MANAGED FUNDS ASSOCIATION

AIMA

August 7, 2018

Mr. Brent J. Fields, Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Requests for Comment Regarding Proposed Regulation Best Interest (File No. S7-07-18), Proposed Form CRS Relationship Summary (File No. S7-08-18), and the Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers (File No. S7-09-18)

Dear Mr. Fields:

Managed Funds Association[1] ("MFA") and the Alternative Investment Management Association[2] ("AIMA") (collectively, the "Associations") appreciate the opportunity to respond jointly to the package of rule proposals and interpretative guidance identified in the above file references, which were published by the Securities and Exchange Commission ("Commission") on April 18, 2018 (collectively, the "Proposals").[3]

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1 MFA represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

2 AIMA is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council ("ACC") to help firms focused in the private credit and direct lending space. The ACC currently represents over 100 members that manage $350 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialized educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors).

3 *See* Securities Exchange Act Release No. 83062 (April 18, 2018), 83 F.R. 21574 (May 9, 2018) ("Regulation Best Interest"); Investment Advisers Act Release No. 4888 (April 18, 2018), 83 F.R. 21416 (May 9, 2018) ("CRS Regulation"); and Investment Advisers Act Release No. 4889 (April 18, 2018), 83 F.R. 21203 (May 9, 2018) (the "Interpretation").

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The Alternative Investment Management Association Ltd

We address each of the proposals in more detail below, starting with the Interpretation since it raises issues of critical importance to the U.S. asset management industry. In summary, the Associations do not believe it is necessary or appropriate for the Commission to adopt the Interpretation because there is longstanding judicial precedent under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), as well as under common law, to address the full range of relationships investment advisers establish with their diverse clientele. This rich precedent is, as then Chair Mary Jo White noted on the 75th Anniversary of the Advisers Act, part of "the bedrock of an industry envied around the world"[4] and the proposed guidance from the Commission will not provide additional investor protection. We are concerned that the Commission's interpretation of decades of jurisprudence regarding advisers' standards of conduct will disrupt long-standing industry norms and will create legal and compliance uncertainty that is likely to limit investment choices and increase costs for clients who rely on the professional assistance of an investment adviser to invest in U.S. capital markets. We also are concerned that the uncertainty caused by the Interpretation could have deleterious effects on existing relationships between advisers and their clients, particularly those involving institutional clients and sophisticated natural persons that have carefully negotiated the terms of those relationships. If the Commission determines to move forward with the Interpretation in some form, it should, at a minimum, modify it to account for the nuances of existing advisory relationships. We further believe the Commission should undertake additional cost-benefit analysis before moving forward with the Interpretation, which we believe underestimates the economic impact on investors and investment advisers that is likely to result from the uncertainty created by the Interpretation.

Second, with respect to the proposed CRS Regulation, the Associations generally agree with the Commission's view that both broker-dealers and investment advisers should be obligated to make material disclosures in connection with their relationships with "retail investors." However, the Associations believe that the Commission's proposed definition of "retail investor" in the proposed CRS Regulation is overbroad to the extent it includes institutional clients and sophisticated natural persons. Sophisticated investors negotiate their advisory arrangements and the disclosures they believe are relevant and, as such, would not benefit from another source of disclosure, particularly one that is subject to arbitrary page limits and content requirements and which is, at best, redundant with existing disclosures. There is simply no need to include institutional clients and sophisticated natural persons within the ambit of the proposed CRS Regulation, and we request that the Commission exclude them from the definition of "retail investor" for that purpose. We note that, in the context of a pooled investment vehicle, the fund itself is the client and not the investors in that fund and, accordingly, we request the Commission clarify that the investment adviser is not required to create a Form CRS for such vehicle or deliver such a form to either the vehicle or to the underlying investors in the vehicle.

Third and lastly, we are commenting on discrete aspects of proposed Regulation Best Interest in respect of the proposal extending the rule to "any securities transaction" rather than in the context of "personalized investment advice," as prescribed by the Commission's express statutory rulemaking

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4 *See* Opening Remarks at the 75th Anniversary of the Investment Company Act and Investment Advisers Act "The Investment Company Act and Investment Advisers Act Standing the Test of Time" https://www.sec.gov/news/statement/im-40-acts-75th-anniv-chair-white-09292015.html.

authority to address the standards of care of broker-dealers and investment advisers.[5] In short, the Associations do not believe that historical precedent supports extending proposed Regulation Best Interest to recommendations of "any securities transaction" especially to private offering transactions involving sophisticated investors that are, by definition, not transactions with retail customers.

I. The Proposed Guidance on Standards of Conduct as Applied to Sophisticated Clients is Unnecessary, Will Raise Investment Costs, and Will Limit Client Choices

The Associations agree with the Commission that investment advisers have a well-established fiduciary duty that applies across all clients.[6] In proposing the Interpretation, the Commission states that its intent is to reaffirm, and in some instances clarify, its view that investment advisers have a fiduciary duty to their clients enforceable under the anti-fraud provisions of the Advisers Act. The Commission acknowledges that the fiduciary standard of conduct is based on equitable common law principles and decades of jurisprudence and is fundamental to investment advisers' relationships with their clients under the Advisers Act, and cites to the existing case law, including the U.S. Supreme Court's decision in *SEC v. Capital Gains*,[7] as continuing to be the law with respect to interpretation and establishing the boundaries of an investment adviser's fiduciary duties.[8]

The Associations believe that such common law and the associated precedents provide sufficient guidance as to the boundaries of the investment adviser's fiduciary standard of conduct. Moreover, such precedents recognize that an investment adviser's fiduciary duty is not one-size-fits-all, but rather, a duty that is shaped by the facts and circumstances under which the investment adviser is engaged, including the level of sophistication of the client and the specific agreed-upon services. Accordingly, the Associations do not think that it would be beneficial or appropriate for the Commission to adopt the proposed Interpretation.

In announcing the Commission's actions with respect to the Proposals, Chairman Clayton stated that the Commission's objectives with respect to the Proposals were to: (1) enhance retail investor protection and decision-making by raising the standard of conduct for broker-dealers when they provide recommendations to retail investors, and reaffirm and in some instances clarify the terms of the relationships that retail investors have with their investment professionals; (2) preserve retail investor access to a variety of types of investment services and investment products; and (3) raise retail

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5 Section 913(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") sets forth the Commission's rulemaking authority to prescribe rules to address the legal or regulatory standards of care for brokers, dealers, investment advisers and their respective associated persons in connection with "providing personalized investment advice about securities" as provided in findings, conclusions, and recommendations commenced by the Commission pursuant to Section 913(b) of Dodd-Frank.

