

August 7, 2018

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

Re: Proposed Form CRS (83 Fed. Reg. 21416); Proposed Regulation Best Interest (83 Fed. Reg. 21574); May 9, 2018.

Dear Mr. Fields:

The American Bankers Association (ABA)<sup>1</sup> appreciates this opportunity to comment on the Securities and Exchange Commission's (Commission) proposed Regulation Best Interest and Form CRS (Proposals). Proposed Regulation Best Interest would impose a standard of conduct on broker-dealers when making a recommendation on any securities transaction or investment strategy involving securities to a "retail customer." Under Proposed Form CRS, firms would be required to provide "retail investors" a relationship summary before or at the time the firm enters into an investment advisory agreement with a retail investor or, with respect to broker-dealers, the retail investor engages the firm's services.<sup>2</sup>

The Proposals, although directed at broker-dealers and registered investment advisers, nonetheless are of interest to our bank and trust company members, and our comments are focused on that perspective. These financial institutions are often part of larger organizations that provide a spectrum of services and products to the investing public through bank trust departments, broker-dealers, registered investment advisers, and affiliated insurance agencies. These services and products are offered under a number of different regulatory and legal regimes governed by federal or state laws and supervised by various regulatory agencies.

---

<sup>1</sup> The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$10 trillion in loans.

<sup>2</sup> In addition, the firm must provide updated information to the retail investor following any material change.

## General Comments

As ABA commented to the Commission in 2010, 2013 and 2017, we believe there are several important considerations for rules governing financial professionals providing personalized investment advice to retail clients.<sup>3</sup> We are pleased to see that the Commission's Proposals are broadly aligned with these considerations in a number of ways. First, ABA believes that any financial professional offering personalized investment advice to retail customers should act in the best interest of the customer. Without commenting on the particular requirements of the Proposal, we are pleased to see the Commission proposing to enhance the standards for broker-dealers providing investment advice to retail customers and seeking "to apply consistent principles across the spectrum of investment advice, and thereby enhance investor protection while preserving investor choice across products and advice models."

Second, we support the promulgation of any new standard for broker-dealers to be called a "best interest" and not a "fiduciary" standard to avoid investor confusion on the duties of different service providers. A bank trust department, for example, acting as trustee of a trust is held to *fiduciary* duties that are more stringent than those under agency law for investment advisers or for broker-dealers under current suitability rules. Labels are important as a proxy for customers to understand the duties owed them, as well as the legal remedies available. We, therefore, are pleased that the Commission refers to its proposed standard for broker-dealers as a "best interest" standard.<sup>4</sup>

Third, ABA believes in effective disclosure to aid investor understanding of the services provided, standard of care owed, and associated fees, among other things. Proposed Form CRS is a good starting point for consideration of such disclosure, and we expect to see many suggestions from the industry and public to improve its helpfulness.<sup>5</sup> Nonetheless, consensus-based disclosure along the lines of the Proposed Form CRS, highlighting key elements such as duties, fees, and conflicts, has the potential to become an important tool for investor clients to

---

<sup>3</sup> ABA Letter Re *Study Regarding Obligations of Brokers, Dealers, and Investment Advisers* (Aug. 30, 2010); ABA Letter Re *Request for Information: Duties of Brokers, Dealers, and Investment Advisers* (July 5, 2013); ABA Letter Re *Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers* (September 1, 2017).

<sup>4</sup> Keeping in mind that with respect to insurance agents who are also registered as broker-dealers, the proposed Regulation Best Interest would only apply to the sale of insurance products that considered securities.

<sup>5</sup> For example, to promote effective disclosure, the Commission should be open to different media of communication with customers, such as Internet-based disclosure or videos.

understand the differences in those services and products, and aid them in making a decision about which financial services provider best suits their needs.

Fourth, as the Commission notes in the Proposals, the 2008 Rand Study found that although investors were confused about the differences between broker-dealer and investment adviser services, they were generally satisfied with their financial professional. ABA believes that any new rulemaking should preserve investor choice, along with the availability of different types of services and fee structures so that investors can determine the type of relationship they want to have with a financial intermediary. We are therefore pleased that the Commission states its intent to address not only investor protection, but also investor “choice regarding access to a variety of products and advice relationships.”<sup>6</sup>

