was suggested that only a uniform and consistent standard would cure investor confusion about the different roles that different professionals play and the different standards of conduct to which they are held.[72] We agree that the goal should be a consistent investment advice standard across account types and advice providers. This is particularly important in an environment where services provided by broker-dealers and investment advisers are indistinguishable to the average investor. Given this, Reg BI fails to accomplish its purported goals.

Moreover, by failing to clearly define "best interest", it is not clear what standard is being applied. The proposed rule text, which requires brokers to act in the best interests of their customers and prohibits them from placing their interests ahead of their customer's interests, is the same language that has been used to describe a broker's obligation under FINRA's suitability rules, an investment adviser's fiduciary duties under the Advisers Act, and the requirements under the DOL Fiduciary Rule. All of these standards are different in significant ways and it is not clear how the proposed standard is similar to and different from each of these established standards.

E. <u>Market Competition</u>

Question:

- *Would proposed Regulation Best Interest result in broker-dealers limiting access to or eliminating certain products in a manner that could, in and of itself, cause harm to certain retail customers for whom those products are consistent with their investment objectives and in their best interest? If so, what products do commenters think would be limited or eliminated? Would any changes in Regulation Best Interest minimize or avoid these outcomes?* (Reg BI, p. 69)

The investment industry responded to the now-vacated DOL Fiduciary Rule by issuing new products and offering revised services that benefit retail investors. Among the innovations spurred by the DOL Fiduciary Rule were T-shares and clean shares. These new investment vehicles had the potential to "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."[73] 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

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[71] *81 Federal Register*, April 8, 2016

[72] See for example, SIFMA: "Since early 2009, SIFMA has consistently advocated for the establishment of a uniform best interest standard for financial professionals when providing retirement advice .https://www.sifma.org/explore-issues/fiduciary. ACLI noted: "We have reviewed the Securities and Exchange Commission's proposed standard of conduct for broker-dealers, and we look forward to working with the SEC, state insurance regulators, the Labor Department, the Financial Industry Regulatory Authority and Congress on a harmonized and uniform best interest standard of conduct for financial professionals. A collaborative approach would ensure all consumers receive retirement savings information and related financial guidance from financial professionals acting in their best interest, regardless of the retirement products they purchase." https://www.acli.com/Public-Policy/Fiduciary-Rule

[73] 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-oflabor-conflict-of-interest-rule/.

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.[74] 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.[75]

In addition to innovative share classes, firms began changing their business operations in other ways. Technology firms started rolling out new back-office software catering to financial services providers looking for accommodation, standardization and elimination of perceived conflicts of interest.[76] We also saw an increased focus on serving smaller accounts.[77]

The encouraging early signs of innovative products that comply with a fiduciary standard are evidence of market adaptability. As representatives of financial professionals who operate under a fiduciary standard, these marketplace innovations are welcome.

F. Dual Registrants

Question:

- *The Commission requests comment on the proposed approach with respect to dual registrants. How do firms currently make the determination of what capacity a dual registrant is acting in when making a recommendation or otherwise? Should there be more guidance regarding the current application of the law to specific scenarios? Is the Commission's interpretations of when a dual-registrant is acting as an investment adviser and when they are acting as a broker-dealer correct?* (Reg BI, pp. 95-96)

CFP Board *Standards* address the issue of dual registrants and "hat switching" with a clean and elegant solution: a fiduciary standard that applies to all financial advice, and not simply investment advice. Investors are unlikely to understand that a single financial advisor operates under a fiduciary standard in one context and under a suitability standard in another context.

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[74] *Id.*, at p. 5.
[75] *Id.,* at p. 7
[76] 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/FireLightDOL-Solution.shtml; and Informa Investment Solutions, "The DOL Fiduciary Standard Rule Change: Advisor Impact," available at http://www.informais.com/resources/dol-fiduciary-rule.
[77] 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-scoopup-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.").

G. Timing of Disclosure

Question:

- *Regarding timing of disclosure, the Commission preliminarily believes that the disclosure should be made "prior to or at the time of" the recommendation. Should the Commission consider a different timing requirement? For example, should the Commission require disclosure "immediately prior to the recommendation"? Should the Commission instead mandate the timing and frequency of certain disclosures? If so, which disclosures should be subject to more specific timing or updating requirements? For example, should the Commission require annual delivery of certain disclosure, such as fee disclosures?* (Reg BI, p. 130)

The timing of the disclosure should ensure that it would reasonably inform the decision of the investor. Getting the disclosure at the time when the investor has already formed a relationship with an advisor and decided to engage in a financial transaction does not serve any purpose. Moreover, the disclosure itself has to be understood; it is difficult to envision meaningful disclosure occurring immediately prior to an investment recommendation. Disclosures made at the time of a recommendation are unlikely to be helpful to a retail investor. Disclosures should be made prior to the recommendation so the retail customer has sufficient time to review and understand them, as well as to ask questions.

H. Mitigation as a Way of Addressing Conflicts

Questions:

- *Should the Commission use a different interpretation for what is a "material conflict of interest"?* (Reg BI, p. 132)
- *Should the Commission define "material conflicts of interest" in terms of an incentive that causes a broker-dealer not to act in the retail customer's best interest?* (Reg BI, p. 132)

Perhaps the most powerful aspect of the proposal is the requirement for firms to mitigate conflicts of interest that arise from financial incentives. However, it is unclear what conflict mitigation practices are required and what practices are restricted. The mitigation approach should cover all material conflicts of interest, whether arising from financial incentives or recommendations.

Reg BI's definition states that a material conflict of interest is "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."[78] According to the CFP Board Standards, "[i]nformation is material when a reasonable Client or prospective Client would consider the information important in making a decision."[79] CFP Board Standards define "conflict of interest" as "(a) When a CFP® professional's interests (including the interests of the CFP® Professional's Firm) are adverse to the CFP® professional's duties to a Client, or (b) When a CFP® professional has duties to one Client that are adverse to another Client."[80]

[78] Reg BI, at p. 110, 169.
[79] *Standards*, at p. 14.
[80] *Standards*, at p. 13.

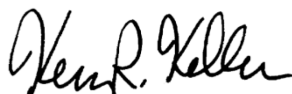
The SEC's proposed definition of a material conflict of interest, in some respects, does not conflict with similar definitions found in CFP Board *Standards.* For example, both sets of definitions are grounded in the reasonable professional standard. Commonly used in tort and criminal law, the reasonable professional standard refers to a professional who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability.[81]

VII. Conclusion

Faced with 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 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 professionals who provide personalized investment advice, including broker-dealers, would help clarify the investment decisions Americans face every day. The fiduciary duty in the new CFP Board *Standards* reflects the simple and unambiguous principle that CFP® professionals operating under all business models must always provide Financial Advice to Clients under a fiduciary standard. An effective SEC rule package for broker-dealers will do the same.

The Coalition appreciates the opportunity to comment on Reg BI, as well as the rest of the SEC's complete proposed package. If you have any questions regarding this comment letter, the corresponding comment letters, or the Coalition, please contact Maureen Thompson, Vice President of Public Policy, CFP Board of Standards at (202) 379-2281 or MThompson@cfpboard.org.

Sincerely,



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cc: The Honorable Jay Clayton
The Honorable Robert J. Jackson, Jr.
The Honorable Hester M. Peirce
The Honorable Kara M. Stein
Brett Redfearn, Director, Division of Trading and Markets
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[81] Available at https://legal-dictionary.thefreedictionary.com/Reasonable+person+standard