6 The Associations also agree with the Commission that investment advisers frequently provide impersonal services that do not implicate a fiduciary duty to any client. *See* Interpretation at Note 8; *see also* 17 C.F.R. § 275.203A-3(a)(3)(ii) (defining impersonal investment advice).

7 *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) ("SEC v. Capital Gains").

8 *See* Interpretation, *supra* note 3, at 21205, citing to *SEC v. Capital Gains*; see also *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979).

investor awareness of whether they are transacting with registered financial professionals.[9] We believe these objectives appropriately focus on protecting retail investors and promoting capital formation through investor access to professional investment advice. We do not believe that altering the standards of conduct with respect to institutional and sophisticated clients is necessary to achieve these objectives and we believe the Interpretation is likely to introduce additional costs and burdens that negatively impact the investment activities of sophisticated investors.

The focus of the Chairman's stated objectives is consistent with the findings and recommendations made by various Commission or Commission-sponsored reports assessing investor perception of the duties of broker-dealers and investment advisers over the past 15 years,[10] and also is consistent with the enactment of Section 913 of Dodd-Frank. The Associations understand that the Commission may feel compelled to clarify and reaffirm the investment adviser standard of conduct with respect to retail clients as part of an overall set of proposals focused on retail client protection; however, the Associations also believe that there is no compelling reason to do so with respect to institutional clients and sophisticated natural person clients. Such clients are able to understand the differences in their relationships with investment advisers and broker-dealers and are able to negotiate for the types and level of services that they want. The Commission's stated focus on "retail customers" in Regulation Best Interest and on "retail investors" in the CRS Regulation demonstrates that there is no compelling need for additional protections of sophisticated and institutional clients. Accordingly, to the extent that the Commission chooses to move forward with an Interpretation, the Associations request that the Commission limit the Interpretation to relationships in which investment advisers provide advice to "retail customers," consistent with the Commission's objectives for the Proposals and with the other aspects of the Proposals.[11]

The Associations also believe that it would be inappropriate for the Commission to adopt the Interpretation as proposed because it is unable to capture the nuances of the investment adviser's standard of conduct. As explained in our specific comments below, our review of the proposed Interpretation has identified a number of areas where the Interpretation either misstates the current investment adviser standard of conduct or misses important nuances of how it applies in the full range of relationships that investment advisers establish with their diverse clientele.

Notwithstanding the Associations' belief that the Interpretation is not necessary and will harm the investment activities of sophisticated natural person and institutional clients, to the extent that the Commission chooses to move forward with an Interpretation, the Associations offer several specific modifications for consideration by the Commission.

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9 *See* Overview of the Standards of Conduct for Investment Professionals Rulemaking Package, Public Statement by Chairman Jay Clayton, U.S. Securities and Exchange Commission, April 18, 2018.

10 The Commission sponsored two reports on the issue of retail customer perception and potential confusion of the duties of broker-dealers and investment advisers. *See Results of Investor Focus Group Interviews Regarding Brokerage Account Disclosures*, Report to the Securities and Exchange Commission by Siegel & Gale, LLC and Gelb Consulting Group, Inc. (Mar. 10, 2005) ("Focus Group Report"); and *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, Report of the RAND Corporation (2008) ("RAND Report"). The Commission also published its own report pursuant to Section 913(d) of Dodd-Frank. *See Study on Investment Advisers and Broker-Dealers*, U.S. Securities and Exchange Commission (January 2011) (the "Dodd-Frank Study").

11 For a discussion of the views of the Associations with respect to the definitions of "retail customer" and "personalized investment advice" please refer to Section III of this letter, discussing Regulation Best Interest.

a. Interpretive Guidance Should be Limited Solely to Relationships with Retail Clients, Defined in a Manner Consistent with the Federal Securities Laws

Although Regulation Best Interest by its terms would apply to "retail customers" and the CRS Regulation would require investment advisers and broker-dealers to deliver a relationship summary to "retail investors," the Commission was unclear whether it intends for the Interpretation to apply to investment adviser fiduciary duties with respect to dealings with all clients, including sophisticated clients, or solely with respect to retail clients. As discussed above, though the Associations acknowledge that investment advisers owe fiduciary duties to all of their clients, we do not believe there is a compelling reason for the Commission to adopt interpretive guidance that applies to investment advisers in the context of relationships with institutional clients or with sophisticated natural person clients. To the extent that the Commission chooses to move forward with a version of the Interpretation, we request the Commission limit the applicability of such guidance to relationships in which investment advisers provide advice to retail clients, consistent with the Commission's objectives for the Proposals.[12]

Moreover, the Associations believe that the Commission should define retail clients in any final Interpretation in a manner that excludes sophisticated clients, consistent with the longstanding approach of the federal securities laws in distinguishing retail and non-retail persons. An appropriately calibrated definition of retail client will help an investment adviser better address the differences inherent in its relationship with true retail clients versus those natural persons who are sophisticated, high net worth clients or institutional clients. Accordingly, the Associations request that the Commission include in any final Interpretation a definition of retail client that excludes sophisticated and high net worth individuals as well as institutional clients. Specifically, we encourage the Commission to adopt a definition that is premised on existing and well-understood standards in the federal securities laws, which currently include different treatment for transactions with and services provided to sophisticated clients (such as "accredited investors," "qualified clients" and "qualified purchasers").

This approach is consistent with a fundamental distinction between sophisticated and retail investors in the federal securities laws, imposing more substantive requirements on transactions with retail investors. This clear precedent of differing requirements with respect to relationships with sophisticated clients should apply to any specific guidance that the Commission proposes. We further encourage the Commission to adopt a similar definition of "retail customer" in the other proposed rules. We believe that distinguishing retail clients and "retail customers" in a manner consistent with existing securities laws standards appropriately reflects the Congressional determination to distinguish between retail and non-retail customers, while avoiding the unnecessary confusion and complexity that would result from adoption of a standard of sophistication that is different from that relied upon by investment advisers in other contexts.