### **Specific Comments on the Proposals**

#### *“Adviser” or “Advisor” in Title*

As the Commission is aware, many broker-dealers have registered representatives that are dual employees of affiliated banks or licensed insurance agent. Dual employees permit financial service institutions to comply with differing requirements of functional regulators while consolidating in one relationship manager the delivery of various types of financial services and products to the firms’ clients. For example, a dual employee of a broker-dealer and bank trust department may provide banking, fiduciary, and securities transaction services. Similarly, a licensed insurance agent that is also a registered representative of a broker-dealer may offer a number of insurance products in both capacities. In both cases, the financial professional, as employed by the broker-dealer, bank, or insurance agency, may have titles or names that contain the words “adviser” or “advisor.” In fact, the preamble to the Proposal, while not specifically mentioning these types of dual employees, states that other regulated financial services providers may use these terms: “the Commission recognizes that terms such as ‘financial advisor’ or ‘financial consultant’ may be used by banks, trust companies, insurance companies, and commodities professionals.”<sup>7</sup>

However, under Proposed Form CRS, the Commission would only allow registered representatives of broker-dealers to use those terms in their titles and names if they are also “an

---

<sup>6</sup> 83 Fed. Reg. 21579.

<sup>7</sup> Proposed Form CRS, 83 Fed. Reg. 21416, 21504.

investment adviser registered under Section 203 of the Investment Advisers Act of 1940 or with a State.”<sup>8</sup> In the case of a dual employee of a broker-dealer and bank trust department, that individual may be providing investment advice under a bank fiduciary standard even more rigorous than that to which registered investment advisers are held. Similarly, a licensed insurance agent, whose insurance activities are regulated under state insurance law and who is licensed to sell securities, may provide insurance advisory services. The Commission should acknowledge the regulated and supervised nature of these activities by other regulators; in so doing, the Commission should broaden the exemption (to the title and name prohibition) to those broker-dealers that are dual employees of a bank or are also licensed insurance agents.

#### *Definitions of “Retail Investor” and “Retail Customer”*

Under Proposed Form CRS, broker-dealers and registered investment advisers must provide standardized disclosure to “retail investors” that summarizes the services provided. Disclosed information must include the standard of care that governs the activities, the fees associated with those services, conflicts of interest, and a listing of any reportable legal or disciplinary events of the firm. A retail investor is defined as a natural person, including “a trust or other similar entity that represents natural persons, even if another person is a trustee or managing agent of the trust.” Similarly, the Proposed Regulation Best Interest applies to investment advice provided to “retail customers,” which is defined as natural persons and “any persons, provided the recommendation is primarily for personal, family, or household purposes. This extension would cover non-natural persons that the Commission believes would benefit from the protections of Regulation Best Interest (such as trusts that represent the assets of a natural person).”<sup>9</sup>

The rationale for expanding these definitions beyond natural persons to include trusts<sup>10</sup> hinges on studies that found deficiencies in financial literacy with the general population.<sup>11</sup> While the study cited may have properly concluded that the understanding of the general

---

<sup>8</sup> Proposed 17 CFR 240.15l-2.

<sup>9</sup> 83 Fed. Reg. 21596.

<sup>10</sup> However, we note that because trusts are not legal persons, only the trustee (such as a corporate entity like a bank) may own property or transact on behalf of the fiduciary relationship in its capacity as trustee. *See American Jurisprudence*, 2d Trusts § 2 (2013).

<sup>11</sup> *See* Federal Research Division, Library of Congress, *Financial Literacy Among Retail Investors in the United States* (Dec. 30, 2011), available at <https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part2.pdf>.

population was not great, it did not address specifically issues that arise in the context of a trustee administering a trust as a fiduciary, nor did it address situations in which a financial firm, such as a bank, was acting in the role as fiduciary.

The Commission should recognize the fiduciary role that banks and trust companies play with respect to trusts and other accounts that they administer on behalf of trusts, estates, and natural persons. In particular, the definition of retail investor and retail customer should exclude trusts where a corporate fiduciary is acting as trustee. In these situations, the duties owed by the corporate fiduciary under trust law are generally more robust than those imposed under the securities laws, and disclosures would not be additive to already imposed duties and disclosures the fiduciary owes the beneficiaries and the account. These clients of the broker-dealer and investment adviser should be treated as sophisticated, institutional clients, and outside of the proposed retail investor or retail customer regulatory regimes.

## **Conclusion**

ABA appreciates this opportunity to provide the perspective of our bank and trust company members. We are pleased that the Commission's Proposals are largely aligned with principles we support in the rulemaking governing retail investor accounts. We offer additional suggestions with the goal in mind of improving the effectiveness of the Proposals.

Sincerely,

A handwritten signature in black ink that reads "Phoebe A. Papageorgiou". The signature is written in a cursive, flowing style.

Phoebe A. Papageorgiou  
Vice President, Trust Policy