If the Commission determines not to limit the applicability of the Interpretation to relationships in which investment advisers provide advice to "retail customers," the Associations

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12 For a discussion of the views of the Associations specifically with respect to the definitions of "retail customer" and "personalized investment advice" please refer to Section III of this letter, discussing Regulation Best Interest.

believe that any final Interpretation should explicitly acknowledge that the facts and circumstances of a specific relationship shape an adviser's fiduciary duty. The exact means of adherence to this standard of conduct varies based on many important factors including differences in the level of the client's sophistication and the services contracted for by the client.

Accordingly, the Associations request that the Commission modify the Interpretation to consider the differences between the needs of retail clients, as defined in the manner discussed above, versus those of sophisticated clients. In particular, the Associations request that a final Interpretation confirm that the application of, and adherence to, an investment adviser's fiduciary duty may impose differing obligations depending on various circumstances including the level of sophistication and financial circumstances of the client, the agree-upon advisory services, and whether the services are offered only through pooled investment funds In this regard, the Commission may wish to consider contrasting the application of the duty in the context of retail clients with the application of the duty in the context of investment advisers to sophisticated clients (individuals and institutions) and pooled investment funds for which they may be, or may not be affiliated with, the sponsor.

Further, the Associations also request that the Commission explicitly include language in any final Interpretation recognizing that, in the context of providing investment advice to a pooled investment fund, the investment adviser owes its fiduciary duty to the pooled investment vehicle and not to the underlying investors in such vehicle.[13] Such clarification would be consistent with prior Commission releases regarding an adviser's obligations to investors in pooled investment funds under the Advisers Act.[14]

b. The Fiduciary Duty Owed by an Investment Adviser is Always Construed in Relation to the Agreement with its Client

Fundamental to the investment advisory relationship established between investment advisers and their clients is the premise that each client will enter into an agreement with the investment adviser that establishes the parameters of the relationship with full knowledge of the relevant, material facts and circumstances. The Interpretation acknowledges this fundamental premise by stating that "the duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship through contract when the client receives full and fair disclosure and provides informed consent."[15] The Interpretation then states that, "although the ability to tailor the terms means that the application of the fiduciary duty will vary with the terms of the relationship, the relationship in all cases remains that of a fiduciary to a client" and that "the investment adviser cannot disclose or negotiate away, and the investor cannot waive, the federal fiduciary duty."[16]

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13 *See Goldstein* v. *SEC*, 451 F.3d 873 (D.C. Cir. 2006).

14 *See Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles* Investment Advisers Release 2628 (August 9, 2007) ("Rule 206(4)–8 does not create under the Advisers Act a fiduciary duty to investors or prospective investors in a pooled investment vehicle not otherwise imposed by law.")

15 Interpretation, *supra* note 3, at 21205.

16 *Id.*

Although the Associations agree that investment advisers have a fiduciary duty to all clients, the Associations also believe that the Interpretation should more clearly acknowledge that the precise contours of an adviser's fiduciary duty to an institutional or sophisticated client can be duly shaped by contract and that the contract establishes the facts and circumstances upon which the fiduciary duty is established. As currently written, the Interpretation seems to create a "one-size-fits-all" fiduciary standard with respect to an investment adviser's relationships with its clients, regardless of the sophistication level of a client and without taking into account the demands and nuances of institutional investment mandates. Accordingly, the Interpretation should clarify that the fiduciary duty owed by the investment adviser is always construed in relation to the services for which the parties contracted. For example, clients, particularly sophisticated natural persons and institutional clients, may negotiate for specific services in exchange for specific fees, for example, by choosing to limit the universe of investable securities from which the investment adviser may choose or choosing to retain an investment adviser only for a particular investment strategy(ies).

c. Duty of Loyalty: Specific Comments and Requests for Clarification

1. Client Consent Based on Full and Fair Disclosure of Conflicts of Interest Meets Fiduciary Duty

The Interpretation states that a client's informed consent to a conflict of interest may be either explicit or implicit, depending on the facts and circumstances of the situation; however, it also notes that informed consent may not be inferred or accepted where either "(i) the facts and circumstances indicate that the client did not understand the nature and import of the conflict, or (ii) the material facts concerning the conflict could not be fully and fairly disclosed."[17] The Associations agree with the concept of obtaining informed consent from clients to material conflicts of interest; however, the Associations believe that further guidance from the Commission is required in two circumstances.

First, the implication from this language in the Interpretation that even full and fair disclosure may be insufficient erodes the industry's historical understanding from relevant case law that conflicts generally may be resolved with full and fair disclosure addressing all material facts.[18] While "fiduciary duty" is not specifically defined in the Advisers Act or in Commission rules, the relevant case law has noted a congressional recognition with the enactment of the Advisers Act "of the delicate fiduciary nature of an investment advisory relationship" as well as a congressional intent to "eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser – consciously or unconsciously – to render advice which was not disinterested."[19] We believe this formulation from the U.S. Supreme Court in *SEC vs. Capital Gains* is the well-established standard and that the above language from the Interpretation is not consistent with the standard articulated by the U.S. Supreme Court.

The Associations believe that, particularly in light of the above discussion regarding the nuances and negotiability of advisory relationships with sophisticated clients, inclusion of such an

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17 Interpretation, *supra* note 3, at 21209.

18 *Id.*

19 *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963).

implication in any final Interpretation will create significant legal and compliance uncertainty. The Associations believe that the uncertainty will inhibit sophisticated clients' access to, or increase costs associated with access to, investment advisers, which can have detrimental effects on investment activity and capital markets more generally. To avoid these negative repercussions on investment activity, the Associations believe that the Interpretation should be modified to expressly state that informed consent by the client to conflicts of interest (even material conflicts of interest) that have been fully and fairly disclosed is appropriate. Moreover, the Interpretation should clarify that the investment adviser and the client may establish the manner in which full and fair disclosure will be made and how informed consent will be granted. Further, we request that, in determining how to incorporate this into the Interpretation, the Commission consider the level of sophistication of the clients, as well as the overall nature of the advisory relationship.

Second, investment advisers frequently obtain consent from sophisticated advisory clients to material conflicts of interest that have been fully and fairly disclosed in the form of "negative consent." Under this approach, a client that continues its relationship with the adviser after it receives all necessary disclosures is deemed to have provided its consent; the client is not required to take any affirmative action to consent to the conflict. The Associations request that the Commission modify the Interpretation to clarify that this form of "negative consent" process may continue to be used by investment advisers when dealing with sophisticated clients.

2. Allocations of Investment Opportunities to Clients Should be Fair and Equitable Over Time

The Interpretation states that, in "allocating investment opportunities among eligible clients, an adviser must treat all clients fairly."[20] Under existing interpretations and industry practices, this requirement has been interpreted to mean that all clients must be treated fairly and equitably "over time," provided that the investment adviser has appropriate allocation policies in place and has made adequate disclosure of the potential methods of allocation.[21] The ability to make fair and equitable allocations of investment opportunities "over time" allows for investment advisers to use rolling allocation policies or other methods of allocation that may be appropriate in connection with a particular type of investment, provided that they have implemented adequate policies and procedures and made appropriate disclosures. These alternatives to *pro rata* allocation are particularly important when inventory in an investment is low, or the investment adviser receives an allocation to an investment that is less than what it requested on behalf of each client. Accordingly, the Associations request that, in any final Interpretation, the Commission clarify that in allocating investment opportunities, investment advisers must treat all clients fairly and equitably "over time" in a manner that is consistent with the disclosed allocation policies of the investment adviser, and that such treatment may not necessarily result in *pro rata* allocations to all investments that may be desirable for a particular client's account.

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20 *Id.* at 21208.

21 *See* Advisers Act Rel. No. 2204 (Dec. 17, 2003); *see also* SMC Capital, Inc., SEC Staff No-Action Letter (pub. avail. Sept. 5, 1995).

d. Duty of Care: Specific Comments and Requests for Clarification

1. The Duty to Make a Reasonable Inquiry in the Context of Sophisticated Investors May be Defined by Agreement with the Client

The Interpretation states that inherent in the duty of care is a duty to make a reasonable inquiry into a client's financial situation, level of financial sophistication, investment experience, and investment objectives (collectively referred to as the client's "investment profile").[22] The Associations request that in adopting any final Interpretation, the Commission clarify that this guidance applies only in the context of a retail client and not in the context of a sophisticated natural person or institutional client (including pooled investment funds). Alternatively, the Commission may wish to differentiate in the Interpretation the level of reasonable investigation that may be required depending on the level of sophistication of the client.

2. A Suitability Requirement is Unnecessary and Inappropriate for Investment Advisers

The Interpretation states that, as part of its duty of care, an investment adviser has a duty "to provide personalized advice that is suitable for . . . the client based on the client's investment profile."[23] The concept of "suitability" has historically been applied only in the broker-dealer context, whereas investment advisers have been subject to the higher fiduciary duty standard. Moreover, it is the understanding of the Associations that concerns regarding the existing broker-dealer suitability standard contributed to the Commission's decision to propose Regulation Best Interest and introduce a higher standard of care to be applied to broker-dealers. We believe that introducing a suitability standard in the Interpretation is, at a minimum, unnecessary and risks creating a lower or different standard than has long applied to investment advisers. We believe the proposed language is inconsistent with the Commission's stated objective in proposing the Interpretation of generally reaffirming current practices of investment advisers and would create substantial uncertainty that is likely to translate into fewer investment choices or higher costs for investors.

The Associations believe that an investment adviser's adherence to the fiduciary duties as established in the existing common law provides sufficient investor protections and that introducing a new concept of suitability would only create confusion with respect to the application of multiple standards. In support of incorporating a suitability requirement in the Interpretation, the Commission cites to a rule proposal from 1994, which would have codified a regulatory suitability requirement for investment advisers.[24] The Commission never adopted the 1994 rule proposal and, therefore, such investment advisers are not subject to an express "suitability" standard under existing regulation, nor have the courts adopted such a standard.[25] The Associations believe that one factor in leading the SEC to abandon the 1994 rule proposal was the recognition that applying an additional "suitability"

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[22] Interpretation, *supra* note 3, at 21206.

[23] *Id.*

[24] *Id.* at Footnote 26 and accompanying text.

[25] *Suitability of Investment Advice Provided by Investment Advisers; Custodial Account Statements for Certain Advisory Clients*, Investment Advisers Act Release No. 1406 (Mar. 16, 1994) ("Suitability Proposal").

standard to investment advisers served no compelling investor protection purpose given the existing fiduciary duties under the Advisers Act. Accordingly, the Associations do not believe it is appropriate to incorporate the suitability concepts from the abandoned 1994 rule proposal and we request that references to an investment adviser suitability requirement be removed from any final Interpretation.

3. The Duty to Provide Advice and Monitoring over the Course of the Relationship with Sophisticated Investors May be Defined by Agreement with the Client

The Interpretation states that, as a part of the duty of care, the investment adviser has a duty "to provide advice and monitoring over the course of a relationship with a client."[26] The Associations request that, in adopting any final Interpretation, the Commission consider clarifying that this guidance applies only in the context of a "retail customer" and not in the context of a sophisticated or institutional client (including pooled investment funds) unless agreed upon by the parties. As noted above, a core tenet of the advisory relationship between an investment adviser and a sophisticated client is the ability to negotiate the terms of the advisory relationship within the investment advisory agreement. Accordingly, the extent of an investment adviser's obligation to provide ongoing advice and monitoring with respect to a sophisticated client is defined by the terms of the investment advisory agreement.

e. The Duty of Care Should Not be Conflated with the Duty of Loyalty

The Interpretation acknowledges that an investment adviser's fiduciary standard of conduct is grounded in equitable common law principles of fiduciary duty, and as a result, imposes on investment advisers both a duty of care and a duty of loyalty to the client. Although the Associations agree that both duties are inherent in an investment adviser's fiduciary duty, we believe that the Commission has misstated the duty of care in a manner that could give rise to confusion among investment advisers, their clients and eventually the courts. Specifically, the Commission states in the Interpretation that the duty of care requires investment advisers, among other things, "to act and to provide advice that is in the best interest of the client."[27] However, the Associations believe that the "best interest" requirement set forth in the Interpretation's duty of care discussion is inherent in the "duty of loyalty," which, as described in the Interpretation, requires that the investment adviser (1) put the client's interest first, (2) not favor its own interests over those of a client or unfairly favor one client over another, (3) make full and fair disclosure to its clients of all material facts relating to the advisory relationship, and (4) seek to avoid conflicts of interest with its clients, and, at a minimum, make full and fair disclosure of all material conflicts of interest that could affect the advisory relationship.[28]

The Interpretation's inclusion of a "best interests" requirement in the duty of care may cause unnecessary confusion for two reasons: first, and most important, the Interpretation's "best interests" duty of care is inconsistent with the common law construct of the duty of care; and second, the Interpretation suggests that there is an overlap between the two distinct duties of care and loyalty.

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[26] Interpretation, *supra* note 3, at 21206.

[27] Interpretation, *supra* note 3, at 21206.

[28] Interpretation, *supra* note 3, at 21208.

Stated differently, incorporating a "best interests" component to the duty of care in the manner articulated in the Interpretation is inconsistent with common law applications of the duty of care and conflates the distinct duties of care and loyalty. Accordingly, we request that the Commission revise this portion of the Interpretation to clarify the appropriate duty of care principles.

f. The Interpretation Should Be Based Solely on Court Decisions or Other Authoritative Legal Precedent

As noted above, there is a well-established body of judicial precedent establishing the boundaries of an investment adviser's fiduciary duty under the Advisers Act, including a vast body of case law stemming from the U.S. Supreme Court's landmark decision in *SEC v. Capital Gains*.[29] It is the view of the Associations that, if a version of the Interpretation is ultimately adopted by the Commission, it should be fully grounded in these precedents and should not establish new requirements or expand existing requirements, a result we believe is likely as a result of the Commission's reliance in numerous places on SEC proposals and secondary sources. Moreover, it is the Associations' view that the Commission should not use non-traditional, secondary sources that have not been tested by the U.S. court system as a basis for supporting the Commission's views and/or inferring that an aspect of the Interpretation is accepted industry practice.

Instead, the Commission has incorporated in the Interpretation positions articulated in unorthodox sources of authority, including industry comment letters, law review articles and abandoned rule proposals. For example, the Interpretation characterizes the fiduciary obligation of investment advisers quoting language from a law journal critique of "contractualist" scholars that barely touches on the Advisers Act.[30] Similarly, in support of the Commission's view that an investment adviser cannot disclose or negotiate away, or waive its fiduciary duty, the Commission offers in Footnote 21 a series of quotations from comment letters received by the Commission from industry trade groups. These types of sources of authority are at odds with the Commission's stated objective for the Interpretation because they do not represent well-settled jurisprudence and raise questions as to whether more sound authorities were considered but rejected. The Associations do not believe the SEC should adopt guidance in the Interpretation that is reliant on such secondary sources, as they have not been tested in U.S. courts as other aspects of the fiduciary duty have and do not necessarily represent a consensus view on the relevant standard applicable to an investment adviser.

Similarly, in certain places throughout the Interpretation, the Commission has proposed guidance that may expand the existing requirements that investment advisers must adhere to in order to satisfy their fiduciary duty to clients. For example, as discussed above in support for its view that an investment adviser has a duty to provide investment advice that is both suitable for, and in the best interest of, the client based on the client's investment profile, the Commission cites to a rule proposal from 1994, which would have established a suitability requirement for investment advisers.[31] The

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[29] *See supra* note 6.

[30] *See* Interpretation, *supra* note 3, at Footnote 17 and accompanying text, citing Arthur B. Laby, *The Fiduciary Obligations as the Adoption of Ends*, 56 Buffalo Law Review 99 (2008). Available at http://www.crab.rutgers.edu/~alaby/laby_final.pdf.

[31] *Id.* at 21206 (see Footnote 26 and accompanying text).

Commission never adopted the 1994 rule proposal and courts have not interpreted the Advisers Act or an adviser's fiduciary obligations to include a "suitability" requirement.[32] Accordingly, the proposed Interpretation appears to re-introduce an investment adviser suitability requirement that would expand the current fiduciary duty of investment advisers. In addition to the concerns outlined above regarding the appropriateness of a suitability standard for advisers, the Associations believe it is inappropriate for the Commission to expand the existing fiduciary standard by incorporating in the Interpretation requirements from a rule proposal abandoned more than 20 years ago. Moreover, there is no guarantee that a court interpreting the fiduciary duties of investment advisers consistent with *SEC v. Capital Gains* and its progeny would reach the same conclusions espoused by the identified secondary sources, or that the courts would agree with the Commission's beliefs or views regarding such duties. Thus, the Interpretation may create unnecessary confusion and conflict in litigation involving an investment adviser's fiduciary obligations by creating a divergent set of standards than those set out in existing law. Accordingly, the Associations request that any final Interpretation be amended to remove discussion of any express requirements that are not consistent with, and supported by, existing judicial precedent.

g. Request for Comment Regarding Areas of Enhanced Investment Adviser Regulation

As part of the Interpretation, the Commission requested comment regarding whether it would be appropriate for the Commission to impose on investment advisers certain regulatory requirements that are currently part of the broker-dealer regulatory framework through additional rulemakings. The Associations have set forth their thoughts with respect to these potential additional rulemakings in a companion comment letter, titled "Requests for Comment on Possible Additional Rules as set forth in Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers (File No. S7-09-18)."

II. Form CRS Should Define Retail Investor in a Manner Consistent with Existing Standards in the Federal Securities Laws

Investment advisers and broker-dealers give advice to retail investors that frequently differs in legal and conduct standards, as well as compensation structure. We understand the Commission's concern that retail investors, particularly those who are unsophisticated, may not fully appreciate the complexity of the different relationship between an investment adviser and a retail investor as opposed to the relationship between a broker-dealer and a retail investor without clear and concise disclosure. The Customer Relationship Summary ("Form CRS"), as proposed by the Commission, is designed to help retail investors understand the type of investment professional they are working with and the fees, conflicts, and other material factors that might affect that relationship.

The Associations generally agree with the Commission that both broker-dealers and investment advisers should be obligated to make clear disclosures of material information in connection with their relationships with retail investors, and that written disclosures may be one appropriate way for retail investors to understand and properly assess the relationship. The Associations believe, however, that the definition of retail investor as included in the proposed CRS

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32 *See* Suitability Proposal, *supra* note 22.

Regulation is overbroad. For purposes of the CRS Regulation, "retail investors" are defined as prospective or existing clients or customers who are natural persons, regardless of account type, net worth, or other indicia of sophistication.[33] In support of including a definition of "retail investor" that does not make a distinction based on net worth, the Commission states that it believes that it is consistent with the definition of "retail customer" included in Section 913 of Dodd-Frank, which also does not make a distinction based on net worth. While Section 913 does not make a distinction based on net worth, the statute does distinguish between natural persons that are "retail customers" and those that are not retail customers.[34] The Commission has not explained why it chose to make no distinction among natural persons, despite Dodd-Frank's definition of "retail customer," which does include a distinction. Therefore, the Associations believe the Commission's proposed definition of "retail investor" in Regulation CRS is significantly broader than the universe of natural persons that Congress intended. Accordingly, the Associations request that the Commission consider redefining the definition of retail investors to which Form CRS must be delivered in a manner consistent with the discussion included in Section I(a) of this letter. As discussed above, we believe that using existing standards in the federal securities laws is consistent with the intent of Section 913(a) to limit the universe of natural persons who are deemed retail customers and would reduce the unnecessary confusion and complexity that would result from adoption of a different standard of sophistication than investment advisers rely on in other contexts. The Associations believe that the standard of sophistication adopted with respect to Form CRS should mirror that adopted with respect to the Interpretation.

Additionally, the Associations request that the Commission clarify that, in the context of a pooled investment vehicle, the investment adviser is not required to create a Form CRS for such vehicle or deliver such a form to either the vehicle or to the underlying investors in the vehicle. This approach is consistent with the fact the pooled investment vehicle (which is not a retail customer), and not the underlying investors in the vehicle, is the client of the adviser.

III. Regulation Best Interest

The Commission also proposed Regulation Best Interest (Rule 15*l*-1 under the Securities Exchange Act of 1934 ("Exchange Act"), a new rule that (if adopted) would apply to broker-dealers (and their associated natural persons) when they make recommendations of "any securities transaction" or an "investment strategy involving securities" to "retail customers." In brief, this proposal is designed to establish a new standard of conduct that requires broker-dealers (and their natural associated persons) to act in the "best interest" of a retail customer at the time a recommendation is made, without placing the financial or other interests of the broker-dealer or natural associated person ahead of the retail customer's interests.[35] The Associations comments are

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33 CRS Regulation, *supra* note 3, at 21420.

34 Section 913(a) of Dodd-Frank defines a retail customer as a natural person (or legal representative of a natural person) who (1) receives personalized investment advice about securities from a broker or dealer or investment adviser; and (2) uses such advice primarily for personal, family, or household purposes.

35 Compliance with the best-interest standard is measured against the following elements: (1) the retail customer must receive disclosure of the scope and terms of the relationship and all material conflicts of interest associated with a recommendation; (2) the broker-dealer (or natural associated person) must satisfy an obligation of care; and (3) a two-part conflicts of interest obligation must be satisfied, which requires written policies and procedures reasonably designed to (a) disclose or eliminate all conflicts of interest; and (b) identify, disclose and mitigate, or eliminate material

limited to two items on which feedback was requested by the Commission in respect of proposed Regulation Best Interest, namely: (i) whether the proposal should apply to recommendations of "any securities transaction;"[36] and (ii) whether commenters agree with the proposed definition of the term "retail customer."[37]

As discussed in more detail below, the Associations are concerned that the Commission disregards a key term in the definition of "retail customer" in the scope of its rulemaking authority under Section 913 of Dodd-Frank (*i.e.*, "personalized investment advice"). As a result, we believe the Commission expands the scope of its rulemaking beyond the scope intended by Congress by using the phrase "any securities transaction." We believe Congress intentionally used the term "personalized investment advice" to address the historical context where broker-dealers and investment advisers were providing essentially the same services but under standards prescribed by different regulatory regimes. This term of art is used throughout and extensively in Section 913. For the reasons discussed below, the Associations do not believe the historical record supports the Commission's proposed expansive application of the express authority granted by Dodd-Frank. Therefore, we do not agree that proposed Regulation Best Interest should apply to recommendations of "any securities transaction" for a "retail customer." For similar reasons, we do not agree with the proposed definition of "retail customer."

a. Proposed Regulation Best Interest Should Exclude Private Fund Offerings

We believe that, in light of the historical underpinnings of, and the reasons for establishing, a new best interest standard, proposed Regulation Best Interest should not apply to private offerings of interests in private funds offered in reliance on Section 4(a)(2) of the Securities Act of 1933, as amended ("1933 Act"), Rule 506 of Regulation D under the 1933 Act, or Regulation S under the 1933 Act.[38] Stated differently, the proposal should be more narrowly tailored to the kinds of retail brokerage transactions and services that were the subject of various Commission or Commission-sponsored reports assessing investor perception of the duties of broker-dealers and investment advisers.[39] None of these reports singled out private offering transactions as the type of "retail transaction" subject to

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conflicts of interest arising from financial incentives associated with a recommendation. *See* proposed 17 C.F.R. §240.15*l*-1(a)(2).

36 Regulation Best Interest, *supra* note 3, at 21598.

37 *Id.*

38 Section 4(a)(2) of the 1933 Act exempts from the registration requirements of Section 5 of the 1933 Act any transaction by an issuer not involving a public offering of securities. Regulation D, a non-exclusive safe harbor adopted by the SEC in 1982, prescribes certain conditions that, if satisfied, give to issuers and their agents assurances of complying with Section 4(a)(2). Regulation D incorporates key judicial and administrative interpretative principles that characterize offerings as private, if made to sophisticated and informed investors who, on the basis of a net worth proxy, can reasonably be presumed as having sufficient market clout and expertise to obtain material information from, and pose questions to, an issuer outside of the protections of the 1933 Act registration requirements. Private fund interests often are offered in reliance on Rule 506 for U.S. offerings and Regulation S for offshore offerings. Regulation S is a safe harbor from the registration requirements of Section 5 of the 1933 Act for offshore offerings with non-U.S. persons in transactions where there are no directed selling efforts in the United States. Regulation S usually imposes a distribution compliance period to prevent the flow back of securities to the United States.

39 *See* Focus Group Report; RAND Report; and the Dodd-Frank Study, *supra* note 8.

express review and evaluation of investor perceptions.[40] Indeed, the offering and sale of private offerings, such as private funds, are specifically intended not to be retail transactions and are designed to comply with numerous regulatory limitations to avoid being transactions with retail investors. Accordingly, the Associations do not believe the historical record and the rulemaking authority granted by Section 913(f) of Dodd-Frank support including private offerings of private funds either as "any securities transaction" or as "personalized investment advice" for purposes of the application of Regulation Best Interest.

As the Commission is aware, the historical basis for evaluating the regulatory regimes of broker-dealers and investment advisers, in light of the convergence of their similar retail services, began in the 1990s with changes in the way the brokerage industry priced and provided services to retail customers. That is, the pricing of brokerage services began evolving from traditional commission-based accounts to asset-based accounts that provided formalized programs offering financial planning or bundled services of advice and securities execution. This evolution was highlighted by a 1995 report to the Commission, known colloquially as the *Tully Report*, which concluded that traditional transaction-based commissions created incentives for brokers to increase securities trading in brokerage accounts potentially in conflict with the best interests of the client.[41] The Tully Report advocated for, among other things, a fee-based compensation system as a model of best practices to better align the interests of registered representatives, brokerage firms, and investors. The shift to fee-based brokerage accounts providing advice and execution began a six-year Commission rulemaking initiative and a newly focused assessment of the standards of care for similar services of personalized investment advice provided by broker-dealers and investment advisers under different regulatory regimes.[42]

At the time, the industry understood the types of transactions that were the subject of evaluation under the standards of care encompassed retail brokerage accounts for financial planning and/or fee-based accounts that bundled brokerage and advice for a flat fee or fee based on a

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40 For example, the customer groups that made up the Focus Group Report were retail investors in stocks, bonds, mutual funds, and 529 plans. Dodd-Frank Report, *supra* note 8, at fn. 452. *See infra* notes 40 and 41 and accompanying text regarding the scope of the RAND Report, *supra* note 8.

41 In 1995, then SEC Chairman Arthur Levitt formed a Committee on Compensation Practices to review brokerage industry compensation practices, identify conflicts of interest, and establish best practices for reducing such conflicts. The results of the report are contained in the Tully Report (April 10, 1995), so named after the Committee Chair, David P. Tully. The Tully Report is available at https://www.sec.gov/news/studies/bkrcomp.txt.

42 Fee-based accounts called into question whether the broker-dealers servicing them operated outside of an exclusion from the Advisers Act for broker-dealers providing incidental advice for no special compensation. In order to retain the broker-dealer exclusion for these kinds of brokerage accounts, the Commission initially proposed Rule 202(a)(11)-1 in 1999. *See* Securities Exchange Act Release No. 42099 (Nov. 4, 1999). After collecting and evaluating comments and re-proposing the rule (*see* Securities Exchange Act Release No. 50980 (Jan. 6, 2005)), the Commission ultimately adopted the rule in 2005. *See* Securities Exchange Act Release No. 51523 (April 12, 2005). The rule was vacated following the decision in *Financial Planning Association v. SEC*, 482 F.3d 481 (D.C. Cir. 2007), in which the court concluded that the Commission exceeded its rulemaking authority to establish conditions beyond those already expressly prescribed for the broker-dealer exclusion from the Advisers Act. This rulemaking initiative triggered the Commission to evaluate the blurring of lines of retail brokerage and advice and the regulatory standards applicable to each, which culminated in a series of reports on the subject. *See, supra* note 8.

percentage of the assets held in the account.[43] The marketing for these types of "personalized investment advisory" programs further confused roles by portraying registered representatives of broker-dealers as "financial advisors" or "financial managers."[44] The Commission-sponsored RAND Report identified overlapping services of broker-dealers and investment advisers to include: (i) cash-flow planning, budgeting, and budget-management planning; (ii) investment, portfolio, and asset management and monitoring, review, and planning; (iii) tax-planning strategies; (iv) education and college planning; (v) retirement planning; (vi) estate planning; and (vii) insurance and risk evaluation planning and analysis.[45] The RAND Report did not identify private offering transactions as one of the overlapping services. Thus, the historical record, and the extensive use of "personalized investment advice" in Section 913 of Dodd-Frank, supports applying proposed Regulation Best Interest to formalized advisory programs sponsored by broker-dealers, and not beyond that.

Indeed, private offering transactions contrast sharply from the types of transactions and services that were the focus of the reports leading up to the present rulemaking initiatives. Notably, the Associations do not believe that placement agent activities and private fundraising constitute retail brokerage *per se* and are certainly not the type of transactions and services that were expressly covered by the historical record. Rather, private offerings of fund interests establish unique relationships among the limited partner/member/shareholder (investor), on one hand, and the various financial intermediaries that participate in the offering or ongoing fund management, such as the placement agent, the fund general partner/member manager, and fund adviser or manager, on the other. First, a placement agent establishes a relationship directly with the fund or the fund's adviser by entering into a placement agent agreement for purposes of offering and selling interests/shares on behalf of the fund to eligible investors. Eligible investors need to be accredited investors or non-U.S. investors, and frequently also need to be "qualified clients"[46] or "qualified purchasers"[47] as well. Second, Rule 506(b) under the 1933 Act requires that eligible investors in a private offering have a pre-existing business relationship either with the fund's investment adviser or placement agent in order to preserve the discrete and private nature of the offering.[48] This contrasts with the more expansive reach of retail brokerage where a broad swath of the public may invest in stocks, bonds, mutual funds, or 529 plans absent such requirements. More particularly, the attributes of a private offering transaction contrast sharply with the formalized financial planning and fee-based programs that historically are understood

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43 *See* RAND Report, *supra* note 9 at pp. 14-15.

44 *See* RAND Report *supra* note 9 at p. 19. In 2017, a Consumer Federation of America ("CFA") study argued that broker-dealers market their services in a way that made them sound as if they are investment advisers, having a fiduciary duty to clients, specifically referring to themselves as "financial advisors," describing their services as "advice" or "planning," and promoting their services with messages designed to convince investors that they will be looking out for the investors' best interests. *See* Financial Advisor or Investment Salesperson? Brokers and Insurers Want to Have it Both Ways, CFA (Jan. 18, 2017), available at http://consumerfed.org/wp-content/uploads/2017/01/1-18-17-Advisor-or-Salesperson_Report.pdf.

45 RAND Report, *supra* note 9 at pp. 69-70. These services would seem to be the "personalized investment advice" or services that would have a "personal," "family," or "household" purpose, as provided in Section 913 of Dodd-Frank and discussed in the Dodd-Frank Study.

46 17 C.F.R. §275.205-3.

47 15 U.S.C. §80a-2(a)(51) and 17 C.F.R. §§270.2a51-1 through 2a51-3 *et seq.*

48 *See generally Royce Exchange Fund, Quest Advisory Group,* SEC No-Action Letter (pub. avail. Aug. 28, 1996); and *Woodtrails – Seattle, Ltd.*, SEC No-Action Letter (pub. avail. Aug. 9, 1982).

to encompass "personalized investment advice" and for which the assessment of the standard of care of broker-dealers applied in the first instance.

Furthermore, private fund investment transactions are not similar to brokerage transactions in terms of the relationships and rights that are created. That is, the investment adviser to a private fund is a fiduciary to the fund and must act in the best interests of the fund. Well-established disclosure practices also are part of the private offering transaction and fund management process. Namely, investors typically receive a private offering memorandum that discloses material information about, among other things, the fund, risks of investment, and conflicts of interest. Fund investors may also receive the adviser's brochure, Part 2A of Form ADV, and brochure supplement, Part 2B, each of which discloses material information about the adviser and portfolio managers, including potential conflicts of interest. Further, the organizational documents of the fund, as well as the laws under which the fund is formed, also establish additional duties and rights between the fund and its investors.

Although the placement agent establishes its relationship in a private offering directly with the fund or fund sponsor, it nonetheless has duties to the end-user investor when offering and selling private fund interests/shares. This includes obligations that are unique to the private offering context, which require the placement agent to perform reasonable diligence on the issuer of the private offering.[49] Placement agents, therefore, are required "to exercise a 'high degree of care'" in investigating and independently verifying representations and claims of the issuer.[50] A placement agent is not permitted to rely solely on income and net-worth tests to assess an investor's suitability, but must, at a minimum, reasonably investigate: (i) the issuer and its management; (ii) the issuer's business prospects; (iii) the issuer's assets; (iv) claims made by the issuer; and (v) the intended use of proceeds[51] to determine the suitability of the investment. Rule 506 prescribes additional protections prohibiting any placement agent that is a "bad actor" from participating in a private offering transaction. Placement agents also vet the sophistication and eligibility of investors in the subscription-intake process. Further, Regulation D extends rights to investors to have the opportunity to ask questions of an issuer, which typically results in investors speaking with a private fund's sponsor.[52]

These attributes of private offering transactions, therefore, are not remotely characteristic of the types of services offering "personalized investment advice," a material limitation of the Commission's rulemaking authority under Dodd-Frank, or that were otherwise under consideration in the Focus Report, the RAND Report, or the Dodd-Frank Report in connection with appropriate standards of care.

The Associations believe that Dodd-Frank's use of the term "personalized investment advice" throughout Section 913 was not an anomaly but used prolifically and purposefully. Accordingly, we believe it would be inappropriate for the Commission to arbitrarily disregard this important term of art and simply substitute "any securities transaction." Because neither Dodd-Frank nor the historical record support applying proposed Regulation Best Interest to "any securities transaction" of a retail

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[49] *See* FINRA Regulatory Notice 10-22 (April 2010).

[50] *Id.* at p. 4.

[51] *Id.* at p. 5.

[52] 17 C.F.R. §230.502(b)(2)(v).

investor, the Associations believe that any final rule should be narrowly tailored to formal programs that provide "personalized investment advice," as was historically understood from the record. As a result, private offering transactions in reliance on Section 4(a)(2) of the 1933 Act, Rule 506 of Regulation D under the 1933 Act, or Regulation S under the 1933 Act should not be captured by Regulation Best Interest. In this respect, this modification to the Commission's proposal would respect the well-established differentiations of private offering transactions, and related obligations, from the types of transactions expressly included in the Commission's rulemaking authority and supported by the historical record.

b. Proposed Regulation Best Interest Should Define Retail Customer in a Manner Consistent with Existing Standards in the Federal Securities Laws

The Commission proposed a definition of "retail customer" for Regulation Best Interest to mean: "a person or 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." The Commission noted that the proposed definition is not limited to natural persons and could include family trusts and presumably family offices.[53] The Associations do not agree with the Commission's observation that the proposed definition "generally tracks the definition of 'retail customer' under Section 913(a) of [Dodd-Frank]. . . ."[54]

Notably, Dodd-Frank limits the definition of "retail customer" to natural persons solely in respect of their receiving "personalized investment advice." Again, we do not believe the Commission has the authority to broaden its rulemaking authority by simply substituting "any securities transaction" for a term of art that is historically understood to encompass formalized financial planning and other programs of a broker-dealer that bundle advice and securities execution. Thus, the definition in proposed Regulation Best Interest should be harmonized with the definition established in Section 913(a) of Dodd-Frank and used in the Commission's rulemaking authority in Section 913(f) of Dodd-Frank.

The Associations further recommend that the Commission consider defining the term "personalized investment advice," as suggested in the Dodd-Frank Report.[55] In so doing, the Commission should consider the historical record to provide valuable color to any definition or interpretative guidance. Namely, the types of brokerage accounts that provided substantially similar services of an investment adviser were financial planning and other accounts in which a broker-dealer bundled advice and securities execution. Private offerings were not part of those types of retail accounts or transactions. The historical record at the time would view personalized investment advisory services as constituting financial planning for purposes of: (i) saving for college; (ii) saving for a house or other large consumer purchase; or (iii) retirement planning. It should not encompass exposure to privately-offered investments, such as hedge funds, private equity funds, real estate funds, or structured products, as part of an eligible investor's diversified investment portfolio.

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53 Regulation Best Interest, *supra* note 3, at 21596.

54 *Id.* at 2195.

55 Dodd-Frank Report, *supra*, note 10 at vii.

The Associations also believe that the part of the "retail customer" definition that limits its scope to services "primarily for personal, family, or household purposes" is a key part of the definition and specifically avoids making all natural persons retail customers for purposes of Section 913. We believe that the Commission's proposed definition of "retail customer," however, effectively writes this limitation out of the statutory definition. We recognize that the statutory definition is vague and needs clarifying, which we believe the Commission should address, either by definition or clear and concise interpretative guidance. Further, while we recognize that the definition of "retail customer" does not specifically reference specific numeric thresholds that are common in the federal securities laws, we do not believe that the statutory language precludes the SEC from issuing rules or guidance that uses existing standards from the federal securities laws that would appropriately tailor the scope of natural persons who should be deemed "retail customers." Because using existing standards would provide certainty and clarity to market participants, including investors, we encourage the Commission to use one or more of the existing standards to provide a clear definition of "retail customer" for purposes of the proposals.

IV. Conclusion

The Associations thank the Commission for the opportunity to provide these comments on the important proposals related to the Interpretation, Regulation Best Interest and the CRS Regulation. Further, we welcome the opportunity to work with the Commission and provide any additional information that may be required. Please do not hesitate to contact Benjamin Allensworth, Matthew Newell, or Stuart Kaswell of MFA at (202) 730-2600, or Jiří Król or Jennifer Wood of AIMA at +44 20 7822 8380 should you have any questions.

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